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INDIAN CASES

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VOLUME LXV.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1964 OF 1919.

July 19, 1921.

Present :—Justice Sir N. R. Chatterjea, KT. and Mr. Justice Pearson.

PROFULLA CHANDRA GHOSE AND ANOTHER—DEFENDANTS Nos. 1 & 2—APPELLANTS

versus

BABURAM MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 148A, Sch. III, Art. 3—Dispossession by landlord—Landlord also auction-purchaser—Suit for possession by tenant—Limitation—Arrears of rent, recovery of.

One of the heirs of a deceased tenant sued to recover his share of the holding, which was sold in execution of a rent-decree against the other heirs and purchased at the execution sale by the landlords themselves. It was admitted in the plaint that the dispossession was not effected by the landlords at the time of the delivery of possession to them as auction-purchasers but subsequently by tenants, who had been settled upon the land by the landlords, and with the help of the landlords' *naib*:

Held, that in these circumstances the question of the landlords being the auction-purchasers did not arise and that the suit was governed by the special rule of limitation contained in Article 3, Schedule III of the Bengal Tenancy Act. [p. 2, col. 2]

Peary Mohan Mukherjee v. *Arunodoy Ghose*, 58 Ind. Cas. 581; 25 C. W. N. 168, followed.

Krishna Chandra v. *Satish Chandra Banerjee*, 25 Ind. Cas. 365; 20 C. W. N. 872, referred to.

A suit for rent to fall under section 148A of the Bengal Tenancy Act, must be for the recovery of the whole of the arrears due, but it need not be for the entire rent payable for the holding. [p. 3, col. 1.]

Brohmanand Nath Deb Sircar v. *Hem Chandra Mitra*, 23 Ind. Cas. 981; 18 C. W. N. 1016 at p. 1019, followed.

Baikantha Nath Sen v. *Ramapati Chatterjee*, 45 Ind. Cas. 767; 27 C. L. J. 101, distinguished.

Appeal against a decree of the Additional Subordinate Judge, Khulna, dated the 4th July 1919, modifying that of the Munsif, Second Court at Satkhira, dated the 15th April 1918.

Babu *Sarat Chandra Roy Chaudhury* (with him Babu *Anilendranath Rai Chaudhury*), for the Appellants—The defendants Nos. 1 and 2, who are the landlords, are the appellants. The appeal arises out of a suit by one of the heirs of a deceased tenant to recover his share of the holding, which was sold in execution of a rent-decree against the other heirs whose names stood in the landlords' register. The question arose as to the applicability of the special limitation of two years and whether the entire tenure passed by the sale as the suit was not properly framed under section 148A of the Bengal Tenancy Act. The First Court dismissed the suit. On appeal, however, the suit has been decreed. Defendants Nos. 1 and 2 obtained rent decree on 29th September 1910. They purchased the holding on 20th March 1911. The sale was confirmed on 27th April 1911. Formal delivery of possession was taken on 27th May 1911. New tenants were settled on the land in June and August of the same year. There was an application to set aside sale made, but was dismissed on 15th March 1916. The tenants defendants with whom the lands were settled out and removed paddy from the plaintiff's land, in consequence of which there was a criminal case by plaintiff which was dismissed on 27th February 1912. The plaintiff thereupon brought the present suit on 28th May 1917. Plaintiff alleges that he was not dispossessed by landlords but when paddy was cut by the new tenants. Refers to *Peary Mohan Mukherjee* v. *Arunodoy Ghose* (1). As

(1) 58 Ind. Cas. 581; 25 C. W. N. 168.

regards the frame of the suit under section 148A of the Bengal Tenancy Act, see *Nunda Lal* v. *Kala Chand* (2), *Brohmonand Nath Deb Sircar* v. *Hem Chandra Mitra* (3), *Ram Dhyan Singh* v. *Pardip Singh* (4). In the present case it was in form for the whole rent but in substance for the plaintiff's share of rent only. Refers to section 148A, Bengal Tenancy Act; *Pramada Nath Roy* v. *Ramani Kanta Roy* (5). The case of *Baikantha Nath Sen* v. *Ramapati Chatterjee* (6) does not apply.

No one appeared for the Respondents.

JUDGMENT.—This appeal arises out of a suit by one of the heirs of a deceased tenant to recover his share of the holding, which was sold in execution of a decree for arrears of rent obtained by two co-sharer landlords and purchased by the latter.

The plaintiff was not made a party to the suit for rent, and he brought the suit, on the ground that he was not bound by the decree for rent and that the decree did not affect his interest, specially as the suit was not framed under section 148A of the Bengal Tenancy Act.

The defence was that the suit was barred by the special limitation of two years under Article 3, Schedule III of the Bengal Tenancy Act, that the decree was one under section 148A and that the sale held thereunder passed the entire holding.

The Court of first instance dismissed the suit. On appeal the decree was reversed and the suit was decreed.

The defendants Nos. 1 and 2, who are the landlords, have preferred this appeal.

Two questions arise for our decision. The first is whether the suit is barred by limitation.

The ground upon which the Subordinate Judge overruled the plea of limitation was that the dispossession was by a co-sharer landlord as auction-purchaser, and he relied upon the case of *Krishna Chandra* v. *Satish Chandra Banerjee* (7).

There is a conflict of decision on the point whether dispossession by a landlord as auction-purchaser comes under Article 3, Schedule III of the Bengal Tenancy Act. In the present case, it is admitted in the plaint that the dispossession was not by the landlord at the time of the delivery of possession to him as auction-purchaser but subsequent to the delivery of possession and that the dispossession was effected by the tenants, who had been settled upon the land by the co-sharer landlords, and with the help of the landlords' *naib*. In these circumstances the question of the landlord being the auction-purchaser does not arise and the suit would be barred by limitation [see the case of *Peary Mohan Mukherjee* v. *Arunodoy Ghose* (1)]. There is, however, no clear finding that the landlord or his agent along with other defendants dispossessed the plaintiff. We think that there should be a clear finding on the point. If the Court finds that the dispossession was by the landlord or his agent, the suit would be barred by limitation.

The second question is whether the suit is one under section 148A of the Bengal Tenancy Act. The learned Subordinate Judge was of opinion that it was not, "because a suit to recover the whole rent is a condition precedent to a section 148A suit." If, by that, the learned Judge meant to say that the suit must be to recover the whole of the arrears due, he is right, but if he means the *entire rent payable* for the holding, we do not think that that is a correct view. The learned Judge refers to the case of *Baikantha Nath Sen* v. *Ramapati Chatterjee* (6), but the facts of that case are distinguishable from the present. It appears that in that case the plaintiff sued to recover his share of the rent and did not seek to recover the entire rent due to himself and his co-sharers. There was merely an alternative prayer that if it was found that the tenant had not paid the rent due to his co-sharers, he might be allowed to amend his plaint so as to secure a decree for the entire rent. On the other hand, in the suit for rent in the present case, the co-sharer landlord who was not in separate collection of rent, stated that he had enquired of his other co-sharers whether they had realised any rent and the latter did not give him any informa-

(2) 8 Ind. Cas. 50; 15 C. W. N. 820.
(3) 23 Ind. Cas. 981; 18 C. W. N. 1016 at p. 1019.
(4) 53 Ind. Cas. 91; 4 P. L. J. 500.
(5) 35 C. 331; 12 C. W. N. 249; 10 Bom. L. R. 66; 35 I. A. 73; 7 C. L. J. 132; 18 M. L. J. 43; 3 M. L. T. 151 (P. C.).
(6) 45 Ind. Cas. 767; 27 C. L. J. 101.
(7) 35 Ind. Cas. 365; 20 C. W. N. 872.

tion, and that in those circumstances he believed that the rent which was due to him was the only arrear due for the holding. His co-sharer were made parties to the suit and the plaintiff stated that if his co-sharers' share of the rent had remained unpaid, he (the plaintiff) was willing to pay Court fee on that sum also. He claimed a decree for the entire arrears, and prayed that his co-sharers might be joined as plaintiffs if they chose to be co-plaintiffs. The case is similar to that of *Brohmanand Nath Deb Sircar* v. *Hem Chandra Mitra* (3). In that case the learned Judges observed as follows:—"We have been invited to construe the expression 'rent due' as equivalent to 'rent payable under the contract of tenancy.'" This argument in substance is that to entitle a person to claim the benefit of section 148A he must include in the suit a claim, not for the rent actually in arrears, but the rent payable under the contract without the deduction of any amount that might have been actually paid to the landlord. This clearly is an...untenable contention. We may further add that it has not been suggested at any stage of the present proceeding, nor was the suggestion made in the course of the original suit, that at the time of the commencement of the litigation, there was an arrear of rent due to the co-sharer landlords. The plaintiff sued for the recovery of what to his information was the whole arrear due, and that was in essence a suit for rent due to all the co-sharers, within the meaning of section 148A of the Bengal Tenancy Act." Those observations apply to the facts of the present case.

We think in these circumstances that the suit was substantially one framed under section 148A of the Bengal Tenancy Act.

The question, however, whether the suit for rent was brought against the registered tenant was not gone into by the learned Subordinate Judge, because having found that the suit was not one framed under section 148A of the Bengal Tenancy Act, it was unnecessary for him to consider the question whether the rent suit was so framed as to affect the interest of the plaintiff. As, however, we have come to the conclusion that the suit was framed under section 148A, we think the lower Appellate Court should consider the question whether the persons against whom the rent-decree was obtained represented the interest of the plaintiff as well, so that the sale held thereunder passed the interest of the plaintiff also.

The decree of the lower Appellate Court is accordingly set aside and the case sent back to that Court in order that that Court may come to a finding on the questions indicated above and dispose of the case according to law.

Costs to abide the result.

B. N. *Appeal allowed; Case remitted.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 882 OF 1919.

June 23, 1921.

Present:—Mr. Justice Coutts and Mr. Justice Ross.

NAZIR RAI—DEFENDANT—APPELLANT

versus

Maharaja KESHO PRASAD SINGH BAHADUR—PLAINTIFF—RESPONDENT.

Cess Act (IX B. C. of 1880), s. 20, applicability of—Rent entered in road cess return—Bengal Tenancy Act (VIII of 1885), s. 105, enhancement of rent under—Landlord, right of, to recover enhanced rent.

Section 20 of the Cess Act is no bar to a landlord recovering rent at a higher rate than that entered in the road cess return, if subsequent to the lodging of the road cess return the rent is enhanced under section 105 of the Bengal Tenancy Act. [p. 4, col. 1.]

Appeal from a decision of the District Judge, Shahabad, dated the 9th August 1919, affirming that of the Additional Munsif, Arrah, dated the 25th November 1918.

Mr. *Atul Krishna Rai*, for the Appellant.

Messrs. *Kulwant Sahay* and *Nirsu Narain Sinha*, for the Respondent.

JUDGMENT.

COUTTS, J.—This matter comes before us on second appeal from the decision of the District Judge of Shahabad. The suit was instituted by the landlord for arrears of rent

which had been settled under sections 105 and 109 A of the Bengal Tenancy Act in 1915. The defence set up by the defendants was that in the year 1901 the plaintiff had filed a road cess return wherein the *jama* was stated to be less than that settled in 1915; and they contended that under section 20 of the Cess Act the landlord was not entitled to recover at a higher rate than that set out in the road-cess return.

The suit was decreed in the Court of first instance, and this decree was affirmed by the learned District Judge on appeal, on the ground that when the rent had been settled under section 105 of the Bengal Tenancy Act, it did not matter what might have been recited in a previous road-cess return, and that the decision under section 105 of the Bengal Tenancy Act operated as *res judicata*.

The main point taken before us in appeal is the same as that which was taken throughout the case, namely, that section 20 of the Cess Act is a bar to the plaintiff recovering more than the amount stated in the road-cess return. With this contention I am unable to agree. Section 20 of the Cess Act runs as follows:—

"Every holder of an estate or tenure in respect of which a return has been made as required by this Chapter shall be precluded from suing for or recovering.....(*b*) rent at at any higher rate than is mentioned in such return for any land, holding or tenure included in such return, unless it be proved that the rent of such land or tenure has been lawfully enhanced subsequently to the lodging of such return."

The present case comes under the last portion of clause (*b*). By section 105 of the Bengal Tenancy Act the rent was lawfully enhanced and this enhancement was subsequent to the lodging of the road-cess return. Consequently there is no bar to the plaintiff's recovering at the higher rate on account of section 20 of the Cess Act. By section 107 of the Bengal Tenancy Act it is enacted that—

"In all proceedings under section 105, section 105 A and section 106, the Revenue Officer shall, subject to rules made by the Local Government under this Act, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits: and his decision in every such proceeding shall have the force and effect of a decree of a Civil Court in a suit between the parties, and, subject to the provisions of sections 108 and 109 A, shall be final."

The rent settled, therefore, under section 105 of the Bengal Tenancy Act in this case is final and it is not open to the defendant to dispute it.

I would accordingly dismiss this appeal with costs.

ROSS, J.—I agree.

J. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1777 AND 2047 OF 1919.

August 10, 1921.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

Raja SASI KANTA ACHARJYA BAHADUR—PLAINTIFF—APPELLANT

versus

SANDHYA MONI DASYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 103B (3)—Entry in Record of Rights with regard to chandina *or* bazar *land—Presumption.*

If an entry is made in the Record of Rights with regard to land which does not come within the scope of the Bengal Tenancy Act, such as *chandina* or bazaar land, the presumption of its correctness arising under section 103B (3 of the Act cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the Record of Rights. [p. 6, col. 2.]

Bipradas Pal Chowdhry v. *Azam Ostagar*, 52 Ind. Cas. 412; 46 C. 441, referred to.

Appeal against decrees of the Second Additional District Judge, Mymensingh, dated the 31st July 1919, affirming those of the Munsif, Third Court at Mymensingh, dated the 22nd July 1918.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Gobinda Chandra Dey Roy*), for the Appellant.—The lower Appellate Court was wrong in not giving effect to the presumption under section 103B of the Bengal Tenancy Act. The holding has been recorded as *chandina*,

which is a tenancy at will in respect of *bazar* lands. This entry raised the presumption under section 103B that it was correct. And, apart from the presumption, the lower Appellate Court has not come to a definite finding upon the evidence as to the character of the tenancy It is not enough to say that it is either *jote* or homestead, It has to be found that the homestead is for agricultural purposes.

Dr. *Sarat Chandra Bysak* (wtih him Babu *Annonda Charan Karkun*), for the Respondents.—Section 103B is a special law. It only governs the relationship of certain classes of tenants and certain classes of landlords. It would not apply to any other class of tenants, *e.g.*, *chandina* tenancy in this case. Refers to *Bipradas Pal Chowdhry* v. *Azam Ostagar* (1), which is authority that the Bengal Tenancy Act applies only to agricultural tenancies.

Babu *Jogesh Chandra Roy*.—That case proceeds on the basis of the record.

Refers to section 102, clause (*b*). That clause enumerates the classes of tenants with which the record is to deal. The Revenue Officer had no jurisdiction to make an entry in respect of a tenancy which did not come under any of the classes described in section 102, clause (*b*), and no presumption can arise under section 103B in respect of such an entry. Chapter X applies exclusively to cases which fall under the Bengal Tenancy Act and to no others.

Babu *Jogesh Chandra Roy*, in reply.—There is no authority directly in point. It cannot be said that this entry ought not to be in the record at all. Reads section 101. Is the Revenue Officer to select only agricultural lands of the *mouza* and leave out all non-agricultural lands?

The case of *Bipradas Pal Chowdhry* v. *Asam Ostagar* (1) decides only this, that section 105 does not apply to non-agricultural tenancies. There is no case which goes so far as my friend's contention that no presumption of correctness attaches to the entry.

Some value ought to be attached to these entries. The officers make enquiries on the spot before making them.

If the tenancy does not come under the Bengal Tenancy Act, it comes under the Transfer of Property Act. I am entitled to succeed in the latter case. My friend says it does not come under the Bengal Tenancy Act when I want to take advantage of section 103B, and when I say that I am entitled to succeed under the Transfer of Property Act, he says the Bengal Tenancy Act applies. He cannot have it both ways.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of the learned Second Additional District Judge of Mymensingh; and, the suit was brought for the purpose of obtaining *khas* possession of the lands in dispute.

The defendant in one case was Brindaban Chandra De Sarkar, and the defendant in the other case was his wife; and, it has been found that she was a *benamdar* for her husband, and the two cases have been treated as if Brindaban was the occupier of both the pieces of land.

The First Court dismissed the suit: and upon appeal to the lower Appellate Court, the decision of the First Court was upheld, and the appeal was dismissed.

The case raises a point of considerable interest, inasmuch as the Record of Rights, which was published in February 1918, described the character of the holding in each case as *chandina*, an expression which in this part of the district was, apparently prior to the entry in the Record of Rights, unknown. There was considerable discussion as to what was the meaning of the word, but the learned Additional Judge for the purpose of his judgment said that he was prepared to hold, though with a certain amount of doubt, that the view urged by the plaintiff was correct, namely, that by *chandina* the Settlement Authorities meant *bazar* land not subject to the provisions of the Bengal Tenancy Act.

The first point, that the learned Vakil for the appellant has urged, is based upon sections 103B (3) of the Bengal Tenancy Act, which provides that "Every entry in a Record of Rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect": and, the argument was to the effect that the learned Judge in the lower Appellate Court had ignored that section and held that in this case the entry in the Record of Rights created no presumption. The words of the learned

(1) 52 Ind. Cas. 412; 46 C. 441.

Judge may be cited: he said, "whatever land is dealt with by the Settlement Authorities as falling under the Tenancy Act, the law says that the various entries made are to be presumed correct until the contrary is shown. But I know of no authority for the view that if the Settlement Authorities decide that the land is not held under the Tenancy Act at all, the view should be deemed correct." My learned brother and I have had some difficulty in understanding how this entry came to be made by the Revenue Officer, if the word "*chandina*" is to be taken to bear the meaning which the learned Judge in the lower Appellate Court put upon it. If the Revenue Authorities understood that it meant *bazar* land which was not subject to the provisions of the Tenancy Act at all, it is difficult to understand why they entered it upon the Record of Rights which was made in connection with lands which are subject to the Tenancy Act. The explanation of it may be that the Revenue Officer had not then the advantage, which the two lower Courts had, of the discussion as to what that word really meant, and the entry may have been made under a misapprehension as to the real meaning. However that may be, the entry was made, and there it stands; and, the question is whether the learned Vakil for the appellant is right when he says that presumption must be made that this description of the holding is correct until evidence is given to prove the contrary.

Dr. Bysak, the learned Vakil for the defendant, has contended that the learned Judge was right in holding that no presumption arose for the reason that section 102 of the Bengal Tenancy Act describes the particulars which are to be recorded in the Record of Rights. It describes the classes of tenants with which the Record or Rights is to deal; and, for the purpose of seeing what classes of tenants are to be dealt with, he referred especially to clause (*b*) of section 102, and he urged that it is only with regard to what I might call proper entries, *i. e.*, the entries which ought to be made and could be made in accordance with the provisions of the Bengal Tenancy Act, that the presumption which is referred to in section 103B (3) would arise. No authority directly upon this question has been cited to us, and consequently it is not unreasonable to assume that the learned Judge was correct when he said: "I know of no authority for the view that if the Settlement Authorities decide that the land is not held under the Tenancy Act at all, the view should be deemed correct." The only authority, in any way touching the question, which was cited to us, is the case of *Bipradas Pal Chowdhry* v. *Asam Ostagar* (1), a decision of my learned brother Mr. Justice Woodroffe and Mr. Smither when he was acting as a Judge of this Court. There Mr. Justice Woodroffe said: "The Legislature contemplated, I think, that only three classes of tenants should be regarded as holding lands within the meaning of the Bengal Tenancy Act, *viz*, a tenure-holder who has been held to mean a person collecting rents from *raiyats*, *raiyats* holding lands for the purpose of cultivation and under *raiyats* holding under them." Again he said: "there seems to me no doubt that in its general scope the Bengal Tenancy Act is a law for agricultural landlords and tenants." Basing his argument upon that, the learned Vakil for the defendant has supported his proposition that if an entry has been made in the Record of Rights with regard to land which does not come within the scope of the Bengal Tenancy Act and with regard to which the Revenue Officer had no jurisdiction to make the entry, no presumption arose under section 103B (3) of the Bengal Tenancy Act. I am not prepared to go so far as to say that in this case no presumption arose from the entry in the Record of Rights, but I am prepared to say that the presumption cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the Record of Rights. In this case, the First Court went so far as to hold that the entry was clearly wrong. Upon that point the learned Judge in the lower Appellate Court has not expressed any definite opinion, as I understand, because he came to the conclusion that no presumption ought to be drawn from the entry. But he discussed the evidence and came to the conclusion that if he had to rely upon the statement of the defendant alone, he would have had difficulty in finding in favour of the defendant. He, however, drew attention to the fact that the plaintiff was a landlord with large posses-

sions and it was an extraordinary thing that the papers which would have shown the origin and the nature of the tenancy had not been produced. That was the point upon which the First Court relied to a large extent, and held that the non-production of these papers is to be regarded as a matter which must weigh heavily against the plaintiff's case. Taking that together with the evidence of the defendant, the learned Judge in the lower Appellate Court came to the conclusion, as I read his judgment, that the defendant had proved that the statement in the Record of Rights was rebutted and that the lands in question were either *jote* lands or homestead lands. Consequently, the first point, in my judgment, which the learned Vakil for the appellant urged is not sufficient to justify us in allowing this appeal or even in directing a remand.

Then there was a further point which the learned Vakil raised. He urged that the facts were not sufficiently found by the learned Judge in the lower Appellate Court. He referred to the finding that the lands must be taken either as *jote* lands or as homestead lands and that the finding that the lands are homestead lands, by itself, is not sufficient, because in order to bring them within the purview of the Bengal Tenancy Act, that must be homestead lands occupied either in connection with agriculture or for purposes of agriculture. In my judgment, although the learned Judge's words are not quite as definite as they might have been, reading the judgment as a whole, I have no doubt that the learned Judge meant to find, and did find as a matter of fact, that the lands were agricultural lands and that the homestead was used in connection with agriculture to some extent. I come to that conclusion upon the words of the judgment itself, and I am fortified in that conclusion by the finding of the First Court that the defendant actually used these lands partly for shop and partly for raising crops. Under those circumstances, the finding of the lower Appellate Court is sufficiently definite: and, I think that the learned Judge found that the holdings were not *chandina*: but that they were holdings which came within the purview of the Bengal Tenancy Act, and consequently the plaintiff was not entitled to a decree for possession in accordance with the claim which he preferred.

The result is that in my judgment for the reasons that I have given the appeal should be dismissed with costs.

The other appeal will follow the event of this appeal, and it is accordingly dismissed with costs.

CHOTZNER, J.—I agree.

B. N. *Appeals dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 349 OF 1920.

April 7, 1921.

Present :—Mr. Lyle, A. J. C.

KANWAR SINGH AND ANOTHER—APPELLANTS

versus

UJAGAR SINGH AND ANOTHER—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 23—Suit for value of tree cut—Defendant pleading ownership—Return of plaint—Nature of suit not altered.

The returning of a plaint to the plaintiff, suing for the value of the branches of a tree cut by the defendant on the latter's pleading that the tree belongs to him, to be presented to a Court having jurisdiction to determine the question of title, does not make the case any the less a suit of the nature cognizable by a Court of Small Causes and no second appeal lies from a decision in such a case. [p. 8, col. 1.]

Sada Shankar v. *Brij Mohan Das*, 20 A. 480; A. W. N. (1898) 129; 9 Ind. Dec (N. S.) 668, *Lala Ram* v. *Man Singh*, 26 Ind. Cas. 128; 12 A. L. J. 1032, followed.

Where in a suit for the value of trees cut by the defendant the plaint does not disclose any offence punishable under Chapter XVII of the Penal Code, it cannot be said that in view of the provisions of Article 35 (*ii*) of Schedule II to the Provincial Small Cause Courts Act that the suit is not one of a nature cognisable by Courts of Small Causes. [p. 8, col. 1.]

Second appeal against a decree of the Subordinate Judge, Kheri, dated the 6th July 1920, upholding that of the Munsif, Kheri, dated the 27th March 1920.

Mr. *M. A. Khan*, for the Appellants.

Mr. *Ram Prasad Verma*, for Respondent No. 1.

JUDGMENT.—A preliminary objection has been taken to the hearing of this appeal. It is that in view of the provisions of section 102 of the Code of Civil Procedure, no second appeal lies. The suit was for the value of branches of a Nim tree which had been cut by the defendants. The suit was brought

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in a Small Cause Court but as the defendants pleaded that they were the owners of the Nim tree, the Court, exercising the discretion vested in it by section 23 of the Provincial Small Cause Courts Act, 1887, returned the plaint to be presented to a Court having jurisdiction to determine the question of title. The fact that it did so does not make the case any the less a suit of the nature cognizable by a Court of Small Causes. This is the view taken in *Sada Shankar* v. *Brij Mohan Das* (1), which was followed in *Lala Ram* v. *Man Singh* (2). The learned Counsel for the appellants would urge that in view of the provisions of Article 35 (*ii*) of the Second Schedule to the Provincial Small Cause Courts Act, the suit was not one of a nature cognizable by Courts of Small Causes. There is clearly no force in this argument, as the plaint does not disclose any offence punishable under Chapter XVII of the Indian Penal Code.

It is not alleged in the plaint that the act was done dishonestly or with intent to cause or with knowledge that it was likely to cause wrongful loss or damage to the plaintiff. The preliminary objection must prevail. The appeal is dismissed with costs.

J. P. *Appeal dismissed.*

(1) 20 A. 480; A. W. N. (1898) 129; 9 Ind. Dec. (N. S.) 668.

(2) 26 Ind. Cas. 128; 12 A. L. J. 1032.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 274 OF 1919.

April 14, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

JOYNARAIN SEN UKIL—PLAINTIFF—APPELLANT

versus

SUCHITRA DEBYA—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42, proviso, scope of—Declaratory suit—Joint possession—Consequential relief—Adverse possession—Co-owner—Limitation Act (IX of 1908), Sch. I, Art. 120, applicability of—Right to sue.

Where the plaintiff is in joint possession of immoveable property, whether such possession be actual possession of his share of the whole, or actual possession of a part coupled with constructive possession of the remainder, he is entitled to maintain a suit] for declaratory relief with a view to remove a cloud on his title created by the act of the defendant disputing his share; in a suit so framed declaration of title is all that the plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition. [p. 13, col. 2.]

Asman Singh v. *Tulsi Singh*, 39 Ind. Cas. 173; (1917) Pat. 131; 2 P. L. J. 221; 1 P. L. W. 335 and *Chinnammal* v. *Varadarajulu*, 15 M. 307; 5 Ind. Dec. (N. S.) 566, followed.

The expression used by the Legislature in section 42 of the Specific Relief Act is, not 'other relief, but 'further relief.' The further relief must consequently be relief in relation to the legal character or right as to property which the plaintiff is entitled to and whose title to such character or right the defendant denies or is interested in denying it must also be relief appropriate to and necessarily consequent on the right or title asserted. [p. 12, col. 2.]

A suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. [p. 12, col. 2.]

The proviso to section 42 of the Specific Relief Act forbids a suit for a pure declaration without further relief, but it does not compel a plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. [p. 13, col. 1.]

Suryanarayanamurti v. *Tammanna*, 25 M. 504; *Sardarsingji* v. *Ganpatsingji*, 14 B. 385; 7 Ind. Dec. (N. S.) 724, *Srinivasa Ayyangar* v. *Srinivasa Swami*, 16 M. 31; 2 M. L. J. 139; 5 Ind. Dec. (N. S.) 729, *Aisa Siddika* v. *Bidhu Sekhar*, 18 Ind. Cas. 633; 17 C. L. J. 50 at p. 53, *Sivaramalinga* v. *Sabharatna*, 51 Ind. Cas. 822; 36 M. L. J. 624; 9 L. W. 357; (1919) M. W. N. 216, 25 M. L. T. 361, *Basavayya* v. *Syed Abbas Saheb*, 24 M. 20, *Ranga* v. *Unnikutti*, 24 M. 275, *Ramaswamy* v. *Muniandy Servai*, 5 Ind. Cas. 345; 20 M. L. J. 709; 7 M. L. T. 253; (1910) M. W. N. 560, *Ganpatgir Guru Bholagir* v. *Ganpatgir*, 3 B. 230; 2 Ind. Dec. (N. S.) 155, *Chokalingapeshana Naicker* v. *Achiyar*, 1 M. 40; 1 Ind. Dec. (N. S.) 25, *Kunj Behari* v. *Keshavlal Hiralal*, 28 B. 567; 6 Bom. L. R. 475, *Chinnappa Chettiar* v. *Thulasi Ammal*, 15 M. L. J. 399, *Loke Nath* v. *Keshab Ram*, 13 C. 147; 11 Ind. Jur. 105; 6 Ind. Dec. (N. S.) 597, *Nirmal Chunder* v. *Mahomed Siddik*, 26 C. 11; 25 I. A. 225; 7 Sar. P. C. J. 385; 13 Ind. Dec. (N. S.) 611 (P. C.) *Satis Chandra* v. *Satya Charan*, 5 Ind. Cas. 531; 14 C. W. N. 576, *Parasram Ratanram* v. *Bhimbhai Kirparam*, 5 Bom. L. R. 195, *Velammal* v. *Vanammal*, 6 Ind. Cas. 198; 20 M. L. J. 349; 7 M. L. T. 155, *Garapaty Venkatrayudu* v. *Butchu Venkatrayudu*, 5 Ind. Cas. 921; 20 M. L. J. 759, 7 M. L. T. 164; (1910) M. W. N. 545, *Sripati Chinna Sanyasi Razu* v. *Suriya Razu*, 5 M. 56; 5 Ind. Jur. 410; 2 Ind. Dec. (N. S.) 107, *Subramanya Chettyar* v. *Padmanabha Chettyar*, 19 M. 264; 6 Ind. Dec. (N. S.) 891, referred to.

The entry and possession of land by one co-owner will not be presumed to be adverse to the

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others, but will ordinarily be held for the benefit of all; the difference between the possession of a co-owner and other cases is that acts which if done by a stranger would *per se* be a disseisin, are, in the case of tenancies-in-common, susceptible of explanation consistently with the real title; acts of ownership are not, in tenancies-in-common, acts of disseisin, the law will not presume that one tenant-in-common intends to oust another; the facts, if the contrary is asserted, must be notorious and the intent must be established in proof. [p. 10, col. 2.]

Corea v. *Appuhamy*, (1912) A. C. 230 at p. 236; 81 L. J. P. C. 151; 105 L. T. 836, *Muttunayangam* v. *Brito*, (1918) A. C. 895; 87 L. J. P. C. 146, *Hardit Singh* v. *Gurmukh Singh*, 47 Ind. Cas. 626; 28 C. L. J. 437; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C) 8 (P. C.), *Varada Pillai* v. *Jeevarathnammal*, 53 Ind. Cas. 901; 46 I. A. 285; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.), followed.

The possession of one joint tenant is the possession of all and there can be no dispossession by one joint tenant, in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy. [p. 10, col. 2.]

Balaram Guria v. *Syama Charan Mondal*, 60 Ind. Cas. 298; 24 C. W. N. 1057; 33 C. L. J. 344, *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh*, 27 Ind. Cas. 465; 20 C. W. N. 51; 21 C. L. J. 253, *Jatindra Nath Roy* v. *Sabidanneesa Khotuur (Narendra Bhusan Roy* v. *Jogendra Nath Roy)*, 35 Ind. Cas. 36; 20 C. W. N. 1258; 24 C. L. J. 165, followed.

Article 120 of the Schedule to the Indian Limitation Act is applicable to a suit for declaration of title to immoveable property, which must consequently be brought within six years from the date when the right to sue accrues. The answer to the question when the right to sue originates, depends upon the circumstances of each case. [p. 11, col. 1.]

Thirumala Rao v. *Kadekar Durgi*, 22 Ind. Cas. 883; (1914) M. W. N. 197; 1 L. W. 134, *Akbar Khan* v. *Turaban*, 1 Ind. Cas. 557; 31 A. 9; 6 A. L. J. 637; A. W. N. (1908) 252; 4 M. L. T. 444, *Rajah of Venkatagiri* v. *Isakapalli Subbiah*, 26 M. 410, *Anantarazu* v. *Narayanarazu Garu*, 13 Ind. Cas. 96; 26 M. 585; 22 M. L. J. 10; (1911) 2 M. W. N. 531; 10 M. L. T. 504, *Sheopher Singh* v. *Deo Narain Singh*, 17 Ind. Cas. 675; 10 A. L. J. 413, *Allah Jilai* v. *Umrao Hussein*, 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810, *Latajat Hussain* v. *Kaliker Nand Singh*, 45 Ind. Cas. 482; (1918) Pat. 225; 3 P. L. J. 86; 4 P. L. W. 508, *Ilahi Bakhsh* v. *Harnam Singh*, A. W. N. (1898) 215, *Robert Skinner* v. *Shankar Lal*, 1 Ind. Cas. 556; 5 A. L. J. 638 *note*; 31 A. 10 *note*, *Brij Behari Singh* v. *Sheo Shankar Jha*, 39 Ind. Cas. 85; (1917) Pat. 108; 2 P. L. J. 124; 1 P. L. W. 434, *Ramji Ram* v. *Sadhu Saran Lal*, 41 Ind. Cas. 11; 2 P. L. J. 458, referred to.

Mohabharat Shaha v. *Abdul Hamid Khan*, 1 C. L. J. 78, *Shyamanand Das* v. *Raj Narain Das*, 4 C. L. J. 568; 11 C. W. N. 156, *Kali Debya* v. *Bhagaban Nanda*, 1 Ind. Cas. 810, *Tarak Nath* v. *Syama Charan*, 36 Ind. Cas. 292, *Hulada Prasad Deghoria* v. *Kalidas Naik*, 24 Ind. Cas. 899; 42 C. 536; 20 C. L. J. 312; 19 C. W. N. 542, followed.

Appeal against a decree of the Subordinate Judge, Bankura, dated the 30th August 1919.

Babus *Shib Chandra Palit* and *Fanindra Nath Das*, for the Appellant.

Babus *Jyoti Prasad Sarbadhicari* and *Panchanan Ghosh*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit for declaration of title to a village called Udaipore in the District of Bankura. The plaintiff and the defendants are descended from a common ancestor, Jugal Kishore Sen Ukil, who had two sons, Kesab and Matiram. Kesab had three sons, Prasad, Sridhar and Nilmohan; Matiram also had three sons, Damodar, Srinivas and Adwaita. The plaintiff represents the branch of Nilmohan. The first defendant is the widow of Prankrishna, the descendant of Prasad. The second and third defendants represent the branch of Srinivas, while the fourth, fifth and sixth defendants represent that of Adwaita. The case for the plaintiff is that in the disputed property, which admittedly belonged to the common ancestor, his share is one-third, while the first defendant owns one-twenty-fourth and the remaining defendants fifteen-twenty-fourths. The first defendant asserts, on the other hand, that the share of the plaintiff is one-fourth, her own share is one-fourth and that of the remaining defendants one-half. The substantial controversy is between the plaintiff and the first defendant, and the dispute reduces to the devolution of the share of Sridhar, which was inherited by his son Syam and then passed into the hands of Sahachari, the widow of Syam. According to the plaintiff, this share, after the death of Sahachari, passed into the hands of his father Gopal (the son of Nilmohan) as the sole surviving reversioner at the time. According to the first defendant, that share was divided equally between the representatives of Prasad as well as Nilmohan. In these circumstances, the plaintiff instituted this declaratory suit, and, on the allegation that he was in joint possession of the one-third share claimed by him, he did not seek consequential relief. The claim for declaratory relief was resisted on the grounds, amongst others, that it was barred by

limitation, and that even if it was well-founded in fact, the suit was not maintainable under section 42 of the Specific Relief Act inasmuch as the plaintiff had omitted to claim further relief. The Subordinate Judge found on the evidence that the share of the plaintiff was one third as alleged by him, that he was in joint possession of that share and that the claim for declaratory relief was not barred by limitation. The Subordinate Judge held, however, that the plaintiff might have claimed further relief by way of partition, and in this view he dismissed the suit. The plaintiff has appealed against the decree and has assailed the reason assigned by the Court below for withholding the declaration justified by the facts found. The respondents have attempted to support the decree of the Subordinate Judge on the ground assigned by him, but they have further contended that the Subordinate Judge came to an erroneous decision on the merits and should have held that the claim was barred by limitation, that the share of the plaintiff was not one-third but one-fourth, and that he was not in joint possession of the one-third share. The points in controversy between the parties have thus been all re-opened in this Court.

The *first* point which requires examination is the question of the extent of the share of the plaintiff in the joint property; the solution depends upon the determination of two factors, namely, the time of the death of Sahasbari when the succession opened out to the reversionary heirs of her husband and who were the persons alive at that time competent to take as such reversionary heirs. The Subordinate Judge has found that she died in 1862 and that the share of her husband thereupon passed to the father of the plaintiff, who was then alive, as the grandfather of the husband of the first defendant had previously died. We see no reason to doubt the correctness of the conclusion of the Subordinate Judge, which is amply supported by the evidence on the record. The story that the share was allowed to be enjoyed by other members of the family, although the father of the plaintiff became entitled thereto as reversionary heir, is not supported by any reliable evidence or intelligible hypothesis. As a last resort, it was argued in the Court below—and the argument has been repeated in this Court—that the title of the father of the plaintiff was extinguished by adverse possession on the part of the husband of the first defendant. The requisites essential for the establishment of title by adverse possession as between co owners of joint property have not, however, been made out. As has been frequently pointed out in recent years by the Judicial Committee, for instance, by Lord Macnaghten in *Corea* v. *Appuhamy* (1), by Lord Dunedin in *Muttunayangam* v. *Brito* (2), by Lord Buckmaster in *Hardit Singh* v. *Gurmukh Singh* (3) and by Viscount Cave in *Varada Pillai* v. *Jeevarathnammal* (4), the entry and possession of land by one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all; the difference between the possession of a co-owner and other cases is that acts which if done by a stranger would *per se* be a disseisin, are, in the case of tenancies in-common, susceptible of explanation consistently with the real title; acts of ownership are not, in tenancies in-common, acts of disseisin; the law will not presume that one tenant-in common intends to oust another; the facts, if the contrary is asserted, must be notorious and the intent must be established in proof. The position is now firmly settled that the possession of one joint tenant is the possession of all and there can be no dispossession by one joint tenant, in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy: *Balaram Guria* v. *Syama Charan Mondal* (5), *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (6),

(1) (1912) A. C. 230 at p. 236; 81 L. J. P. C. 151; 105 L. T. 836.

(2) (1918) A. C. 895; 87 L. J. P. C. 146.

(3) 47 Ind. Cas. 626; 29 C. L. J. 437; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

(4) 53 Ind. Cas. 901; 46 I. A. 285; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 343; 38 M. L. J. 318; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

(5) 60 Ind. Cas. 298; 24 C. W. N. 1057; 33 C. L. J. 344.

(6) 27 Ind. Cas. 465; 20 C. W. N. 51; 21 C. L. J. 253.

Jatindra Nath Roy v. *Sabidannessa Khatun* (*Narendra Bhuson Roy* v. *Jogendra Noth Roy*) (7). Tested in the light of these principles, the case for acquisition of title by adverse possession completely breaks down. The defendant has not adduced satisfactory evidence of exclusive possession; on the other hand, the plaintiff has proved that in one instance at least he succeeded in realising a decree from one Imam for an one third share of the sum at which the latter had purchased a jungle belonging to all the co sharers. No doubt, the evidence shows that the husband of the first defendant had asserted, from time to time, title to a larger share than he possessed, but such bare assertion could in no sense be deemed to constitute ouster or dissesin. In our opinion, the Subordinate Judge has rightly held that the share of the plaintiff amounted to one third, that such title was not extinguished by adverse possession, and that he was in joint possession of the disputed property to the extent of his share at the date of the institution of this suit.

The *second* point which requires examination is whether the claim for declaratory relief is barred by limitation. It was pointed out in the case of *Mohabharat Shaha* v. *Abdul Hamid Khan* (8) that Article 120 of the Schedule to the Indian Limitation Act is applicable to a suit for declaration of title to immoveable property, which must consequently be brought within six years from the date when the right to sue accrues: *Shyamanand Das* v. *Raj Narain Das* (9), *Kali Debya* v. *Bhagaban Nanda* (10), *Tarak Noth* v. *Syama Charan* (11), *Hulada Prasad Deghoria* v. *Kalidas Naik* (12). It is plain that if there is a right to sue, it cannot be impossible to define when it originates, but the answer obviously depends upon the circumstances of each case. There has been some divergence of judicial opinion on the question, whether there may or may not be instances of successive accruals of causes of action for relief by way of declaration. Thus it was ruled in *Thirumala Rao* v. *Kadekar Durgi* (13) that when a plaintiff brings a declaratory suit on the ground that the defendant has denied his title, there is only one cause of action which accrues from the date of knowledge in the plaintiff that the defendant denied his title. This view was rested on the decisions in *Akbar Khan* v. *Turabin* (14) and *Raiah of Venkatagiri* v. *Isukapalli Subbiah* (15), which, it was explained, could not be reconciled with the opinion expressed in *Anantarasu* v. *Narayanarazu Garu* (16) and *Sheopher Singh* v. *Deo Narain Singh* (17). On the other hand, the decisions in *Allah Jilai* v. *Umrao Hussein* (18) and *Latafat Hussain* v. *Kaliker Nand Singh* (19) furnish instances where the possibility of a fresh cause of action for declaratory relief is recognised, and the doctrine is broadly formulated that a plaintiff seeking a declaration is entitled to sue upon each successive invasion of his right. Similar instances may be found in *Ilahi Bakhsh* v. *Harnam Singh* (20), *Robert Skinner* v. *Shankar Lal* (21), *Brij Behari Singh* v. *Sheo Shankar Jha* (22) and *Ramji Ram* v. *Sadhu Saran Lal* (23). In the case before us, the Subordinate Judge has found that the cause of action arose in 1914, within six years before the date of the institution of the suit, when the first defendant, in denial of the title of the plaintiff, mortgaged and sold shares in the disputed property in excess of her lawful interest therein. But it has been contended on her behalf that a cause of action had arisen in 1893, when her husband filed a

(7) 35 Ind. Cas. 36; 20 C. W. N. 1258; 24 C. L. J. 165.
(8) 1 C. L. J. 73.
(9) 4 C. L. J. 568; 11 C. W. N. 186.
(10) 1 Ind. Cas. 810.
(11) 36 Ind. Cas. 292.
(12) 24 Ind. Cas. 999; 42 C. 536; 20 C. L. J. 312; 19 C. W. N. 542.
(13) 22 Ind. Cas. 893; (1914) M. W. N. 197; 1 L W. 134.
(14) 1 Ind. Cas. 557: 31 A. 9; 5 A. L. J. 637; A. W. N. (1908) 252; 4 M. L. T. 444.
(15) 26 M. 410.
(16) 13 Ind. Cas. 96; 36 M. 383; 22 M. L. J. 103; (1911) 2 M. W. N. 531; 10 M. L. T. 504.
(17) 17 Ind. Cas. 675: 10 A. L. J. 413.
(18) 24 Ind. Cas 535; 36 A. 492; 12 A. L. J. 810.
(19) 45 Ind. Cas. 432; (1918) Pat. 225; 3 P. L. J. 361; 4 P. L. W. 303.
(20) A. W. N. (1893) 215.
(21) 1 Ind. Cas 556; 5 A. L. J. 638 *note*; 31 A. 10 *note*.
(22) 39 Ind. Cas 85; (1917) Pat. 103; 2 P. L J. 124; 1 P. L. W. 434.
(23) 41 Ind. Cas. 11; 2 P. L. J. 433.

written statement and gave his deposition in a suit, in which he denied that the plaintiff had one third share and himself claimed a one-fourth share. The Subordinate Judge has held that these assertions, which were not accompanied or followed by an overt act, were not calculated to cast a cloud upon the title of the plaintiff and did not accordingly give rise to a cause of action. This, in our opinion, is a reasonable view. But it is also clear that the present cause of action is entirely distinct from and is in no sense a continuation of a prior cause of action, even if it should be held that a cause of action did arise in 1898. We accordingly affirm the conclusion of the Subordinate Judge that the claim for declaratory relief is not barred by limitation.

The *third* and final point which requires consideration is, whether the suit has been rightly dismissed under the proviso to section 42 of the Specific Relief Act, which is in the following terms:

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

It was successfully contended in the Court below, and the same view has been reiterated in this Court on behalf of the respondent, that inasmuch as the plaintiff could have sought further relief than a mere declaration of title by way of partition, omission to do so must draw upon him the penalty of refusal of the declaration he seeks. In support of this view, reliance has been placed upon the decision of the Madras High Court in *Suryanarayanamurti* v. *Tammanna* (24). In the case mentioned, it was ruled that a plaintiff suing for a declaration that property bequeathed by his father to the defendant was ancestral and that his father had no power to bequeath it and that he was entitled to it by survivorship along with the defendant, ought to pray for partition of the property even if it be in the possession of tenants. With regard to this decision, as also the two earlier cases of *Sardarsingji* v. *Ganpatsingji* (25) and *Strinivasa Ayyangar* v. *Strinivasa Swami* (26), Sir Frederick Pollock has remarked in his commentary on the Specific Relief Act that they mark the extreme limits of the application of the proviso to section 42. We are inclined to adopt the same view and it appears to us to be fairly clear that assuming that the plaintiff was in possession in the case of *Suryanarayanamurti* v. *Tammanna* (24) that decision does not give due weight to the fundamental fact that the expression used by the Legislature is, not 'other relief,' but 'further relief.' The further relief must consequently be relief in relation to the legal character or right as to property which the plaintiff is entitled to and whose title to such character or right the defendant denies or is interested in denying; it must also be relief appropriate to and necessarily consequent on the right or title asserted. This view is supported by the decision in *Aisa Siddika* v. *Bidhu Sekhar* (27), which was recently followed in *Sivaramalinga* v. *Subharatna* (28). These cases emphasise the standpoint that a suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. Thus, when a person is out of possession of the land in respect of which he seeks to have his title declared, possession of the land in dispute is further consequential relief appropriate to the declaration prayed for and should as a general rule be sought. *Basavayya* v. *Syed Abbas Saheb* (29), *Ranga*

(24) 25 M. 504.

(25) 14 B. 395; 7 Ind. Dec. (N. S.) 724.
(26) 16 M. 31; 2 M. L. J. 139; 5 Ind. Dec. (N. S.) 729.
(27) 18 Ind. Cas. 633; 17 C. L. J. 30 at p. 33.
(28) 51 Ind, Cas. 822; 36 M. L. J. 624; 9 L. W. 357 (1919) M. W. N. 216; 25 M. L. T. 361.
(29) 24 M. 20.

v. *Unnikutti* (30), *Ramaswamy* v. *Muniandy Sercai* (31). This is manifestly right on principle, for it would lead to multiplicity of litigation if the plaintiff were allowed to seek the full measure of relief piecemeal, namely, first, a declaration of title in a suit for declaratory relief, and next, ejectment in a suit for recovery of possession: *Ganpatgir Guru Bholagir* v. *Ganpatgir* (32), *Chokalingapeshana Naicker* v. *Achiyar* (33). The position, however, is different where the plaintiff is in joint possession of joint property to the extent of the share claimed by him and is driven to ask for declaratory relief, because the extent of his share is disputed by the co-owner. In a case of this description, it is difficult to appreciate on what principle the plaintiff should be driven to seek for partition as a consequential relief. One of the incidents of joint property is that it may be enjoyed jointly; another incident is that its joint character is liable to be terminated. If a co owner is content to enjoy joint property as such, there is no reason why he should be driven to seek for partition, merely because his co owner chooses to dispute the extent of his share. The proviso to section 42 forbids a suit for a pure declaration without further relief, but it does not compel a plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. It may be that the plaintiff requires nothing more than a mere declaration and in those circumstances to refuse to make the decree asked for will be a denial of justice: *Kuni Behari* v. *Keshavlal Hiralal* (34), *Chinnappa Chettiar* v. *Thulasi Ammal* (35). On this ground, it has been maintained that if the plaintiff is only entitled to what is called constructive possession by receipt of rent from the defendant, a declaration of title is all he needs; *Loke Nath* v. *Keshab Ram* (36), *Nirmal Chunder* v. *Mahomed Siddik* (37), *Satis Chandra* v. *Satya Charan* (38) *Parasram Ratanram* v. *Bhimbhai Kirparam* (39). Reference may in this connection be made to the decision in *Velammal* v. *Vanammal* (40). There the plaintiff, one of several sharers, sued to have it declared that the decree passed on a hypothecation made by his co sharers did not affect his share; it was ruled, notwithstanding the decision in *Suryanarayanamurti* v. *Tammanna* (24), that the plaintiff need not ask for a general partition, even though he had impleaded those co-sharers as defendants. This is obvious good sense, but rather difficult to reconcile with the opinion expressed in *Garapaty Venkatrayudu* v. *Butchu Venkatrayudu* (41) on the authority of the earlier decisions in *Sripati Chinna Sanyasi Razu* v. *Suriya Rozu* (42) and *Subramanya Chettyar* v. *Padmanabha Chettyar* (43). The view that in cases of this description it is not obligatory upon the plaintiff to ask for partition was, however, maintained by Chamier, C. J., in *Asman Singh* v. *Tulsi Singh* (44), which is consistent with the view indicated in *Chinnammal* v. *Varadarajulu* (45). We hold accordingly that where, as in the case before us, the plaintiff is in joint possession of immoveable property, whether such possession be actual possession of his share of the whole or actual possession of a part coupled with constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the defendant disputing his share; in a suit so framed, declaration of title is all that the plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition. The conclusion follows that the Subordinate Judge has erroneously held that

(30) 24 M. 275.
(31) 5 Ind. Cas. 343; 20 M. L. J. 709; 7 M. L. T. 253; (1910) M. W. N. 550.
(32) 3 B. 230; 2 Ind. Dec. (N. S.) 155.
(33) 1 M. 40; 1 Ind. Dec. (N. S.) 25.
(34) 28 B. 567; 6 Bom. L. R. 475.
(35) 15 M. L. J. 399.
(36) 18 C. 147; 11 Ind. Jur. 105; 6 Ind. Dec. (N. S.) 597.
(37) 26 C. 11; 25 I. A. 225; 7 Sar. P. C. J. 383; 13 Ind. Dec. (N. S.) 611 (P. C.)
(38) 5 Ind. Cas. 531; 14 C. W. N. 576.
(39) 5 Bom. L. R. 195.
(40) 6 Ind. Cas. 198; 20 M. L. J. 349; 7 M. L. T. 155.
(41) 5 Ind. Cas. 921; 20 M. L. J. 759; 7 M. L. T. 164; (1910) M. W. N. 545.
(42) 5 M. 196; 6 Ind. Jur. 410; 2 Ind. Dec. (N. S.) 137.
(43) 19 M. 267; 6 Ind. Dec. (N. S.) 891.
(44) 39 Ind. Cas. 173; (1917) Pat. 131; 2 P. L. J. 221; 1 P. L. W. 335.
(45) 15 M. 307; 5 Ind. Dec. (N. S.) 566.

the proviso to section 42 of the Specific Relief Act is a bar to the relief claimed by the appellant.

The result is that the appeal is allowed and the suit decreed with costs in both Courts payable by the first defendant. The plaintiff will have a declaration in terms of the first clause of his prayer in the plaint.

BUCKLAND, J.—I agree.

E. M. & J. P. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 46 OF 1918.

April 25, 1921.

Present:—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

SUHIJRAM TAHILRAM—APPELLANT

versus

TOWER SON OF GUL AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—"In accordance with law," adjectival effect of—Application for execution—"Costs" and "previous application" not mentioned—Defect, whether material or immaterial—Civil Procedure Code (Act V of 1908), O. XXI, r. 11, cl. 2, sub-cls. (f), (h).

Of all things that do not appear and of all things that do not exist the reckoning in a Court of Law is the same. [p. 15, col. 2.]

In clause 5, Article 182, Schedule I, Limitation Act, 1908, the words "in accordance with law" must be taken to qualify both the application for execution as well as the step taken in aid of execution. [p. 15, col. 1.]

Bhagwan Jethiram v. *Dhondi*, 22 B. 83; 11 Ind. Dec. (N. S.) 637, relied upon.

In order that an application may be in accordance with law, it must ask the Court to do something which the Court is competent to do. [p. 15, col. 2.]

Purna Chandra Mandal v. *Radha Nath Dass*, 33 C. 367; 4 C. L. J. 141, relied upon.

The question whether an application for execution or for taking some step-in-aid of execution is one according to law must be determined with reference to the circumstances of each case. It is not every failure to comply with the requirements of Order XXI, rule 11, clause 2, Civil Procedure Code, that would vitiate the application. Informalities of a material character, but not of an immaterial character, would vitiate the application. [p. 15, col. 1.]

Gopal Chunder Manna v. *Gosain Kalay*, 25 C. 594 (F. B.); 2 C. W. N. 556; 13 Ind. Dec. (N. S.) 392, referred to.

Applications for the execution of a decree for possession of immoveable property were made one after another on the 6th December 1911, on the 6th December 1912, on the 7th December 1914, and on the 8th December 1916. In the application of 7th December 1914, there was no mention of costs nor of the application of 1912 as required by sub-clauses (*f*) and (*h*) of clause 2, rule 11, Order XXI, Civil Procedure Code:

Held, (1) that the omission to mention the amount of costs in the application of 1914 was a defect of such an immaterial character as could hardly be said to render the application one not in accordance with law; [p. 15. col. 2.]

(2) that the omission to mention the application of 1912 was such a material defect as to render the application of 1914 not in accordance with law, inasmuch as this last application, as it was presented to the Court, was on the face of it time-barred and on that application, as it stood, the Court had no power to grant the relief sought. [p. 15, col. 2.]

Rama v. *Varada*, 16 M. 142; 5 Ind. Dec. (N. S.) 807, distinguished.

Appeal against a judgment of the Joint Judge, Hyderabad, dated the 23rd August 1918.

Mr. *Tolasing Khushalsing*, for the Appellant.

Mr. *Javhermal Villaitrai*, for the Respondents.

JUDGMENT.

RAYMOND, A. J. C.—On the 7th December 1916, plaintiff made an application for the execution of his decree asking for possession of some immoveable property. Prior to this application, four applications had been made in execution, one on the 10th December 1910, then on 6th December 1911, next on the 6th December 1912 and then on the 7th December 1914. To the application presented on the 8th December 1916 objection was taken that it was time-barred as the last previous application of 7th December 1914 was not in accordance with law, and that more than three years had elapsed since the date of the application of 1914. It was argued that the application of 1914 was defective in two particulars, one, that it omitted to specify the costs of the previous application for execution and also the costs of the application of 1914, and secondly, it omitted to mention the previous application of 1912 as required by clause (*f*) of Order XXI, rule 11, Civil Procedure Code. The First Class Sub-Judge, Hyderabad, held that the application of 1914 was in accordance with law, as the omission to mention the costs was not a material defect and that, therefore, the application of 1916 was in time. For some reason or other he did not consider the effect of the omission to mention the execution application.

of 1912. On appeal the District Court of Hyderabad held that the omission of the application of 1912 in the application of 1914 was a material defect, rendering the latter application not in accordance with law, and, therefore, that the application of 1916 was time barred. In second appeal it is argued that the lower Appellate Court is in error in holding that the application of 1914 was not in accordance with law.

It appears from the order of the lower Courts that when the application of December 1914 was returned for amendment, an amended application was filed but it was neither signed nor verified, and as the judgment-creditor, though called upon to do so, neglected to sign and verify it, the order of the Court was that it be filed.

To satisfy the requirements of clause 5 of Article 182 of the Limitation Act, which applies to the present case, there must have been an application to the proper Court in accordance with law for execution or to take some step-in-aid of execution. The words "in accordance with law" must be taken to qualify both the application for execution as well the step taken in aid of execution. In *Bhagwan Jethiram* v. *Dhondi* (1) it was held that the phrase "in accordance with law" must be taken as adjectival not only to the words "to the proper Court for execution" but also to the words "to take some step in execution." The question whether an application for execution or for taking some step in-aid of execution is one according to law must be determined with reference to the circumstances of each case. It is certainly not the case that every failure to comply with the requirements of Order XXI, rule 11, clause 2, Civil Procedure Code, would vitiate an application, as the result of that would be, as stated in *Gopal Chunder Manna* v. *Gosain Kaloy* (2), that "*bona fide* applications for execution would fail to save limitation owing to trivial defects of form, a result which the Legislature could not have intended." The authorities seem to be agreed that informalities of an immaterial character in an execution application will not vitiate an application. Thus, for instance, in the present case there can be very little doubt that the omission to mention the amount of costs in the execution application of 1914 is a defect of such an immaterial character as could hardly be said to render the application one not according to law. The substantial question in the present appeal, however, is whether the omission to mention, as required by clause 2 (*f*) of Order XXI, rule 11, Civil Procedure Code, the previous application for execution of 1912 was such a material defect as to render the application of 1914 not in accordance with law. It is obvious that the application of 1914, as it was presented to the Court, was on the face of it time-barred, and on the application as it stood, the Court had no power to grant the relief sought. "Of things that do not appear and of things that do not exist the reckoning in a Court of Law is the same." In order that an application may be in accordance with law, it must ask the Court to do something which it is competent in law for the Court to do. *Purna Chandra Mandal* v. *Radha Nath Dass* (3). Applicants strongly relied on the case of *Rama* v. *Varada* (4). In this case in an application for execution of a decree it appeared that the last previous application, which had been made within a period of 3 years, was defective by reason of not containing particulars required by section 235, Civil Procedure Code, corresponding to Order XXI, rule 11 of the Civil Procedure Code of 1908, and though returned for amendment, had not been amended. It was held that though the application was defective with reference to the provisions of section 235, Civil Procedure Code, it substantially complied with them. This case is clearly distinguishable. The defect consisted in not stating the *earlier* of two previous applications and its result. In the present case it was the omission of the *last* previous appplication which rendered the execution application of 1914 *prima facie* time-barred.

Now I take it that an execution application, in order to be in accordance with law, must contain such particulars as to show that it is presented within the period of limitation, and I cannot regard an omission to do this as an immaterial defect. It appears to me fundamental, as one of the essential

(1) 22 B. 83; 11 Ind. Dec. (N. S) 637.
(2) 25 C. 594 (F. B.); 2 C. W. N. 553; 13 Ind. Dec. (N. S.) 394.
(3) 33 C. 867; 4 C. L. J. 141.
(4) 16 M. 142; 5 Ind, Dec. (N. S.) 807.

requisities to the success of the application is lacking.

As the application was, therefore, *prima facie* time-barred, could it neither be effectual as a step-in-aid of execution.

I, therefore, hold that as the last application for execution, namely, that of 1914, was one not in accordance with law, it could not give a fresh starting point for limitation and, therefore, the execution application of 1916 is time-barred.

It was argued that as the execution application was permitted to be amended and amendment was made within the time fixed, the application should be deemed one according to law; but the amended application was neither signed nor verified and though an application for execution may not be invalid for want of verification, yet it could hardly be that in the present case an unsigned and unverified amended application was sufficient to remedy a material defect in the original application. The duty of the Court to which the application was presented was to reject the application of 1914 as *prima facie* time-barred, and though the Court allowed it to be amended, yet it was not amended by a properly signed and verified application, and as this was not done, the Court directed the papers to be filed, which implied that no action was to be taken on the application. I agree with the lower Appellate Court that this virtually amounted to a dismissal of the application. That being so, the present application, as was argued, cannot be regarded as a continuance of the application of 1914.

I would, therefore, dismiss this appeal with costs.

KENNEDY, J. C.—I agree.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 112 OF 1920.

March 30, 1921.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

HARBANS NATH TEWARI AND OTHERS—APPELLANTS

versus

ACHRAJ NATH AND OTHERS—RESPONDENTS.

Execution—Re-sale—Separate mortgage-bonds—Properties sold together—Re-sale.

In the execution of a decree on three mortgage-bonds where a sale of all the properties together had already taken place, the High Court held, on an objection by one of the transferees of the judgment-debtor, that one sale was objectionable and that each property separately mortgaged ought to have been separately sold. The decree-holder, who was also the auction-purchaser, applied as auction-purchaser and absolute owner, for possession, ignoring the direction of the High Court. An objection was taken to the possession being given and it was urged that a separate sale should take place in accordance with the directions of the High Court:

Held, that the decree-holder was not entitled to possession but he ought to be allowed to pursue his alternative remedy in accordance with the judgment of the High Court or, in other words, to apply alternatively, by way of amendment of his application, for an order for re-sale of the properties separately in accordance with the High Court's direction. [p. 17, col. 1.]

First appeal from a decision of the District Judge.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Brij Nath Vyas*, for the Respondents.

JUDGMENT.

WALSH, J.—This is an appeal raising a question which also governs Appeals Nos. 113 and 114. Nice questions are raised by the appeal, but we do not think it necessary to express any opinion about them. It is one of those cases where possibly not entirely owing to the feelings of the parties themselves, the parties have been engaged for some years in a technical quarrel during which the real substance between them has been lost sight of and, we propose, as far as in us lies, to make an end of this technical dispute and to endeavour to make an order which will eventually dispose of the litigation and decide the rights of the parties finally. The present application was brought before the Subordinate Judge on the 11th of July 1919. The whole matter arose out of a decree on three mortgage-bonds. On a petition to the High Court by one of the transferees of the judgment-debtors, the High Court held that one sale was objectionable and that each property

separately mortgaged ought to have been separately sold. Before the High Court delivered judgment, the sale of all the properties together had already taken place. It had been confirmed and, on the face of it, the purchasers were the absolute owners and entitled to possession. The High Court did not push its own order to a logical conclusion and say what was to be done with the proceedings which had taken place since the order which it overruled, and the decree-holder, who was also the auction-purchaser, applied by this application to the Court below for possession as auction purchaser and absolute owner, ignoring the direction of the High Court that the properties ought to be re sold separately. The objectors objected to the applicant being given possession, but asked that a separate sale should take place in accordance with the directions of the High Court. The lower Court agreed with the view of the objectors and we agree with its view. To hold otherwise would be to ignore the two Bench decisions of this Court, but the lower Court having, in our view, rightly taken that view of the position of the parties, ought to have allowed the decree-holder, who was obviously held up in his proceedings, if this view is correct, to pursue his alternative remedy in accordance with the judgment of the High Court which the lower Court held was binding upon it or, in other words, to apply alternatively; by way of amendment of his application, for an order for re sale of the properties separately in accordance with the High Court's direction. We think that that is the order which the lower Court ought to have made. It is the order that we are prepared to make to day. This appeal, therefore, must be, to that extent, allowed, although we are not deciding any point in favour of any party, and the application must be remanded to the lower Court with directions to allow the decree-holder to amend it and to hear the amended application for re-sale of the properties. The application will not be a new application but merely a continuation of the application originally made on the 11th of July 191 . I am clearly of opinion that no question of limitation can arise or ought to be listened to for a moment. In my view, time began to run as against the decree-holder from the date of the High Court's decision, the 7th of March 1917, up to which date the decree holder had obtained everything that he could possibly have obtained, but my learned brother will give detailed reasons for his view, which I share.

RYVES, J.—I agree. The decree-holders applied for the sale of the properties decreed to them on their suit and the 12th of July was fixed. Before that date one of the judgment-debtors applied to the Court executing the decree to disallow the sale, on the ground that it was not being carried out according to the directions in the decree. On the 19th of July 1916 the Court disallowed this objection and the sale was held as advertised on the 20th of July 1916. The decree-holders themselves purchased the property. On the 1st of August 1916 the objector, in the Court below, filed an appeal to this Court, urging the same objection as he had in the Court below. This he was clearly entitled to do. On the 20th of August 1916 the sale was confirmed. On the 7th of March 1917 this Court allowed the appeal of the objector, and in the decree which it passed the operative words are as follows:—"It is ordered and decreed that the case be and it is hereby sent back to the Court of the Subordinate Judge aforesaid with direction that the property of the objector-appellant shall be sold for the decretal amount in respect of the mortgage under which his property is mortgaged." It follows that the objection of the objector, which was disallowed on the 19th of July, ought to have been allowed and if the Court had come to a right decision, the sale fixed for the 20th of July would not have taken place as arranged and a fresh sale in accordance with what was subsequently directed by the High Court would have been necessary. The fact that the sale was confirmed on the 20th of August seems to me, must depend for its validity on the decision of the High Court. Of course if the High Court had dismissed the appeal, nothing more would have remained to be said, but the sale clearly was held subject to the objection of the objector and, it seems to me, it must be held that the sale and its confirmation were both dependent on the final result of that objection. It must be remembered that the decree-holders them-

selves were the purchasers and they were before this Court in both capacities when that appeal was heard and decided and, it seems to me that they should have, in accordance with that judgment, applied not for possession given under the certificate of sale which they received after the confirmation of the sale giving the go-by entirely to the High Court's decree, but should have applied in accordance with the High Court's decree for re-sale. This was the position taken up by the respondents even in the lower Court. The Court has recorded in its judgment: "They (the persons whose properties have been sold) object that the decree-holder-auction-purchaser should not be given possession but should be directed to sell the properties separately again as directed by the Hon'ble Court." It seems to me they cannot be heard to say that this should not be done for any reason and, therefore, I agree in thinking that this application for possession, dated the 11th of July 1919, should be amended as suggested by my brother, and as that was filed on the 11th of July 1919 within three years of the date of the decree of this Court, I cannot see how any plea of limitation can be set up. Up to the 7th of March 1917 the decree-holders had obtained execution to the full. They had not only purchased the property but the sale had been given to them. It was only when this Court directed a re-sale and, therefore, inferentially set aside the previous sale, that any right to apply for execution arose.

BY THE COURT.—The order of the Court is that we allow this appeal to this slight extent, that the application will be remanded to the lower Court with directions to allow the decree-holder to amend the same by adding an alternative claim, as from the 11th of July 1919, for re-sale in accordance with the High Court's direction of the 7th of March 1917 and to dispose of it according to law. If there is any such application already on the file, it must be consolidated with this and disposed of along with it. In the event of a re-sale being ordered, the costs of these proceedings must be borne rateably by the three separate properties and the resultant proportion added to the amount of the decree; otherwise each party will pay their own costs.

J. P. *Appeal partly allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2130, 2377, 2378 and 2379 OF 1919.

August 5, 1921.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

ANNADA PRASAD *alias* ANNODA CHANDRA *alias* BHOLA GHOSH—DEFENDANT NO. 4—APPELLANT

versus

UPENDRA NATH DEY SIRCAR—PLAINTIFF AND *Mahara adhiraj* SIR BEJOY CHAND MAHATAP BAHADUR AND OTHERS—*Pro forma* DEFENDANTS AND OTHERS—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (3)—Guardian ad litem—*Appointment without consent—Certificated guardian—Presumption as to consent—Suit against minor unrepresented by guardian—Decree—Jurisdiction.*

In a suit against a minor a Court is not entitled to presume that a certificated guardian (of the person and property of the minor under Act VIII of 1890) will consent to be appointed guardian for the suit, and should not without his consent to such an appointment, in contravention of the express direction of sub-rule 3 of rule 4 of Order XXXII of the Civil Procedure Code appoint him as guardian for the suit. [p. 21, col. 2.]

The provision as to the consent of the person proposed to be appointed guardian for the suit is mandatory and imperative. [p. 22, col. 1.]

Therefore when, a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect upon him. [p. 21, col. 2.]

Khiarajmal v. *Daim*, 32 I. A. 23; 32 C. 296; 1 C. L. J. 584; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.), *Rashid-un-nissa* v. *Muhammad Ismail Khan*, 3 Ind. Cas. 864; 36 I. A. 168; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631 (P. C.), *Partab Singh* v. *Bhabuti Singh*, 21 Ind. Cas. 288; 40 I. A. 182; 35 A. 487; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001 (P. C.), *Dakeshur Pershad Narain Singh* v. *Rewat Mehton*, 24 C. 25; 12 Ind. Dec. (N. S.) 681, *Narsing Narain* v. *Jahi Mistry*, 13 Ind. Cas. 414; 15 C. L. J. 3, *Bal Kishan Lal* v. *Topeswar Singh*, 14 Ind. Cas. 845; 15 C. L. J. 446, 17 C. W. N. 219, *Dinabandhu Nandi* v. *Mashuda Khatun*, 17 Ind. Cas. 263; 16 C. L. J. 518, *Purna Chandra Kumar* v. *Bejoy Chand*, 18 Ind. Cas. 859; 18 C. L. J. 18; 17 C. W. N. 549, *Krishna Chandra* v. *Jogendra Narain*, 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537, *Baneswar Pramanik* v. *Tarapada Bhattacharjee*, 41 Ind. Cas. 872; 26 C. L. J. 258, *Radhashyam Dasya* v. *Ranga Sundari Dasya*, 59 Ind. Cas. 664; 24 C. W. N. 541, *Surendra Nath Bose* v. *Aghore Nath Bose*, 62 Ind. Cas. 464; 25 C. W. N. 525, *Chundury Krishnayya* v. *Koripalli Raju*, 35 Ind. Cas. 154; 31 M. L. J. 39, *Shroof Sahib* v. *Raghunatha Sivaji*, 29 Ind. Cas. 579; 18 M. L. T. 401, followed.

Oodayanasamy Tevar v. *Alagappa Chetty*, 14 M. L. J. 342, referred to.

Mohan Krishna Dar v. *Har Parsad*, 40 Ind. Cas. 2, followed.

When a Court proceeds to make a decree against an infant who is not properly represented by a guardian, as contemplated by the Code of Civil Procedure, the Court acts without jurisdiction, inasmuch as a decree is made against a person who is in essence not before the Court. [p. 22, col. 1.]

Surendra Nath Bose v. *Aghore Nath Bose*, 62 Ind. Cas. 464; 25 C. W. N. 525, followed.

Janki Das v. *Mahabir Prosad*, 22 Ind. Cas 240, *Pokhpal Singh* v. *Chhiddu Singh*, 15 Ind Cas. 903; 9 A. L. J. 663, *Ram Asray Singh* v. *Sheonandan Singh*, 35 Ind. Cas. 868; 1 P. L. J. 573; 1 P. L. W. 35; (1917) Pat. 21, *Keshawesarindra Sahi* v. *Debendra Bala Dassi*, 48 Ind. Cas. 245; 4 P. L. J. 213; (1919) Pat. 121, referred to.

In a suit notices were duly served upon a minor defendant and his certificated guardian for the latter's appointment as guardian *ad litem* of the minor in the suit The certificated guardian did not appear, but was nevertheless appointed by the Court as guardian *ad litem*. He, however, never appeared and took no steps to protect the interests of the infant. On the suit being decreed *ex parte* against the minor, the certificated guardian preferred an appeal, which was dismissed. The minor meanwhile attained majority and preferred a second appeal:

Held, that, inasmuch as the fact that the proposed guardian had preferred an appeal could not be taken as an index that he had consented to his appointment as guardian for the suit, the decree made against the minor could not be maintained and must be vacated. [p. 22, col. 2.]

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021: 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.), distinguished.

Surendra Nath Bose v. *Aghore Nath Bose*, 62 Ind. Cas. 464; 25 C. W. N. 525, followed.

Appeals against the decrees of the Subordinate Judge, Second Court, Hoogly, dated the 19th of June 1919, affirming the decrees of the Munsif, Second Court at that place, dated the 19th of June 1917.

FACTS appear from the judgment.

Babu *Debendra Nath Mandal*, for the Appellant.—Defendant No. 4 is the appellant. The appeal arises out of a suit for recovery of possession on establishment of plaintiff's title thereto. At the date of suit I was an infant. On 5th May 1916 plaintiff applied for making one Haridas Ghosh, who was appointed my guardian under the Guardians and Wards Act, guardian *ad litem*. Though the proposed guardian did not appear, the Court appointed him guardian *ad litem*. The suit was, therefore, decreed *ex parte* against me. My guardian thereupon appealed against this decree, but the appeal has been dismissed. As I have attained majority since the appellate decree, I have preferred this appeal against it in my own right. I submit the decree of the First Court is void and inoperative in law against me. Refers to Order XXXII, rules 3 and 4 of the Code of Civil Procedure. The order of the First Court appointing the guardian proposed was initially bad, inasmuch as there was no consent of the person proposed to act as guardian. The rules expressly provide that no person shall be appointed guardian against his consent The proposed guardian never appeared to defend the suit on my behalf at any stage of the suit. Refers to *Dakeshur Pershad Narain Singh* v. *Rewat Mehton* (1), *Radhashyam Dasya* v. *Ranga Sundari Dasya* (2), *Surendra Nath Bose* v. *Aghore Nath Bose* (3) and *Baneswar Pramanik* v. *Tarapada Bhattacharee* (4). I submit under the circumstances the decree against me will not be binding on me.

Babus *Karunamoy Ghose* (with him Babus *Bepin Behari Ghose* and *Sarat Kumar Mitter*), for the Respondents.—I submit consent is necessary, only under the Guardians and Wards Act. A certificated guardian's consent is not necessary inasmuch as he is under an obligation to defend a suit instituted against the ward. Therefore, his consent is to be presumed by the Court. Refers to sections 10 and 27 of the Guardians and Wards Act (VIII of 1890); Order XXXII, rule 16 of the Code of Civil Procedure. I submit it is the duty of a guardian who has been proposed to come forward and express his dissent. Further the certificated guardian has entered appearance, though at a very late stage of the suit. He has preferred the appeal before the lower Appellate Court. I submit it is mere irregularity that he did not appear in the First Court. He conducted the appeal, which was decided against the minor. Refers to *Walian* v. *Banke Behari Pershad Singh* (5) and *Oodayanasamy Tevar* v. *Alagappa Chetty* (6). I submit the decree is fully binding on the minor.

Babu *Debendra Nath Mandal* replied in brief.

JUDGMENT.

S. A. No. 2130 of 1919.

This is an appeal by the fourth defendant in a suit for recovery of possession

(1) 24 C. 25; 12 Ind Dec (N. s.) 681.
(2) 59 Ind. Cas. 654; 24 C. W. N. 541.
(3) 62 Ind. Cas. 464; 25 C. W. N. 525.
(4) 41 Ind. Cas. 872; 26 C. L. J. 258.
(5) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).
(6) 14 M. L. J. 342.

of immoveable property on establishment of title. The appellant was an infant at the date of the institution of the suit. On the 5th May 1916 an application was made on behalf of the plaintiff that Hari Das Ghose, who had been appointed guardian of his person and property under the Guardians and Wards Act, 1890, might be appointed his guardian for the suit. Thereupon notices were issued upon the minor and the proposed guardian. The notices were in the form prescribed in Appendix H to the Code of Civil Procedure and stated that if within the period prescribed an application was not made to the Court for the appointment of the proposed guardian or some friend of his to act as guardian of the minor for the suit, the Court would proceed to appoint some other person to act as guardian *ad litem* of the minor. On the 6th June 1916 it was reported to the Court that the notices had been duly served both upon the minor and his proposed guardian. There was no appearance, however, on behalf of the proposed guardian, yet the Court proceeded to appoint him as guardian of the minor for the suit. At no stage of the suit, did the guardian appear and the result was that the suit was decreed *ex parte* against the infant described on the record as represented by the certificated guardian. Against this decree, the guardian, on behalf of the infant, preferred an appeal to the Subordinate Judge and contended that the decree could not stand as against the infant. This contention was overruled and the appeal was dismissed. Since the date of the decree of the Subordinate Judge, the infant has attained majority and the present appeal has been preferred by him in his own right. His contention is that the decree made by the Primary Court is void and inoperative as against him and should be set aside with direction to that Court to re-try the suit so far as he is concerned. This position has been controverted on behalf of the respondent. The decision of the question raised before us is not free from difficulty and depends upon the true construction of the provisions of Order XXXII of the Code of Civil Procedure.

Order XXXII, rule 3 (1), provides that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. This makes it obligatory on the Court to appoint a proper person to be guardian of the minor defendant for the suit. The rule then prescribes the procedure to be followed for the purpose of such appointment. No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, and where there is no such guardian, upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule. Rule 4 next deals with the question as to who may act as next friend or be appointed guardian for the suit. The persons who may so act are divided into two classes. Sub rule (1) provides that any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardain for the suit. Sub rule (2) provides that where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be. Then follows sub-rule (3) in the following terms: "No person shall, without his consent, be appointed guardian for the suit." The generality of the language used in sub-rule (3) makes it abundantly clear that the Legislature intended this sub rule to be applicable as well to cases under sub-rule (1) as under sub-rule (2); in other words, the Legislature has prescribed that no person who is competent to act as guardain of an infant either under sub rule (1) or under sub rule (2) shall be appointed guardian for the suit without his consent. It was argued on behalf of the respondent in essence that this sub-rule is applicable only to cases of persons other than certificated guardians. This result, it was contended, follows from the provisions of the Guardians and Wards Act, 1890, which define in sections

10 and 27 the duties of a person appointed as guardian of the person and property of an infant. Sub-section (3) of section 10 provides that the application of a person to be appointed guardian of an infant must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses. Section 27 provides that a guardian of the property of a ward is bound to deal with it as carefully as a man of ordinary prudence would deal with it, if it were his own, and, subject to certain qualifications, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property. The respondent has urged that a guardian appointed under Act VIII of 1890 is under an obligation to defend a suit instituted against his ward; and that consequently, the Court where the suit has been instituted is entitled to presume, if not as a matter of law, at any rate as a matter of fact, that he will consent to be appointed guardain for the suit. We are of opinion that this contention should not prevail. If this were the intention of the Legislature, sub rule (3) of rule 4 might have been placed between sub-rules (1) and (2) or might have been framed in different words. For instance, it might have provided that no person, other than a certificated guardian, shall, without his consent, be appointed guardian for the suit.

But, beyond this, a serious difficulty might arise, if the Court which had seisin of the suit were held competent to appoint a certificated guardian as guardian for the suit even where he withheld his consent or expressly declined the appointment. A person appointed guardian for the suit in such circumstances would, almost to a certainty, neglect to look after the suit, and the interest of the minor would be placed in serious jeopardy. It may be conceded that a certificated guardian who takes up such an attitude may render himself amenable to the disciplinary jurisdiction of the Court which appointed him as guardian. He may, indeed, be removed under section 39 for breach of duty or neglect of trust. But that clearly does not afford adequate protection to the infant whose interests would be imperilled by the remissness of a person appointed, against his wishes, possibly in spite of his protest, to act as guardian for the suit. We are reluctant to adopt a construction of rule 4 which may conceivably lead to so disastrous a result. In our opinion, sub rule (3) of rule 4 controls both sub rule (1) and sub-rule (2) and places a material restriction upon the power which the Court may exercise thereunder. It is thus plain that, in the case before us, as the proposed guardian did not signify his consent, the Court should not, in contravention of the express direction of sub-rule 3 of rule 4, have appointed him as guardian for the suit.

What, then, is the effect of an appointment so made? It has been laid down in a long series of decisions that when a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constitued has no binding effect upon him. Amongst the decisions of the Judicial Committee, reference may be made to *Khiarajmal* v. *Daim* (7), *Rashid unnissa* v. *Muhammad Ismail Khan* (8) and *Partab Singh* v. *Bhabuti Singh* (9). Amongst the decisions of this Court, reference may be made to *Dakeshur Pershad Narain Singh* v. *Rewat Mehton* (1), *Narsing Narain* v. *Jahi Mistry* (10), *Bal Kishan Lal* v. *Topeswar Singh* (11), *Dinabandhu Nandi* v. *Mashuda Khatun* (12), *Purna Chandra Kumar* v. *Bejoy Chand* (13), *Krishna Chandra* v. *Jogendra Narain* (14), *Baneswar Pramanik* v. *Tarapada Bhattacharjee* (4), *Radhashyam Dasya* v. *Ranga Sundari Dasya* (2) and *Surendra Nath Bose* v. *Aghore Nath Bose* (3). A similar view was adopted by the Madras High Court in

(7) 32 I. A. 23; 32 C. 293; 1 C. L. J. 584; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

(8) 3 Ind. Cas. 864; 36 I. A. 168; 31 A 572; 18 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M L. T. 279; 19 M. L. J. 631 (P. C.).

(9) 21 Ind. Cas 288; 40 I. A. 182; 35 A. 487; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001 (P. C.).

(10) 13 Ind Cas. 414; 15 C. L. J. 3.

(11) 14 Ind. Cas. 845; 15 C. L. J. 443; 17 C.W.N.219.

(12) 17 Ind. Cas. 263; 16 C. L. J. 318.

(13) 18 Ind. Cas. 859; 18 C. L. J. 18; 17 C. W. N. 549.

(14) 27 Ind Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537.

Ohundury Krishnayya v. *Koripalli Raiu* (15) and *Shroof Sahib* v. *Raghunatha Sivaji* (16), though a contrary view appears to have prevailed at one time in that Court, as indicated by the judgment in *Oodayanasamy Tevar* v. *Alagappa Chetty* (6). Indeed it is now well-settled that the provision as to the consent of the person proposed to be appointed guardian for the suit is mandatory and imperative, and this was emphasised by this Court in *Mohan Krishna Dar* v. *Har Prasad* (17). But the respondent has urged that the present case falls within the principle of the decision of the Judicial Committee in *Walian* v. *Banke Behari Pershad Singh* (5), which is clearly distinguishable. As appears from the judgment of the Judicial Committee in that case, the mother who had been proposed for appointment as guardian of her minor son had entered appearance and acted throughout the trial of the suit. No trace, however, could be found on the record of a formal order for her appointment as guardian *ad litem*. The Judicial Committee held in substance that the absence of a formal order of appointment as guardian is not fatal to the validity of the proceedings, where the proposed guardian has in fact appeared and acted on behalf of the minor. In such a contingency, the absence of the formal order may well be treated as a curable irregularity. That this is the true effect of the decision of the Judicial Committee follows from the decisions in *Janki Das* v. *Mahabir Prosad* (18), *Pokhpal Singh* v. *Chhiddu Singh* (19), *Ram Asray Singh* v. *Sheonandan Singh* (20) and *Keshawesarindra Sahi* v. *Debendra Bala Dassi* (21). This principle has obviously no application to the circumstances of this case; nor can the provision of section 99, Civil Procedure Code, be invoked successfully, because as pointed out in *Surendra Nath Bose* v. *Aghore Nath Bose* (3), when the Court proceeds to make a decree against an infant who is not properly represented by a guardian as contemplated by the Code of Civil Procedure, the Court acts without jurisdiction, inasmuch as a decree is made against a person who is in essence not before the Court.

It has been finally urged that the fact that the proposed guardian had preferred an appeal to the Subordinate Judge may be taken as an index that he had consented to his appointment as guardian for the suit. We are unable to give effect to this contention. No doubt the proposed guardian preferred an appeal on behalf of the infant; but we have the equally important fact that he never appeared during the trial of the suit and took no steps to protect the interest of the infant. The view we take is supported by the decision of the Madras High Court in *Shroof Sahib* v. *Raghunatha Sivaji* (16). We hold accordingly that the decree made against the appellant cannot be maintained and must be vacated.

The result is that this appeal is allowed, the decrees of both the lower Courts set aside, only in so far as the appellant is concerned, and the suit remitted to the Court of first instance to be re tried against him. The appellant is entitled to his costs in this Court from the plaintiff-respondent. We make no order as to his costs in the Court below.

It is conceded that this judgment will govern Second Appeals Nos. 2377 to 2379 of 1919; a decree will be drawn up in similar terms in each of those cases.

B. N. & J. P. *Appeals decreed; Case remitted.*

(15) 35 Ind. Cas. 154; 31 M. L. J. 39.
(16) 29 Ind. Cas. 579; 18 M. L. T. 401.
(17) 40 Ind. Cas. 2.
(18) 22 Ind Cas 240.
(19) 15 Ind. Cas. 903; 9 A. L. J. 663.
(20) 35 Ind. Cas. 868; 1 P. L. J. 573; 1 P. L. W. 35; (1917) Pat. 21.
(21) 48 Ind. Cas. 245; 4 P. L. J. 213; (1919) Pat. 121.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 67 OF 1920.

August 2, 1921.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

TUSTU MONDAL AND OTHERS—DEFENDANTS Nos. 2, 3 AND 4—APPELLANTS

versus

KENARAM MONDAL—PLAINTIFF—RESPONDENT.

Easment of necessity—Transfer of portion of land—Discharge of burden imposed upon portion transferred—Implied reservation of easement of necessity—Easements Act (V of 1882), s. 13 cl. (a).

Where the owner of two tenements or of one tenement divided into two parts transfers one part, he puts an end by contract to any relation which he might have himself created between the land sold and the land retained. He discharges the land so sold from any burden imposed upon it during his joint occupation; the condition of such land is thenceforth determined by the contract of alienation, and not by the previous

user of the former common owner during his common ownership. [p. 24, col. 1.]

Suffield v. *Brown*, (1864) 4 De G. J. & S. 185; 33 L. J. Ch. 249; 3 N. R. 340; 10 Jur. (N. S.) 111; 9 L. T. 627; 12 W. R. 356; 46 E. R 888; 146 R. R. 267 and *Crossley* v. *Lightowler*, (1867) 2 Ch. 478; 36 L. J. Ch. 584; 16 L. T. 438; 15 W. R. 801, followed.

But where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will upon severance ripen into an easement, if it be such as to be absolutely necessary to the enjoyment of the part retained, and capable of constituting the subject-matter of an easement. [p. 24, col. 1.]

Wheeldon v. *Burrows*, (1879) 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; 28 W. R. 196, *Pyer* v. *Carter*, (1857) 1 H. & N. 916; 26 L. J. Ex. 258; 5 W. R. 371; 156 E. R. 1472; 28 L. T. (o. s.) 371; 108 R. R. 896, *Taws* v. *Knowles*, (1891) 2 Q. B. 564; 60 L. J. Q. B. 641; 65 L. T. 124; 39 W. R. 675; 56 J. P. 68, *Thomas* v. *Owen*, (1888) 20 Q. B. D. 225; 57 L. J. Q. B. 198; 58 L. T. 162; 36 W. R. 440; 52 J. P. 516 and *Kadambini Debi* v. *Kali Kumar Haldar*, 26 C. 516; 3 C. W. N. 409; 13 Ind Dec. (N. S.) 932, referred to.

Where an owner grants part of his land and retains other parts himself, although the grantee may be in a more favourable position than the grantor in so far as the grantee may claim all easements necessary for reasonable enjoyment of the part so granted, the grantor may claim that all "easements of necessity," without which no enjoyment at all would be possible, should be raised by implication in favour of the part retained. [p. 25, col. 2.]

Richards v. *Rose*, (1853) 9 Ex. 218 at p. 221; 2 Com. L. R. 311; 23 L. J. Ex. 3; 17 Jur. 1036; 96 R. R. 675; 156 E. R. 93, *Union Lighterage Co.* v. *London Graving Dock Co.*, (1902) 2 Ch. 557 at p. 573; 71 L. J. Ch. 791; 87 L. T. 331; 18 T. L. R. 754, *Ray* v. *Hazeldine*, (1904) 2 Ch. 17 at p. 20; 73 L. J. Ch. 537; 90 L. T. 703, *Gordon* v. *Ogilvie*, (1899) 15 T. L. R. 239, *Schwann* v. *Cotton*, (1916) 2 Ch. 459; 85 L. J. Ch. 689; 115 L. T. 168; 60 S. J. 654 and *Derry* v. *Sanders*, (1919) 1 K. B. 223; 88 L. J. K. B. 410; 120 L. T. 194; 63 S. J. 115; 35 T. L. R. 105, followed.

Plaintiff took settlement of western portion of a plot abutting on a road from the landlord and subsequently defendant took settlement of the eastern portion of the same plot. In a suit by the plaintiff for declaration that the defendant had no right of way over the western portion of land:

Held, that the defendant was entitled to the right of way if it was established that at the time of the grant to the plaintiff there was a way of necessity in respect of the eastern plot which was retained by the landlord. [p. 24, cols. 1 & 2.]

Letters Patent appeal against a judgment of Justice Sir Syed Shamsul Huda, KT., dated the 20th of July 1920, in Appeal from Appellate Decree No. 1867 of 1919.

FACTS appear from the judgment.

Babu *Gopendranath Das*, for the Appellant.—The Courts below, in deciding the question whether the defendants were entitled to a right of way, have failed to consider whether there was an implied reservation of an easement of necessity in respect of the eastern plot. The principle applicable to cases of reservation of easements has not been correctly applied. The fact that after the settlement of the land with the plaintiff, the landlord could not grant a right of way over a portion of that land does not affect the right of the defendants, if the right of way which they are claiming is an easement of necessity. See *Wheeldon* v. *Burrows* (1) *Ray* v. *Hazeldine* (2), *Schwann* v. *Cotton* (3), and *Derry* v. *Sanders* (4). See also *Kadambini Debi* v. *Kali Kumar Haldar* (5).

No one appeared for the respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Huda in a suit instituted by the plaintiff-respondent for recovery of certain plots of land from which, he alleges, he has been dispossesse by the defendants and also for a declaration that the defendants have no right of way over certain other plots of land. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge decreed the suit. On appeal to this Court the decree of the Subordinate Judge, in so far as it establishes the title of the plaintiff to the plots claimed by him, was not controverted. But it was argued that the Subordinate Judge had erroneously negatived the right of way claimed by the defendants. Mr. Justice Huda held that the contention of the defendants in respect of the alleged right of way was not tenable and confirmed the decree of the Subordinate Judge. On the present appeal the judgment of Mr. Justice Huda has been assailed on the ground that the principle applicable to cases of reservation of easements has not been correctly applied to the facts of this litigation.

It appears that there was a plot of land which was originally held by the defendants as tenants. The land was sold in execution of a decree against them and was pur-

(1) (1879) 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; 28 W. R. 196.

(2) (1904) 2 Ch. 17 at p. 20; 73 L. J. Ch. 537; 90 L. T. 703.

(3) (1916) 2 Ch. 459; 85 L. J. Ch. 689; 115 L. T. 168; 60 S. J. 654.

(4) (1919) 1 K. B. 223; 88 L. J. K. B. 410; 120 L. T. 194; 63 S. J. 115; 35 T. L. R. 105.

(5) 26 C. 516; 3 C. W. N. 409; 13 Ind. Dec. (N. S.) 932.

chased by the landlord. In the year 1901 the plaintiff took settlement of the western plot which abutted on a road, and in the year 1906 the defendants took settlement of the eastern plot. It is with regard to this eastern plot that the defendants now contend that they are entitled to have access to the road across the western plot settled with the plaintiff. Mr. Justice Huda has held that the defendants cannot rely on any rights their grantors might have possessed before the execution sale, which extinguished their title, nor can they claim a right of way against the plaintiff under section 26 of the Indian Limitation Act, because they obtained the settlement within a period of less than 20 years from the date of the institution of the suit. This view is unquestionably right; the decisions in *Suffield* v. *Brown* (6) and *Crossley* v. *Lightowler* (7) show that where the owner of two tenements or of one tenement divided into two parts transfers one part, he puts an end by contract to the relation which he had himself created between the land sold and the land retained. He discharges the land so sold from any burden imposed upon it during his joint occupation; the condition of such land is thenceforth determined by the contract of alienation, and not by the previous user of the former common owner during his common ownership. The question thus inevitably arises; whether the defendants have an easement of necessity, because, where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will upon severance ripen into an easement, if it be such as to be absolutely necessary for the enjoyment of the part retained and the accommodation be such that it is capable of constituting the subject matter of an easement. According to Mr. Justice Huda, inasmuch as it has been found that after the settlement with the plaintiff, no *khas* land of the landlord remained and that the settlement included the whole land to the west, the landlord could not, when he afterwards settled the eastern plot with the defendants, grant to them expressly or by implication a passage over the land which he had already settled with the plaintiff. This view is assailed by the appellant, and the crucial question is, whether when the landlord settled the western plot with the plaintiff in 1901 there was an implied reservation of an easement of necessity in respect of the eastern plot retained by him. We are of opinion that this question should be answered in the affirmative, provided that it is established that at the time of the grant there was a way of necessity in respect of the eastern plot which was retained by the landlord.

The principle applicable to cases of this character was lucidly explained by Thesiger, L. J., in the case of *Wheeldon* v. *Burrows* (1) in the following terms: "We have had a considerable number of cases cited to us and out of them I think that two propositions may be stated as, what I may call, the general rules governing cases of this kind. The first of these rules is that on the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or in other words, all those easements which are necessary to the reasonable enjoyment of the property granted....The second proposition is that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well-established by authority as it is consonant to reason and common sense—*viz.*, that a grantor shall not derogate from his grant." The distinction thus pointed out between easements which may be claimed by the grantee and easements which are reserved by the grantor has not always been

(6) (1863) 4 De G. J. & S. 185; 33 L. J. Ch. 249; 9 N. R. 340; 10 Jur. (N. S.) 111; 9 L. T. 627; 12 W. R. 356; 46 E. R. 888; 146 R. R. 267.

(7) (1867) 2 Ch. 478; 36 L. J. Ch. 584; 16 L. T. 438; 15 W. R. 801.

recognized. In *Fyer* v. *Carter* (8) implied grants and implied reservations of apparent easements were put on the same footing, but this was disapproved of in *Suffield* v. *Brown* (6) and *Wheeldon* v. *Burrows* (1) and it was held that if a grantor of part of his estate wishes to reserve an easement over it for himself he should do so in express terms, as such reservation cannot be implied, being in derogation of his grant. The same view was maintained in the case of *Taws* v. *Knowles* (9), in which the owner of a house and garden built a second house in the garden and walled off a strip of the garden by the second house to serve as a special way from the old house to a back street and used it continually: yet, because on separation of the two houses, when the strip with the path went with the new house, no express reservation was made of the right of way from the old house, the right was disallowed. In *Thomas* v. *Owen* (10), however, a reservation of a right of way was allowed to be implied without any words of reservation in the grant, as the condition and direction of the road as well as the long user of it for the sole benefit of the part of the estate reserved was considered proof positive that the grantor of the servient tenement must have intended to reserve the right of way. Thus the old rule that upon severance of an estate and in the absence of any express grant, those *quasi* easements which the owner of the entirety has been accustomed to use for the beneficial enjoyment of the part sold over the part retained, if of an apparent and continuous character, will be given to the grantee by implied grant, but that similar easements will not be reserved for the benefit of the part retained by implied reservation, must be deemed to have been shaken, if not "almost swept away." But, whatever divergence of opinion there may be upon the general doctrine of the creation of easements by implication of law and the applicability of the principles that a man shall not derogate from his grant and a grant shall always be construed most strictly against the grantor, there is weighty authority for the view that where an owner grants part of his land and retains other parts himself, although the grantee may be in a more favourable position than the grantor in so far as the grantee may claim all easements necessary for reasonable enjoyment of the part so granted, the grantor may claim that all "easements of necessity," without which no enjoyment at all would be possible, should be raised by implication in favour of the part retained: *Richards* v. *Rose* (11), *Union Lighterage Co.* v. *London Graving Dock Co.* (12), *Ray* v. *Hazeldine* (2), *Gordon* v. *Ogilvie* (13), *Schwann* v. *Cotton* (3), *Derry* v. *Sanders* (4). This is also the result of the provisions of the Indian Easements Act. Section 13, clause (*a*), provides that where one person transfers immoveable property to another, if an easement in other immoveable property of the transferor is necessary for enjoying the subject of the transfer, the transferee shall be entitled to such easement. Illustration (*b*) is to the following effect: "*A*, the owner of two fields, sells one to *B*, and retains the other. The field retained was, at the date of the sale, used for agricultural purposes only, and is inaccessible except by passing over the field sold to *B*. *A* is entitled to a right of way, for agricultural purposes only, over *B's* field to the field retained." The Indian Easements Act no doubt is not applicable to the case before us; but, as was pointed out by Mr. Justice Banerjee in *Kadambini Debi* v. *Kali Kumar Haldar* (5), since there is no enactment of the Legislature applicable to a case like this, the question raised will have to be answered with reference to the principles of justice, equity and good conscience; and the Courts in this country have considered the rule of English Law known as the doctrine of implied grant of easements upon severance of tenement, as in accordance with justice, equity and good conscience. The conclusion follows that the

(8) (1857) 1 H. & N. 916; 26 L. J. Ex. 258; 5 W. R. 371; 156 E. R. 1472; 28 L. T. (o. s.) 371; 103 R. R. 896.

(9) (1891) 2 Q. B. 564; 60 L. J. Q. B. 641; 65 L. T. 124; 39 W. R. 675; 56 J. P. 68.

(10) (1888) 20 Q. B. D. 225; 57 L. J. Q. B. 198; 58 L. T. 162; 36 W. R. 440; 52 J. P. 516.

(11) (1853) 9 Ex. 218 at p. 221; 2 C. L. R. 311; 23 L. J. Ex. 3; 17 Jur. 1036; 96 R. R. 675; 156 E. R. 93.

(12) (1902) 2 Ch. 557 at p. 573; 71 L. J. Ch. 791; 87 L. T. 381; 18 T. L. R. 754.

(13) (1899) 15 T. L. R. 239.

view taken by Mr. Justice Huda cannot be supported.

The appeal must consequently be allowed, the judgment and decree of Mr. Justice Huda set aside and the case remitted to the Subordinate Judge for consideration of the question raised in the eighth issue which was framed in the following terms: whether the defendants have a right of way as claimed by them over the land as shown in the sketch annexed to the written statement. The Subordinate Judge will first consider whether the defendants have an easement of necessity. If the question is answered in the affirmative, the Subordinate Judge will next consider the location of the way. As the decree of the Subordinate Judge upon the question of title has not been assailed and must stand confirmed, there will be no order as to the costs of this appeal.

B. N.

Appeal allowed;
Case remitted.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 1282 OF 1919.

March 30, 1921.

Present:—Mr. Kemp, A. J. C.

FIRM OF MANGHOOMAL JETHANAND —PLAINTIFFS

versus

FIRM OF MESSRS. ARATMAL SATRAMDAS —DEFENDANTS.

Limitation Act (IX of 1908), s. 22 (2)—Firm—Joinder of parties—One partner retiring, another joining, effect of—Suit by new firm on contract made by old firm—Substitution of partners of old firm for partners of new firm after limitatian.

In a suit by a firm all the partners must be joined, because the cause of action vests in them jointly. [p. 27, col. 1.]

Guruvayya Gouda v. *Dattatraya Anant*, 28 B. 11; 5 Bom. L. R. 618, referred to.

If a partner of a firm retires after the firm has entered into a contract and a new partner joins the firm, the newly constituted firm is different from the old firm and cannot institute a suit on the contract entered into by the latter. If such a newly constituted firm brings a suit on a contract entered into by the old firm, it cannot, after the expiration of the period of limitation for a suit on the contract, substitute the names of the partners of the old firm under section 22 (2). [p. 27, cols. 1 & 2.]

Mr. *Sri Krishnadas H. Lulla*, for the Plaintiffs.

Mr. *Tolasing Khushalsingh*, for the Defendants.

JUDGMENT.—A preliminary issue as to limitation is raised. The contract relates to two delivery orders Nos. 374 and 375 for $2\frac{1}{2}$ tons each of the Brown Java sugar, which were issued by David Sassoon & Co. and passed down a chain of the buyers. The defendants handed the delivery orders to the plaintiffs, and plaintiffs now seek to recover the advance made against the price and damages and other charges.

The point of limitation arises in the following way:—

The contract between Manghoomal Jethanand and defendants was made in April 1916. On that date one Sugnomal Taramal was a partner in the firm of Manghoomal Jethanand. Sugnomal retired from the firm before the suit was filed. The suit was filed on 3rd November 1919 in the name of Manghoomal Jethanand by one Premchand Nihaldas, who had joined the firm in July 1916, *i e*, after the contract, and who was described in the plaint as the managing partner of the firm. Premchand filed the suit with the permission of the Sheth of the firm. Clearly, therefore, the suit was filed by the firm of Manghoomal Jethanand, consisting of the firm of which Premchand was a partner. That was, the defendants say, a different firm to the firm of which Sugnomal was a partner and which had made the contract. Plaintiffs filed an amended plaint on 23rd December 1920 describing themselves as "Manghoomal Jethanand carrying on their business by their managing partner Newandran Manghoomal." At the time when this amendment was made, the suit on the contract had become time barred. But plaintiffs say the old firm can be substituted for the new firm as plaintiffs and that this is merely a case of substituting the principal for the agent and, the suit having been brought in the name of the firm, of correctly placing the names of the partners on the record. Plaintiffs say limitation does not apply in such a case.

Now, clearly, the suit as originally filed is by the firm existing at the date of the suit, which was not the firm which made the contract. The amendment put on the record the firm which made the contract. It is not suggested that the new firm took over

by arrangement all the laibilities and outstandings of the plaintiff's firm. The suit is filed in both cases in the name of the firm, but in the original plaint that firm, consisted of different partners to the partners in the firm of the same name existing when the suit was filed. The procedure which allows a suit to be brought in the name of a firm is merely a convenient way of allowing all the partners in that firm to sue. A firm is not a legal entity, but the use of a firm's name does not permit the general rule to be infringed that you cannot, except in certain cases, permit plaintiffs having a cause of action to be substituted so as to avoid the bar of limitation for plaintiffs who have no cause of action, *Subbaraya Iyer* v. *Vaithinatha Iyer* (1); nor add after the period of limitation a party to give a cause of action where the parties already on the record had none without him. The provisions of the new Code of Civil Procedure do not abrogate this rule. In a suit by a firm all the partners must be joined, because the cause of action vests in them jointly, *Guruvayya Gouda* v. *Dattatraya Anant* (2), nor does the authority of the Sheth of the old firm to file the suit assist the plaintiffs' argument because that authority was to file the suit *for the firm existing at the date of the suit.* This is clear from the description of Premchand as managing partner, and no evidence was asked to be admitted to show that the authority was on behalf of the old firm.

It is to be noted that the cases where a plaintiff has been allowed to be substituted or added after the period of limitation are all cases where either an agent has filed a suit in his own name when it ought to have been filed in the principal's name, or an estate is the real plaintiff and the wrong persons to represent it are on the record as original plaintiffs, or a plaintiff has been added to enable a complete adjudication to be made or to fully protect the interests of the defendants. *Ganpat Pandurang* v *Adarji Dadabhai* (3), *Subodini Debi* v. *Oumar Ganoda Kant Roy* (4), and *Ravji Appaji Kulkarni* v. *Mahadev Bapuji Kulkarni* (5) are instances of the first named class; *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee* (6) is an instance of the second; and *Vadilal Lallubhai* v. *Shah Bhushal Dalpatram* (7) is an instance of the third.

The present case cannot be brought within any of these classes. Nor has it been shown—if indeed that could affect the decision—that Sugnomal has ever given his permission to the new firm filing the suit as agents for the old firm in which he was a partner. As I have said, the new firm purport to file the suit in their own right.

Nor have the plaintiffs any claim to the sympathy of the Court. The contract was made in April 1916 and the cause of of action accrued on 5th November 1916. The defendants received no notice that delivery had not been taken until 28th October 1919 and by that time defendants' vendor had become insolvent. The delivery orders were not presented until 9th November 1916 and it was held in a suit, to which the firm which imported the sugar and issued the delivery orders was a party, that the holder of the delivery orders was in default.

The suit must, therefore, be dismissed under section 22, Limitation Act, with costs.

S. D.

Suit dismissed.

(1) 5 Ind. Cas. 931; 33 M. 115; 7 M. L. T. 185.
(2) 28 B. 11; 5 Bom. L. R. 618.
(3) 3 B. 312; 2 Ind. Dec. (N. S.) 209.
(4) 14 C. 400; 7 Ind. Dec. (N. S.) 265.
(5) 22 B. 672; 11 Ind. Dec. (N. S.) 1030.
(6) 32 C. 582; 9 C. W. N. 421.
(7) 27 B. 157; 4 Bom. L. R. 968.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 2 OF 1920.

August 23, 1920.

Present:—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

ANNADA MOHAN ROY—APPELLANT

versus

GOUR MOHAN MALLIK—RESPONDENT.

*Hindu Law—Reversioner's interest—Alienation—*Spes successionis—*Estoppel—"Feeding the grant by estoppel," principle of, applicability of—Transfer of Property Act (IV of 1882), s. 6 (a).*

ANNADA MOHAN ROY v. GOUR MOHAN MALLIK.

The interest of a Hindu reversioner is an interest expectant on the death of a qualified owner; it is not a vested interest, it is a *spes successionis* or a mere chance of succession; it cannot be sold, mortgaged, assigned or relinquished, for a transfer of a *spes successionis* is a nullity and has no effect in law. But though a transfer of his interest by a reversioner is void, he may, by becoming a party to a compromise and by taking the benefit of the compromise, be estopped from claiming as a reversioner. [p. 30, col. 2.]

Kanhai Lal v. *Brij Lal*, 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 23 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.), *Khunni Lal* v. *Gobind Krishna Narain*, 10 Ind. Cas. 477; 33 A. 356; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645 (P. C.), *Hiran Bibi* v. *Sohan Bibi*, 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C.) and *Upendra Nath Bose* v. *Bindeshri Prosad*, 32 Ind. Cas. 468; 20 C. W. N. 210, 22 C. L. J. 452, followed.

So long as the estate is vested in the female heiress, the interest of the reversioner is a mere chance of succession which cannot form the subject of any contract, surrender or disposal. [p. 31, col. 1.]

Nand Kishore Lal v. *Kanee Ram*, 29 C. 355; 6 C. W. N. 395, *Ram Chandar* v. *Kallu*, 30 A. 497; 5 A. L. J. 631; A. W. N. (1908) 225, *Jagannath* v. *Dibbo*, 1 Ind. Cas. 818; 31 A. 53; 6 A. L. J. 49, *Bhana* v. *Guman Singh*, 44 Ind. Cas. 629; 40 A. 384; 16 A. L. J. 191, *Manickam Pillai* v. *Ramalinga Pillai*, 29 M. 120, *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu*, 30 M. 486; 2 M. L. T. 443; 17 M. L. J. 505, *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya*, 30 M. 201; 2 M. L. T. 184, *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar*, 3 Ind. Cas. 476; 32 M. 206; 5 M. L. T. 122; 19 M. L. J. 88, *Narasimham* v. *Madhavarayudu*, 13 M. L. J. 323 and *Subbaraya Goundan* v. *Muthayammal*, 49 Ind. Cas. 260; 35 M. L. J. 684, followed.

The principle of law referred to as "feeding the grant by estoppel," *viz.*, if a man who has no title whatever to property, grants it by conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes, has no application where the contract of assignment refers to property which has been expressly rendered inalienable by the Legislature. [p. 32, col. 2; p. 33, col. 1.]

Tilakdhari Lal v. *Khedan Lal*, 57 Ind. Cas. 465; 48 C. 1; 32 C. L. J. 479; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319, 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239 (P. C.), *Bhairab Chandra* v. *Jiban Krishna*, 60 Ind. Cas. 819; 33 C. L. J. 184, *Dooli Chand* v. *Brij Bhookun Lal Awasti*, 6 C. L. R. 528, followed.

An instrument which purports to be a transfer of a chance or possibility, mentioned in section 6 (*a*) of the Transfer of Property Act, has no operation. [p. 34, col. 1]

Holroyd v. *Marshall*, (1861) 10 H. L. C. 191; 33 L. J. Ch. 193; 9 Jur. (N. S.) 213; 7 L. T. 172; 11 W. R. 171; 11 E. R. 999; 138 R. R. 108 and *Tailby* v. *Official Receiver*, (1888) 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 62; 37 W. R. 513, followed.

No one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir-at-law or next-of-kin of such living person; during the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his properties; *nemo est hæres viventis*; there is no such character in law as the heir of a living person or as his statutory next-of-kin. [p. 35, col. 2.]

Dursley (Lord) v. *Fitzhardinge Berkeley*, (1801) 6 Ves. 251 at pp. 259, 261; 31 E. R. 1036; 5 R. R. 285, *Hinde* v. *Blake*, (1840) 3 Beav. 234; 49 E. R. 91, *Meek* v. *Kettlewell*, (1842) 1 Hare 464; 11 L. J. Ch. 293; 58 R. R. 137; 66 E. R. 1114, *Davis* v. *Angel*, (1862) 4 D. F. & J. 524 at p. 529; 8 Jur. (N. S.) 1024; 6 L. T. (N. S.) 880; 10 W. R. 722; 135 R. R. 275; 45 E. R. 1287; *Ellenborough, In re, Towry-Law* v. *Burne*, (1903) 1 Ch. 697; 72 L. J. Ch. 218; 87 L. T. 714; 51 W. R. 315, *Simpson, In re, Simpson* v. *Simpson*, (1904) 1 Ch. 1; 73 L. J. Ch. 53; 89 L. T. 642; 52 W. R. 310, *Green, In re, Green* v. *Meinall*, (1911) 2 Ch. 275; 80 L. J. Ch. 623; 105 L. T. 360; 55 S. J. 552; 27 T. L. R. 490, *Mudge, In re*, (1914) 1 Ch. 115; 83 L. J. Ch. 243; 109 L. T. 781; 58 S. J. 117, followed

Under the principles of Hindu Law, even apart from the provisions of section 6 of the Transfer of Property Act, the interest of a reversioner is not alienable. [p. 36, col. 2.]

Appeal against a decree of Mr. Justice Greaves, dated the 20th August 1919.

Mr. *H. D. Bose* (with him Messrs. *R. K. Chatterjee, M. N. Basu, B. K. Chaudhuri, B. C. Dutta* and *D. N. Sen*), for the Appellant.

Sir *Binod Mitter* (with him Mr. *S. M. Bose*), for the Respondent.

JUDGMENT.

MOOKERJEE, A. C. J.—This is an appeal by the plaintiff from the judgment of Mr. Justice Greaves in a suit for specific performance of a contract of sale executed by the defendant on the 7th May 1908 and confirmed on the 27th November 1909. The subject-matter of the agreement is a share of the estate left by one Gopal Lal Seal, the maternal uncle of the defendant. Gopal Lal Seal died intestate on the 25th May 1902, leaving him surviving two widows Kumudini and Nayan Manjari and five nephews (sons of sisters) Jogendra, Kanta Mohan, Giri Mohan, Gour Mohan and Panchanan. After the death of Gopal Lal Seal, a Will was set up which this Court pronounced to be a forgery on the 3rd August 1902; this decision was upheld on appeal by the Judicial Committee on the 16th March 1909. The position consequently was that the estate left by Gopal Lal

Seal vested in his two widows with right of survivorship *inter se*. On the death of both of them, the estate would pass to such of the nephews as might be alive when the succession would open out to them. During the pendency of the litigations mentioned, the defendant Gour Mohan, one of the nephews of Gopal Lal Seal, entered into an agreement with the plaintiff on the 7th May 1908, which has led up to the present litigation. By this instrument the defendant agreed to convey to the plaintiff, for consideration mentioned, his interest in the estate of his maternal uncle, if such interest was ultimately established on the basis of the Will then in controversy, or, failing the Will, on the basis of his position as a reversionary heir. It is to be observed that the extent of the share and the time of its accrual would be materially different in the two events contemplated. If the Will was established, the defendant would take one-sixteenth of the estate with effect from the date of the death of the testator; if the Will failed, the defendant would take a share the extent whereof would be ascertained, only upon the death of both the widows; if the defendant died before that date, nothing would vest in him; if he survived both of his maternal aunts, his share would be one fifth, two fifths, three-fifths, four-fifths or the whole, according as four, three, two, one or none of his cousins survived him; such was in essence the nature of the agreement now under consideration. After the final determination by the Judicial Committee of the question of the genuineness of the alleged Will, the defendant executed a supplementary agreement in favour of the plaintiff on the 28th November 1909. This document recited the failure of the appeal to the Judicial Committee and provided that the defendant would convey his interest in the estate of his maternal uncle, whensoever or howsoever it might vest in him, by the death of his maternal aunts, by relinquishment on their part, or by voluntary transfer by them. After this agreement nothing happened for several years till circumstances were altered by the death of Kumudini on the 21st November 1917. The entire estate thereupon passed into the possession of her co-wife Nayan Manjari, who had, however, been meanwhile declared a lunatic. Thereupon, on the 28th November 1917, the defendant Gour Mohan and his brother Giri Mohan instituted a suit against her for declaration that in the events which had happened, the nephews of Gopal Lal Seal had become entitled to be placed in immediate possession of the estate with all additions and accretions thereto. The suit was compromised on the 28th March 1918, whereby the nephews of Gopal Lal Seal took the moiety share held by Kumudini, while Nayan Manjari took the other moiety. The result, consequently, was that the defendant obtained one-fifth of a half share of the estate of Gopal Lal Seal by virtue of this consent decree. The plaintiff thereupon instituted the present suit on the 25th November 1918, for enforcement of the agreement for sale made by the defendant on the 7th May 1908, and confirmed on the 28th November 1909. The defendant resisted the claim for specific performance of the contract on the ground, amongst others, that it was void, illegal and unenforceable as the subject matter was an expectancy. Mr. Justice Greaves has given effect to this objection and has dismissed the suit with costs. The plaintiff has appealed against this decree of dismissal and has contended that the agreement in suit should have been specifically enforced.

The true position of a Hindu reversioner with reference to the estate of the last full owner, so long as it is vested in a female heiress who takes a qualified interest therein, has formed the subject of consideration by the Judicial Committee on more than one occasion during the last quarter of a century. In *Sham Sundar* v. *Achhan Kunwar* (1), Lord Davey stated that such a reversioner could not by Hindu Law make a disposition of or "bind his expectant interest" or his "future rights." This pronouncement was treated by Maclean, C. J., and Banerjee, J., in *Nand Kishore Lal* v. *Kanee Ram* (2), as an authority for the proposition that the

(1) 21 A. 71; 2 C. W. N. 729; 25 I. A. 183; 7 Sar P. C. J. 417; 9 Ind. Dec. (N. s.) 755 (P. C.).
(2) 29 C. 355; 6 C. W. N. 395.

interest of a Hindu reversioner expectant upon the death of a Hindu female could not be validly mortgaged by the reversioner, and that consequently the contrary opinion expressed in *Brahmadeo Narayan* v. *Harjan Singh* (3) must be treated as overruled. The same view was re-iterated by Lord Davey in *Bahadur Singh* v. *Mohar Singh* (4). Again, in *Venkatanarayana Pillay* v. *Subbammal* (5), Mr. Ameer Ali observed that under the Hindu Law, though the death of the female owner opens the inheritance to the reversioners and the one most nearly related at the time to the last full owner becomes entitled to possession, in her lifetime the reversionary right is a mere possibility or *spes successionis*. In *Janaki Ammal* v. *Narayansami Aiyar* (6) Lord Shaw described the nature of the widow's estate and the situation of the reversionary heirs. Her right is of the nature of a right of property; her position is that of owner: her powers in that character are, however, limited; but so long as she is alive, no one has any vested interest in the succession. The law as to the situation of the reversionary heirs is also in substance quite clear. There is no vesting as at the date of the husband's death and the questions of who is the nearest reversionary heir or what is the class of reversionary heirs, fall to be settled at the date of the expiry of the ownership for life or lives. But "a reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis* is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life," in other words, to appeal to the Court in a representative capacity, truly for the conservation and just administration of the property, so that the corpus of the estate may pass unimpaired to those entitled to the reversion. On this principle it has been maintained that although a reversioner under the Hindu Law has no present alienable interest in the property left by the deceased, he is substantially interested in the protection or devolution of the estate and as such is entitled to appear and be heard in a Probate proceeding: *Brindaban Chandra* v. *Sureshwar Saha* (7). Similarly, in *Amrit Narayan Singh* v *Gaya Singh* (8), Mr. Ameer Ali observed that a Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life; until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs; his right becomes concrete only on her demise: until then, it is mere *spes successionis*. We must accordingly take it as settled by the decisions of the Judicial Committee that the interest of a Hindu reversioner is an interest expectant on the death of a qualified owner; it is not a vested interest, it is a *spes successionis* or a mere chance of succession; it cannot be sold, mortgaged, assigned or relinquished, for a transfer of a *spes successionis* is a nullity and has no effect in law. But though a transfer of his interest by a reversioner is void, he may, by becoming a party to a compromise and by taking the benefit of the compromise, be estopped from claiming as a reversioner: *Kanhai Lal* v. *Brij Lal* (9), *Khunni Lal* v. *Gobind Krishna Narain* (10), *Hiran Bibi* v. *Sohan Bibi* (11), *Upendra Nath*

(3) 25 C. 778; 13 Ind. Dec. (N. s.) 507.
(4) 24 A. 94; 6 C. W. N. 169; 29 I. A. 1; 4 Bom. L. R. 233; 12 M. L. J. 56; 8 Sar. P. C. J. 152 (P. C.).
(5) 29 Ind. Cas. 298; 38 M. 406; 42 I. A. 125; 2 L. W. 596; (1915) M. W. N. 555; 19 C. W. N. 641; 28 M. L. J. 535; 17 M. L. T. 435; 21 C. L. J. 515; 17 Bom. L. R. 468 (P. C.).
(6) 37 Ind. Cas. 161; 39 M. 634; 20 M. L. T. 168; 31 M. L. J. 225; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530; 43 I. A. 207 (P. C.).
(7) 3 Ind. Cas. 178; 10 C. L. J. 263.
(8) 44 Ind. Cas. 408; 45 C. 590; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 45 I. A. 35 (P. C.).
(9) 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.).
(10) 10 Ind. Cas. 477; 33 A. 356; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645 (P. C.).
(11) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C.).

Bose v. *Bindeshri Prosad* (12). We are not concerned here, however, with the question of the legal effect of a compromise in the nature of a family settlement, entered into by a Hindu widow or other limited heir with the presumptive reversioner, and its operative character either against the presumptive reversioner who is a party to the transaction or against the person who, by the development of events, becomes the actual reversioner. There can, in our opinion, be no doubt that according to the decisions of the Judicial Committee, so long as the estate is vested in the female heiress, the interest of the reversioner is a mere chance of succession which cannot form the subject of any contract, surrender or disposal This view is now generally accepted in nearly all the Indian High Courts: *Nand Kishore Lal* v. *Kanee Ram* (2), *Ram Chandar* v. *Kallu* (13), *Jagannath* v. *Dibbo* (14), *Bhana* v. *Guman Singh* (15), *Manickam Pillai* v. *Ramalinga Pillai* (16), *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu* (17), *Dhoorjeti Subbayya* v. *Dhooreti Venkayya* (18), *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* (19), *Narasimham* v. *Madhavarayudu* (20), *Subbaraya Goundan* v. *Muthayammal* (21). In some of these cases, for instance, in *Nand Kishore Lal* v. *Kanee Lal* (2), *Narasimham* v. *Madhavarayudu* (20), *Manickam Pillai* v. *Ramalinga Pillai* (16), *Ramasami* v. *Ramasami* (22), *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu* (17), reference is expressly made to the provisions of section 6 of the Transfer of Property Act, which lays down that "the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred." No useful purpose is, therefore, likely to be served by an analysis of judicial decisions which were pronounced before section 6 of the Transfer of Property Act was enacted or before the Judicial Committee made a pronouncement on the subject in *Sham Sundar* v. *Achhan Kunwar* (1). But it may be pointed out that the trend of judicial opinion in this Court was undoubtedly not in favour of the contention that the interest of a Hindu reversioner could form the subject of actual alienation, voluntary or involuntary, or of valid agreement for transfer. We are not unmindful that in one of the earliest cases in this Court, *Rychurn Kaul* v. *Peary Monee Dassee* (23), Raikes and Sumbhoonath Pundit, JJ., held that there was nothing so peculiar in the position of a Hindu reversioner that he should be excluded from disposing of his contingent interest if he pleased, and that consequently the assignee of the reversionary contingent interest was entitled to restrain the widow from committing waste. The contrary rule, however, was enunciated, in the case of involuntary sales, by Campbell and Macpherson, JJ., in *Koraj Koonwar* v. *Konul Koonwar* (24), which was followed by Norman, J., on the Original Side of this Court in *Bhoobun Mohun Banerjee* v. *Thakoor Doss Biswas* (25). The same view had been taken in *Pranputtee Kooer* v. *Lalla Futteh Bahadur Singh* (26), which, however, was not followed in *Gour Huree Dutt* v. *Radha Gobind Shaha* (27). The result of this conflict of opinion was that the question was referred by Phear and Dwarkanath Mitter, JJ., to a Full Bench in *Ram Chunder Tantra Doss* v. *Dhurmo Narain* (28). The Full Bench ruled that the interest of a reversionary heir, according to Hindu Law, expectant on the death of a widow in possession, is not property; it is a mere expectancy and is not rendered liable to attachment and sale in execution of a decree as the "right, title and interest of a judgment debtor." But Phear, J., in the

(12) 32 Ind. Cas. 468; 20 C. W. N. 210; 22 C. L. J. 452.
(13) 30 A. 497; 5 A. L. J. 631; A. W. N. (1908) 225.
(14) 1 Ind. Cas. 818; 31 A. 53; 6 A. L. J. 49.
(15) 44 Ind. Cas. 629; 40 A. 384; 16 A. L. J 191.
(16) 29 M. 120.
(17) 30 M. 486; 2 M. L. T. 443; 17 M. L. J. 505.
(18) 30 M. 201; 2 M. L. T. 184.
(19) 3 Ind. Cas. 476; 32 M. 206; 5 M. L. T. 122; 19 M. L. J. 88.
(20) 18 M. L. J. 323.
(21) 49 Ind. Cas. 260; 35 M. L. J. 684.
(22) 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201.
(23) Marsh 622.
(24) 6 W. R. 34.
(25) 2 Ind. Jur. (N. S.) 277; 15 W. R. (F. B.) 18 *note*.
(26) 2 Hay 608.
(27) 7 B. L. R. 343 *note*; 12 W. R. 54.
(28) 7 B. L. R. 341 (F. B.); 15 W. R. (F. B.) 17

course of the observations he made in the Order of Reference, appears to have thought that although the interest was nothing more than an expectation, if the so-called heir voluntarily sold his reversionary right, on his succeeding to the property, if he did so, a Court of Equity might compel him to fulfil his contract. The Full Bench, however, did not commit itself to this proposition, which cannot now be maintained in view of the circumstance that the Legislature has, by section 6 of the Transfer of Property Act, made inalienable a mere possibility of succession to an estate.

The Transfer of Property Act does not define the term "property," but let it be assumed that the mere possibility of succeeding to an estate might have been regarded as property within the meaning of the provision, in section 6, that "property of any kind may be transferred" and that consequently the Legislature thought it necessary to make inalienable, by express enactment, "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature," that is, possibility of a nature akin to the two chances expressly mentioned. There can, in our opinion, be no doubt that the possibility of a Hindu reversioner succeeding to the estate of the last full owner, on the termination of the estate of the intermediate female heiress or heiresses, falls within clause (*a*) of section 6. There is no escape from this position, and, indeed, it is on this basis that the argument has been advanced that we should apply to the present case the principles of equity which may be invoked by a transferee of non-existent future property. Reliance has, in this connection, been placed upon the decisions in *Holroyd* v. *Marshall* (29) and *Tailby* v. *Official Receiver* (30). Reference has also been made to the principle in *Walsh* v. *Lonsdale* (31) and to the doctrine of estoppel embodied in section 43 of the Transfer of Property Act. We are of opinion that none of the principles which have been invoked by the appellant can be of any possible assistance to him. The principle in *Walsh* v. *Lonsdale* (31) has been applied in a long series of decisions in this Court, which will be found reviewed in *Sym Kishore De* v. *Umesh Chandra* (32) to reach the result that when in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed, provided specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. The result attained in this class of cases was reached by the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* (33) by the application of the doctrine of part performance enunciated in *Maddison* v. *Alderson* (34). But, plainly neither of these principles can assist the appellant, as they are ultimately based on the maxim that "equity regards that as done which should have been done." There is manifestly a fundamental difference between non-compliance with the formal requisites prescribed for a transaction whereby alienable property is transferred, and an attempt to accomplish a transfer of property which has been rendered inalienable by a statutory provision. The appellant is in a position of similar difficulty when he invokes the aid of the principle of law which is sometimes referred to as feeding the grant by estoppel. That doctrine, as recently stated by Lord Buckmaster in *Tilakdhari Lal* v. *Khedan Lal* (35), is that "if a

(29) (1861) 10 H. L. C. 191; 33 L. J. Ch. 193; 9 Jur. (N. S.) 213; 7 L. T. 172; 11 W. R. 171; 11 E. R. 999; 138 R. R. 108.

(30) (1888) 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513.

(31) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 855; 31 W. R. 109.

(32) 55 Ind. Cas. 154; 31 C. L. J. 75; 24 C. W. N. 463.

(33) 28 Ind. Cas. 930; 42 C. 801; 19 C. W. N. 250; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

(34) (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(35) 57 Ind. Cas. 465; 48 C. 1; 32 C. L. J. 479; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 13 L. W. 161; 2 P. L. T. 101 (P. C.).

man who has no title whatever to property, grants it by conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes; in such a case, there is nothing on which the second grant could operate in prejudice to the first." This principle has sometimes been applied in our Courts [see, for instance, *Bhairab Chandra* v. *Jiban Krishna* (35)] to reach the result that though the assignment was of a defective title, yet as the assignor afterwards acquired a good title, the Court would make that good title available to make the assignment effectual. But this principle plainly has no application where the contract of assignment refers to property which has been expressly rendered inalienable by the Legislature. This view is supported by the decision in *Dooli Chand* v. *Brij Bhookun Lal Awasti* (37), where the Judicial Committee, in a case decided before the Transfer of Property Act, declined to affirm the proposition that the interest of a Hindu reversioner could be made the subject of a sale, or, that in the event of an attempted sale, the conveyance could attract the operation of the principle of English Law which allows a subsequently acquired interest to feed the estoppel. The appellant is met by the same difficulty, when he invokes the aid of the principle which underlies the decisions in *Holroyd* v. *Marshall* (29) and *Tailby* v. *Official Receiver* (30), which have sometimes been applied by the Courts of this country on grounds which will be found investigated in *Khobhari Singh* v. *Ram Prosad* (38). Here also the appellant seeks the benefit of the principle that equity considers that done which ought to be done. The question whether the effect of section 6, clause (*a*), of the Transfer of Property Act is not merely to except, specially, the chance of an heir apparent from the category of transferable property, but also to make the principle that "equity considers that done which ought to be done" entirely inapplicable to attempted transfers in the cases mentioned, was raised but left undecided in the case of *Rebati Mohan Das* v. *Ahmed Khan* (39), where the proposition was affirmed, on the authority of the decision in *Sumsuddin Goolam Husein* v. *Abdul Husein Kalimuddin* (40), that a Mahammadan cannot, any more than a Hindu, bind his chance as an heir-apparent. In the case last mentioned, however, Jenkins, C. J., held that it was not intended by section 6, clause (*a*), to establish and perpetuate the distinction between what, according to the phraseology of English lawyers, is assignable in law and what is assignable in equity. We are of opinion that this conclusion is well-founded on principle. Jenkins, C. J., referred to the observation of Lord Hardwicke in *Chauncy* v. *Graydon* (41) that "though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable and transmissible to the representative of the devisee," and to the observation of Lord Eldon in *Carleton* v. *Leighton* (42) "that the expectancy of an heir presumptive or apparent (the fee-simple being in the ancestor) was not an interest, or a possibility, nor was capable of being made the subject of assignment or contract." It is not improbable, if speculation is permissible, that the Indian Legislature intended, by the provision in section 6, clause (*a*), to settle the question, whether "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature," should be governed by the general principle enunciated by Lord Hardwicke or should be subject to the special rule indicated by Lord Eldon. Section 6 makes property of any kind transferable, subject, however, to exceptions set out in the Act or provided by any other law for the time being in force. The exceptions included in clause (*a*) cannot be supposed to have been selected, merely by reason of the future character of the chances; if that had been the determining factor, all future property might as well have been declared inalienable. The truth is that an attempted conveyance of non-existent property, though it cannot operate as an immediate alienation, may, when made for consideration, be valid as a contract and when the object to which it refers

(36) 60 Ind. Cas. 819; 33 C. L. J. 184.
(37) 6 C. L. R. 528.
(38) 7 C. L. J. 387 at p. 393.
(39) 1 Ind. Cas. 590; 9 C. L. J. 50.
(40) 31 B. 165; 8 Bom. L. R. 781.
(41) (1748) 2 Atk. 616 at p. 621; 26 E. R. 768.
(42) (1805) 3 Mer. 667 at p. 671; 36 E. R. 255.

comes into existence, equity, taking as done that which ought to be done, fastens upon the property, and the contract to assign thus becomes a complete assignment. This was precisely the point of view of the Judicial Committee in *Rajah Sahib Perhlad Sein* v. *Maharajah Rajender Kishore Sing* (43), where Sir James Colvile observed: "But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro* and upon the happening of a contingency, of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do." The principle which is thus seen to underlie the rule in *Holroyd* v. *Marshall* (29) and *Tailby* v. *Official Receiver* (30) makes it abundantly clear that an instrument which purports to be a transfer of a chance or possibility, mentioned in section 6, clause (*a*), can, as such, have no operation. Thus, where an instrument of mortgage was executed in the lifetime of a Zemindar by a member of his family who at the time was next in succession, it was ruled in *Ramasami* v. *Ramasami* (22) that a mortgage suit could not be instituted against him after his succession to the Zemindari. To the same effect is the decision in *Nand Kishore Lal* v. *Kanee Ram* (2) that where during the lifetime of a Hindu widow a mortgage was executed by the reversionary heir, and subsequently after her death, another mortgage was executed by the same person, the holder of the first mortgage could not enforce it against the property in the hands of the second mortgagee. Further illustrations of the application of this principle may be found in *Laliteshwar Singh* v. *Rameshwar Singh* (44), *Hargawan Mogan* v. *Baij Nath Das* (45), *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu* (17), *Dhoorjeti Subbayyar* v. *Dhoorjeti Venkayya* (18), *Abdool Hoosein* v. *Goolam Hoosein* (46). The contrary view implied in *Gitabai* v. *Balaji Keshav* (47), where the point does not appear to have been argued, cannot be supported. The decision in *Ram Nirunjun Singh* v. *Prayag Singh* (48), which was mentioned with approval in *Nasirul Haq* v. *Fyaz-ul-Rahman* (49), is distinguishable. In that case a clause in a compromise deed was held to be not a conveyance of an expectant right, but an agreement between expectants to divide a particular property in a certain way on the happening of a particular contingency. The circumstances of the case, which was decided before the Transfer of Property Act, were held to attract the operation of the principle of equity that a fair agreement between expectants or their heirs to divide the property which might be left between them or to any one of them was not contrary to public policy and would be enforced in equity. That case may consequently be deemed to belong, not to the class now before us, but rather to the type of which the decisions of the Judicial Committee in *Kanhai Lal* v. *Brij Lal* (9), *Khunni Lal* v. *Gobind Krishna Narain* (10) and *Hiran Bibi* v. *Sohan Bibi* (11) furnish examples. It is thus abundantly clear that whatever be the path selected by the appellant for escape, he is enmeshed in the same difficulty, for he has always to invoke the aid of principles of equity to enable him to defeat the application of a statutory provision, framed by the Legislature on grounds of public policy, with a view to render inalienable certain categories of property. No Court of Equity will assist him in his endavour to accomplish this purpose.

In the view we take, it is not necessary to examine the phraseology of a definition of the term "property" based in a large measure on the analysis given in Fearne on Contingent Remainders, Vol. II, p. 16, with ingenious modifications by Mr. Bose, who argued this appeal on behalf of the appellant with much learning and industry, though he obviously found himself unable to breast the tide of authority.

"'Property' includes any estate or interest in the goods, chattels or real or personal

(43) 12 M. I. A. 292 at p. 307; 2 Suth. P. C. J. 225 at p. 239; 2 Sar. P. C. J. 430; 20 E. R. 349.
(44) 2 Ind. Cas. 290; 36 C. 481; 13 C. W. N. 838; 6 M. L. T. 11.
(45) 4 Ind. Cas. 144; 32 A. 88; 7 A. L. J. 11.
(46) 30 B. 304; 7 Bom. L. R. 742.
(47) 17 B. 232; 9 Ind. Dec. (N. S.) 152.
(48) 8 C. 138; 10 C. L. R. 66; 4 Ind. Dec. (N. S.) 89.
(49) 9 Ind. Cas. 530; 33 A. 457; 8 A. L. J. 275.

estate of a person of any kind whatsoever, whether *in præsenti* or *in futuro*, and whether in possession or in reversion or in remainder or in expectancy, for which the claimant can ask for and seek relief in a Court of Law, and which right or interest the Court protects or in regard to which Courts grant relief in a suit for possession or recovery or for perpetuation of testimony or waste or appointment of a Receiver or injunction or any other relief."

It is sufficient to say that even if this definition were accepted, the question would still remain, whether the interest of a Hindu reversioner is "property" within its meaning. Let it be assumed, as was done in the case of *Jagannada Raju* v. *Prasada Rao* (50), that a mere chance of succeeding to an estate was a bare possibility incapable of assignment, *Jones* v. *Ros* (51), *Parsons, In re, Stackley* v. *Parsons* (52) and that it was nevertheless held in England that in the case of such expectancies, equity would enforce a contract to convey the estate when it fell in : Fearne on Contingent Remainders, Vol. 1, pp. 549—551, *Wiseman* v *Roper* (53), *Hobson* v. *Trevor* (54), *Wethered* v. *Wethered* (55) and *Lyde* v. *Mynn* (56); notwithstanding the observation of Lord Eldon in *Carleton* v. *Leighton* (42) and *Harwood* v. *Tooke* (57), it does not follow that the same course can be legitimately adopted here, in the face of section 6, clause (*a*) of the Transfer of Property Act. No useful purpose is thus likely to be served if we were to undertake an elaborate examination of the distinctions between possibilities coupled with an interest, such as contingent remainders, executory devises springing or shifting uses, on the one hand, and a bare or naked possibility such as the hope of inheritance entertained by the heir on the other hand. The former class, it has been said, may with propriety be denominated contingent interests, the latter mere expectancies, inasmuch as a possibility coupled with an interest is more than a possibility and is a present devisable interest [*Perry* v. *Phillips* (58)], while the expectancy of an heir-apparent during the lifetime of his ancestor, is less than a possibility, being but a mere hope or anticipation. But it appears to be the indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next-of-kin of such living person; during the life of such person, no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property; *nemo est hæres viventis*: there is no such character in law as the heir of a living person or as his statutory next-of-kin; this doctrine is not peculiar to English Jurisprudence, and as we shall presently see, was recognised by Hindu Jurists of the Bengal School: *Dursley* (*Lord*) v *Fitzhardinge Berkeley* (59), *Hinde* v. *Blake* (60), *Meek* v. *Settlewell* (61), *Davis* v. *Angle* (62), *Ellenborough, In re, Towry Law* v. *Burne* (63), *Simpson, In re, Simpson* v. *Simpson* (64), *Green, In re, Green* v. *Minall* (65), *Mudge, In re* (66).

(50) 29 Ind. Cas. 241; 39 M. 554; 17 M. L. T. 419; 28 M. L. J. 650; (1915) M. W. N. 626.
(51) (1789) 3 T. R. 88 at p. 93; 100 E. R. 470; 1 R. R. 656.
(52) (1890) 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929; 38 W. R. 712.
(53) (1645) 1 Ch. Rep. 158.
(54) (1723) 2 P. Wms. 191; 10 Mod. 307; 34 E. R. 695.
(55) (1828) 2 Sim. 183; 29 R. R. 77; 57 E. R. 757.
(56) (1833) 1 Myl. & K. 683; Coop. T. Brough. 123; 39 R. R. 839; 36 R. R. 415.
(57) (1812) 2 Sim. 192; 29 R. R. 81; 57 E. R. 761.
(58) (1810) 17 Ves. 173 at p. 181; 34 E. R. 67.
(59) (1801) 6 Ves. 251 at pp. 259, 261; 31 E. R. 1036; 5 R. R. 285.
(60) (1840) 3 Beav. 234; 49 E. R. 91.
(61) (1842) 1 Hare 484; 11 L. J. Ch. 293; 58 R. R. 137; 66 E. R. 1114.
(62) (1862) 4 D. F. & J. 524 at p. 529; 8 Jur. (N. S.) 1024; 6 L. T. (N. S.) 880; 10 W. R. 722; 135 R. R. 275; 45 E. R. 1287.
(63) (1903) 1 Ch. 697; 72 L. J. Ch. 218; 87 L. T. 714; 51 W. R. 315.
(64) (1904) 1 Ch. 1; 73 L. J. Ch. 53; 89 L. T. 542; 52 W. R. 310.
(65) (1911) 2 Ch. 275; 80 L. J. Ch. 623; 105 L. T. 360; 55 S. J. 552; 27 T. L. R. 490.
(66) (1914) 1 Ch. 115; 83 L. J. Ch 243; 109 L. T. 781; 58 S. J. 117.

Finally, reference has been made to section 2 of the Transfer of Property Act, which provides that nothing in the Second Chapter (which includes section 6) shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law. Consequently, it has been suggested that the appellant may conceivably succeed, notwithstanding section 6 of the Transfer of Property Act, if it transpires that under the Hindu Law the interest of a reversionary heir is alienable or may form the subject-matter of a valid contract for assignment. No authority, however, has been produced from the original texts, which may lend even a semblance of support to such a theory; on the other hand, whatever indications are available, militate against the view. The interest of a reversioner, as we have seen, does not constitute a present or vested interest in the estate, which is completely represented by the female heiress, during her lifetime, although her powers of alienation may be of a restricted character. The interest of the reversioner is neither devisable nor transmissible by inheritance; it lacks the fundamental characteristic of the juristic concept of ownership as understood by Hindu law-givers. Srikrishana Tarkalankar, in his Commentary on the Dayabhaga, states that, according to the old established explanation, fitness for free disposal is essential to constitute property. This, it may be observed, did not stand in the way of the recognition of the existence of various concurrent rights to one and the same thing vested in different persons, provided that there was no incompatibility in the co existence of such rights. But, if fiteness for free disposal is essential to constitute ownership, the question at once arises, what is the mode of such transfer of ownership. Now, the earliest method of transfer known to Hindu jurists was gift, which was defined as the renunciation of property in favour of a sentient being, having the result of extinguishing the ownership of the donor and creating ownership in the donee. The subject-matter of the gift, consequently, must be of such a nature that the donor might renounce his title therein to the donee, according to prescribed formalities. These formalities included delivery on the part of the donor and acceptance on the part of the donee; the substance of the matter thus is, that transfer of ownership and delivery of possession go hand in hand. The transfer of ownership is the result of the manifestation of intention on the part of the transferor to part with the ownership *in præsenti* in favour of another, who thereupon accepts the situation, agrees to become the owner and does become the owner by the combined effect of renunciation on the one hand and appropriation on the other. It is not necessary to investigate whether an actual delivery of possession is necessary to perfect the transfer of ownership or whether the transfer may not be accomplished without actual delivery by the co-ordinated desire of the transferor and transferee; but what is essential is that the subject-matter of the gift should be property capable of delivery. In course of time, the rules applicable to gifts were extended to the case of sales and other kinds of transfer. The Hindu jurists do not appear to have ever contemplated the transfer of mere chance, or possibility of succession, which, as is abundantly clear from numerous passages of the Dayabhaga, was not property (Dayabhaga, Chapter I, paragraphs 13, 14, 15, 18, 19, 26, 30, 38, 39 and 42). These passages show that the expectant interest of a son, in other words, what has been called, not very felicitously, "the inchoate right of inheritance created by birth" is not property; while the father lives, no property is vested in the sons, and they have no ownership which could form the subject of partition which is in essence a form of alienation. There is thus no ground to hold that the claim of the plaintiff, tested by Hindu Law, apart from the provisions of section 6 of the Transfer of Property Act, can be seriously entertained.

The result is that the decree made by Mr. Justice Greaves is affirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

J. P.

Appeal dismissed.

NARAINDAS v. JASSOMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 9 OF 1918.

October 19, 1920.

Present :—Mr. Kennedy, J. C., and Mr. Madgaonkar, A. J. C.

NARAINDAS AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

JASSOMAL—DEFENDANT—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 115—Section to be interpreted liberally—Stamp Act (II of 1899)—Fiscal Enactment, object of—Agreement, factum of—Agreement, terms of—Loan—Document inadimissible in evidence—Lender, when can fall back and sue upon loan itself—Consideration, failure of—Equity.

The power under section 115, Civil Procedure Code, must receive a liberal rather than a narrow interpretation, particularly when the applicant has no other remedy. [p. 37, col. 1.]

Bai Atrani v. *Deepsing Baria*, 33 Ind. Cas. 358; 40 B. 86 at p. 88; 17 Bom. L. R. 1097, relied upon.

The Stamp Act is a fiscal Enactment the primary object of which is to prevent evasion of the revenue. This object is attained by excluding the unstamped document from evidence entirely and not by acting upon it. But this object apart, it may, in other respects, be considered in favour of the subject. [p 38, col. 1.]

Where the terms of an agreement can be distinguished from the fact that an agreement was come to and such fact is itself also in issue, the Court can allow the fact to be proved and even the document to be used in evidence for collateral purposes. [p 38, cols. 1 & 2.]

Fatechand v. *Kisan*, 18 B. 614; 9 Ind. Dec (N. S.) 918, relied upon.

The question whether a loan was given and taken, can in certain cases, such as those of collateral securities, be distinguished from the question of the terms of the loan and of its re-payment. Where it can be so distinguished, if the document embodying the terms is inadmissible, the lender may fall back and sue upon the loan itself and prove it by other evidence, as an implied contract to re-pay money arises from the fact that the money was lent. [p. 38, col. 2.]

Pramatha Nath Sandal v. *Dwarka Nath Dey*, 23 C. 851; 12 Ind. Dec. (N S.) 565, *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwadi*, 24 B. 360; 2 Bom. L. R. 25; 12 Ind. Dec. (N. S) 773 and *Ram Sarup* v. *Jasoda Kunwar*, 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72, relied upon.

The basis of such an action is not the document, but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed should return the money to the payer. [p. 38, col. 2]

Baij Nath v. *Salig Ram*, 16 Ind. Cas. 33, relied upon.

The defendant asked the plaintiff to lend him Rs. 400. The latter agreed to pay Rs. 200 at once and half later. On payment of Rs 200 the defendant executed in favour of the plaintiff a document for Rs. 400 and stamped it with one anna stamp. Out of the remaining Rs. 200, Rs. 30 only were paid to the defendant some days later. The plaintiff sued the defendant for recovery of Rs 230 which he had lent. The document was held to be inadmissible in evidence for want of stamp:

Held, that, as the giving of the loan of Rs. 230 and the agreement to lend Rs. 400 and its terms as embodied in the inadmissible document were distinguishable, notwithstanding the fact that the document itself was excluded from evidence and could not be acted upon, the plaintiff was entitled to fall back upon the sums actually lent to the defendant and to sue and to prove that they were lent and obtain a decree in respect of them. [p. 39, col. 1]

Revision application from a decision of the District Judge, Hyderabad.

Mr. *Tahilram Maniram*, for the Applicants.

Mr *Fatehchand Asudimal*, for the Opponent.

JUDGMENT.—The value of the subject-matter of the suit is less than Rs. 500. Section 102 of the Code of Civil Procedure, therefore, bars a second appeal. The plaintiffs-applicants seek to avoid the bar on the strength solely of their description in the plaint of the defendant-opponent as a Zamindar, and it is argued that he must, therefore, be an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, and the suit fall within the class of suits under section 3 of Chapter 2nd of the Act, the cognizance of which by the Court of Small Causes is barred under section 5 or 6. The suit therefore falls under clause 41 of the II Schedule of the Provincial Small Causes Courts Act IX of 1887.

This question of the defendant's "status" has never been raised in the lower Court and the defendant cannot, upon the record, be held proved to be an agriculturist. We, therefore, prefer to accede to the applicant's alternative prayer, to treat this as an application under section 115 of the Civil Procedure Code the powers under which, we agree, must receive a liberal rather than a narrow interpretation, particularly when the applicant has no other remedy; *Bai Atrani* v. *Deepsing Baria* (1).

The concurrent findings of facts of the lower Courts are as follows:—

The plaintiffs had an account with the defendant's father. The defendant asked the plaintiffs to lend him Rs. 400. The latter agreed to pay him half the amount at once and half later. On payment of the former half, the defendant passed to the plaintiffs a stamped deed or document, termed "Handi" by the Subordinate Judge and a promissory note by the District Judge, stamped with

(1) 33 Ind. Cas. 358; 40 B. 86 at p. 88; 17 Bom. L. R. 1097.

a one anna stamp. Of the other half Rs. 30 only were paid to the defendant some days later. Plaintiffs' Hundi for Rs. 170 on their father in Karachi was dishonoured, whether at the instance of the defendant's brother or otherwise is immaterial for the purposes of this suit.

The document was clearly inadmissible in evidence under section 35 of the Stamp Act and was rightly excluded by both the lower Courts. The question of law is whether the plaintiffs' suit for Rs. 230, found to have been lent, was rightly decreed by the First Court, or whether, as the lower Appellate Court held, the suit failed by reason of section 91 of the Indian Evidence Act. Both Courts have relied on the case of *Ramsing* v. *Parumal* (2). In that case, however, the document was passed in foreign territory and was held to be outside the purview of the Stamp Act and, therefore, to be admissible without any stamp.

The question has been exhaustively considered by this Court in the later case of *Lokumal* v. *Sind Bank Limited* (3), which was not before the lower Courts when they pronounced the judgment. The answer depends not so much on whether the document found to be inadmissible was passed simultaneously with the loan or not, as the learned District Judge appears to have thought, but on somewhat different considerations which we proceed to indicate and which may perhaps help to elucidate the point.

The Stamp Act is a fiscal Enactment the primary object of which is to prevent evasion of the revenue. This object is attained by excluding the document from the evidence entirely and by not acting upon it. But this object apart, it may, in other respects, be considered in favour of the subject. Section 91 of the Evidence Act is a rule of evidence excluding oral evidence of the terms of a contract or grant or disposition of property when such terms have been reduced to writing in the form of a document. Where, however, the terms of an agreement can be distinguished from the fact that an agreement was come to and such fact itself is also in issue, the Courts have allowed the fact to be proved and even the document to be used in evidence for collateral purposes: *Fatehchand* v. *Kisan* (4).

In the same manner, the question whether a loan was given and taken, can in certain cases, such as those of collateral security, be distinguished from the question of the terms of the loan and of its re-payment. Where it can be so distinguished, it has been held by the High Courts of Calcutta, Bombay and Allahabad that, even if the document embodying the terms is inadmissible, the lender may fall back and sue upon the loan itself and prove it by other evidence. And in such a case, to quote the word of Petheram, C. J., "There can be no doubt that an implied contract to re-pay money lent always arises from the fact that the money is lent"; *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (5), *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwadi* (6), *Ram Sarup* v. *Jasoda Kunwar* (7). The basis of such an action is not the document, but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed should return the money to the payer, *Baij Nath* v. *Salig Ram* (8).

Precisely in what kind of cases and how far this rule of equity should be applied, are points on which there has been some difference of opinion. The Madras High Court in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (9) have dissented from the decisions of the High Courts of Bombay and Allahabad in the cases of *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwadi* (6) and *Baij Nath* v. *Salig Ram* (8) and followed the current of the Madras decisions in *Pothi Reddi* v *Velayudasivan* (10). This last case has, however, been distinguished even in Madras in *Yerlagadda Veera Raghavayya* v. *Gorantla Ramayya* (11), following the Calcutta case of *Sheikh Akbar* v. *Sheikh Khan* (12), which has been distinguished in the

(2) 32 Ind. Cas. 582; 9 S. L. R. 150.
(3) 57 Ind. Cas. 386; 13 S. L. R. 169.
(4) 18 B. 614; 9 Ind. Dec. (N. S.) 918.
(5) 23 C. 851; 12 Ind. Dec. (N. S.) 565.
(6) 24 B. 360; 2 Bom. L. R. 25; 12 Ind. Dec. (N. S.) 773.
(7) 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72.
(8) 16 Ind. Cas. 33.
(9) 21 Ind. Cas. 864; 38 M. 660; 14 M. L. T. 520; (1914) M. W. N. 58; 26 M. L. J. 19.
(10) 10 M. 94; 11 Ind. Jur. 60; 3 Ind. Dec. (N. S.) 816.
(11) 29 M. 111; 15 M. L. J. 484.
(12) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 718.

cases of *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (5), *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwadi* (6) and *Ram Sarup* v. *Jasoda Kunwar* (7) above.

In this last case the plaintiff had a claim against the defendant for the value of a share in the partnership. The claim was fixed by agreement between the parties at Rs. 250. The defendant paid the plaintiff Rs. 25 and for the balance, the plaintiff took from the defendant a promissory note and passed to him a receipt for Rs. 225. The promissory note being inadmissible for want of stamp the plaintiff failed, as he had agreed to settle his claim on the partnership in consideration of receiving the promissory note, and had passed a receipt for the amount of the claim, so that no cause of action other than the inadmissible document remained to him to fall back upon.

But except in such cases the weight of authority in the Courts in India, which are Courts of Equity as well as Courts of Law, is in favour of avoiding what Jenkins, C. J., in the case of *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwadi* (6) above calls a needlessly technical view of the law and of applying the rule of Equity laid down by Petheram, C. J., in the case *Pramatha Nath Sandal* v. *DwarkaNath Dey* (5) above, so that the plaintiff is deprived only of the special advantages contained in the inadmissible document and not also of the amount of the actual loan.

In the present case a loan of Rs. 230 actually made in two instalments and the agreement to lend Rs. 400 and its terms, as embodied in the inadmissible documents, are easily distinguishable. Under these circumstances, notwithstanding the fact that the document itself must be excluded from evidence and cannot be acted upon, the plaintiffs can, in our opinion, be allowed to fall back upon the sums actually lent to the defendant and to sue for them and to prove that they were lent and obtain a decree in respect of them.

We, therefore, allow the application, set aside the decree of the lower Appellate Court and restore the decree of the First Court. The defendant must pay the plaintiffs' costs throughout.

S. D. *Application allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 798 OF 1919.

May 31, 1921.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Newbould.

GYANENDRA NATH CHAKRAVARTI —DEFENDANT—APPELLANT

versus

PORESH NATH PAL AND ANOTHER— PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105, O. VI, r. 17—Amendment of plaint—General conditions on which amendment should be granted—Amendment, when should not be allowed.

An amendment of pleadings is allowed subject to three general conditions, (1) *bona fides* on the part of the applicant, (2) possibility of amendment without such prejudice to the other party as cannot be compensated by costs and (3) the amendment is not such as to turn a suit of one character into a suit of another character. [p. 42, cols. 1 & 2.]

Upendra Narain Roy v. *Janaki Nath Roy*, 47 Ind. Cas. 129; 22 C. W. N. 611 at p. 617; 45 C. 305, *Kali Das* v. *Draupadi*, 43 Ind. Cas. 893; 22 C. W. N. 104; 27 C. L. J. 403 and *Rebati Raman Basak* v. *Haris Chandra Basak*, 58 Ind. Cas. 665; 24 C. W. N. 749, followed.

In a suit for damages and permanent injunction the plaintiffs in their plaint asserted that they had title to and possession of the land in suit; the defendants denied the plaintiffs' title, and pointed out that the suit could not be maintained as framed, as the plaintiffs were out of possession. Then the plaintiffs applied for amendment of the plaint and the only amendment which they wanted was that there should be a prayer for declaration of their title. That was disallowed by the Court of first instance. The Appellate Court by a remand order directed an amendment in terms of the plaintiffs' petition. After the case went back on remand, the plaint was amended with a prayer for declaration of the plaintiffs' title. Thereafter the plaintiffs put in another petition for further amendment, of the plaint with a prayer for recovery of possession. This was objected to by the defendants, on the ground that the amendment was illegal and altered the character of the suit. This objection was, however, disallowed and the case was tried out, with the result that the suit was decreed by the First Court and the decree was affirmed on appeal. On second appeal by the defendants:

Held, that in all the circumstances of the case the Court ought not to have allowed the second amendment; [p. 43, col. 2.]

(2) that although the defendants not having appealed against the order of remand directing amendment, were debarred by the provisions of section 105, sub-section (2) of the Code of Civil Procedure, from disputing the correctness of the order, they were not precluded by the provisions of that section from showing that they had been prejudiced by the further amendment made in the course of the re-trial. [p 43, col. 1.]

Appeal against a decree of the Subordi-

nate Judge, Third Court, 24-Parganas, dated the 4th of February 1919, affirming that of the Munsif, First Court at Alipore, dated the 8th of February 1918.

FACTS appear from the judgment.

Babu *Amarendra Nath Bose* (with him Babu *Probodh Chandra Chatterjee*), for the Appellant.—The appeal arises out of a suit, as originally framed, for damages and permanent injunction which was filed on 29th November 1913. On 12th January 1914 the defendant-appellant filed a written statement denying plaintiffs' title to the land. On 11th July 1914 the plaintiffs prayed for amendment of the plaint with a prayer for declaration of title to the land which they had got by reason of *khas* possession and of adverse possession. On 22nd January 1915 the First Court found that the plaintiffs were out of possession before suit, but dismissed the suit although plaintiffs' title had been proved, on the ground that the suit for injunction and damages was not maintainable. The prayer for amendment of the plaint was disallowed. On appeal by the plaintiffs, the lower Appellate Court remanded the case for re-trial allowing the plaintiffs to amend their plaint, inasmuch as the amendment was material for the decision of the suit. On 16th January 1917 the plaintiffs applied for further amendment of the plaint with a prayer for recovery of possession. This amendment was allowed by the First Court. On appeal the decree of the First Court was affirmed. Against that decree the present appeal is preferred by the defendant.

My first point is that the amendment of the plaint in respect of the prayer of recovery of possession is illegal and has considerably prejudiced me. Refers to Order VII, rule 1, clauses (*e*), (*g*), of the Code of Civil Procedure. My right of suit has been barred. The suit as framed, even after the amendment, is barred even if the first amendment is to prevail. This amendment relates back to the date of the suit. It is open to me to challenge the first amendment. The Appellate Court's order of remand was not one under Order XLI, rule 23 of the Code of Civil Procedure. The suit was not dismissed originally on a preliminary point. The other issues were tried also. Order XLI, rule 23, Civil Procedure Code, contemplates dismissal on a preliminary point and other issues need not be gone into. Upon the suit as framed, the decision of the First Court was not wrong. Refers to *Rameshur Singh* v. *Sheodin Singh* (1), *Mallikarjuna* v. *Pathaneni* (2) and *Mohendra Nath Chakraburtty* v. *Ramtaran Bandopadhya* (3); Order XLIII, rule 1 (*u*), Civil Procedure Code. The suit was barred so far as damages and injunction were concerned. The suit was barred even when the prayer for declaration of title was made. When the land is capable of physical possession, the onus is on the plaintiff to prove possession. Refers to *Mahomed Ibrahim* v. *Morrison* (4). To consider the question of prejudice the case will have to go back on remand for determination of the question of limitation. As regards injunction and declaration of title, Article 120 of the Indian Limitation Act would operate as bar to the right of suit. As regards damages Article 39 of the Indian Limitation Act would bar the suit. So that any way the plaintiffs' right of suit is barred. Refers to *Doyle* v. *Kaufman* (5), *Weldon* v. *Neal* (6), *Steward* v. *North Metropolitan Tramways Co.* (7). In these cases either the original suit would have been barred or the suit after the amendment would have been barred. Refers to Order II, rule 2, of the Code of Civil Procedure: *Moonshee Buzloor Raheem* v. *Jodonath Bose* (8). The order of amendment has not been acted upon. Order VI, rule 18, of the Civil Procedure Code would, therefore, be a bar. Refers to *Rebati Raman Basak* v. *Haris Chandra Basak* (9).

Babu *Rupendra Kumar Mitter* (with him Babu *Hemendra Nath Chatterjee*), for the Respondents.—The First Court disallowed my first prayer for amendment. Before that some witnesses on either side were examined. The first amendment was on 11th July 1914. That was only for declaration of title. With

(1) 12 A. 510; A. W. N. (1890) 18; 6 Ind. Dec. (N. S.) 1069.

(2) 19 M. 479; 6 Ind. Dec (N. S.) 1039.

(3) 55 Ind. Cas. 96; 23 C. W. N. 1049; 31 C. L. J. 357.

(4) 5 C. 36; 2 Ind Dec (N. S.) 635.

(5) (1877) 3 Q. B. D. 7; 47 L. J. Q. B. 26; 26 W. R. 98.

(5) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820.

(7) (1885) 16 Q. B. D. 178, affirmed on Appeal (1886) 16 Q. B. D 556; 55 L. J. Q B. 157; 54 L. T. 35; 34 W. R. 3 6; 50 J P. 324.

(8) 11 M. I. A 551 at p. 603; 8 W. R P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E, R. 208.

(9) 58 Ind, Cas. 665; 24 C, W. N. 749.

regard to that no question was raised and the plaint was amended accordingly. Additional written statement was filed on 19th February 1917 and an issue framed. The wording of that issue and the discussion thereof rather go to show that the defendant was trying to go behind the remand order. The examination of the witnesses takes away all the force in the appellant's argument. I submit my application for amendment was *bona fide*. The defendant has not been prejudiced in any way. It is too late in the day now to object to the first amendment. He is now debarred as he did not appeal against that order. The next question is that apart from the remand order, was the second amendment justified? I submit, it was. A reference to the plaint will show that the question of possession was doubtful and, therefore, the amendment which was very necessary for the decision of the case was justified. It is not a case that I began falsely and shaped my case as it progressed. My application was, therefore, *bona fide* and I had very valid reasons for it. Refers to *Cropper* v. *Smith* (10) and *Tildesley* v. *Harper* (11). The other side must prove that they have been prejudiced and how they have been prejudiced. Refers to *Saral Chand Mitter* v. *Mohun Bibi* (12), Bullen and Leak's Precedents on Pleadings, page 1; Annual Practice (1921) 452, 454. The case of *Rebati Raman Basak* v. *Haris Chandra Basak* (9) is distinguishable and is not applicable to the peculiar facts and circumstances of the present case. The important question to be considered is at what stage the amendment is applied for. Refers to *Mohummud Zahoor Ali Khan* v. *Thakoorranee Rutta Koer* (13). As regards the second point the case of *Bhramar Lal Banduri* v. *Nanda Lal* (14) is based on wrong law. Refers to Banerjee (Tagore Law Lectures) on Specific Relief 633. The case would, therefore, be maintainable because I cannot be made to include the whole of my relief in the plaint. As regards the admissibility in evidence of the partition decree between the defendant and his brothers, I submit it is admissible in evidence. Refers to *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (15), *Abinash Chandra Chatterjee* v. *Paresh Nath Ghose* (16), *Tepu Khan* v. *Rajani Mohun Das* (17). Even if it is inadmissible, I would rely on *Ambar Ali* v. *Lutfe Ali* (18).

Babu *Amarendra Nath Bose* replied briefly.

JUDGMENT.—This appeal arises out of a suit instituted on the 29th November 1913, which was originally framed as one for damages and permanent injunction. It was alleged that the plaintiffs had title to and possession of the land in suit, and that the defendants had trespassed upon the land. The defendants on the 12th January 1914 filed a written statement in which they pleaded that the plaintiffs having no right to or possession of the land, the suit for damages in the form laid could not proceed according to law. On the 11th July 1914 the plaintiffs by a petition prayed for amendment of the plaint with a prayer for declaration of their title and it was alleged that the plaintiffs had been holding *khas* possession of the land, and had acquired title by adverse possession.

The case came on for hearing on the 22nd January 1915, and the Court of first instance found that the plaintiffs were out of possession of the disputed land before the institution of the suit, and that the suit for injunction and damages could not, under the circumstances, be maintained, although it came to the conclusion that plaintiffs' title was proved, and defendants had failed to prove adverse possession for 12 years.

Against that decree the plaintiffs appealed, and the lower Appellate Court was of opinion that the order of the Court of first instance disallowing the prayer for amendment of the plaint by addition of a prayer for declaration of the plaintiffs' title to the land was not a proper one, as none of the parties could have been prejudiced by the grant of the prayer at that stage, and as the question of title was material for the

(10) (1884) 26 Ch D. 700 at p. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.

(11) (1878) 10 Ch. D. 393 at p. 396; 48 L. J. Ch. 495; 39 L. T. 552; 27 W. R. 249.

(12) 25 C. 371 at p. 390; 2 C.W.N. 18 and 201; 13 Ind. Dec. (N.S.) 247.

(13) 11 M.I. A. 468 at p 487; 9 W.R. P. C. 9; 2 Suth. P .C. J. 107; 2 Sar P. C. J. 320; 20 E. R. 177.

(14) 24 Ind. Cas. 199; 18 C. W. N. 545.

(15) 29 C. 187; 29 I A. 24; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar P. C. J. 224 (P. C.).

(16) 9 C. W. N. 402.

(17) 25 C. 522; 2 C. W. N. 501; 13 Ind. Dec. (N.S.) 347.

(18) 41 Ind Cas. 116; 25 C. L. J. 619; 21 C. W. N. 996; 45 C. 159.

GYANENDRA NATH v. PORESH NATH PAL.

proper decision of the suit. That Court accordingly remanded the case to the lower Court for an amendment of the plaint in terms of the plaintiffs' petition and for a re-trial of the suit after such amendment. After the case went back on remand, the plaint was amended with a prayer for declaration of plaintiffs' title. Then on the 16th January 1917, the plaintiffs put in another petition for further amendment of the plaint with a prayer for *recovery* of *possession*, and the prayer which they wanted to add by way of amendment was as follows:—"Or if in the opinion of the Court the plaintiffs are declared to have been dispossessed, then the Court may be pleased to pass a decree in favour of the plaintiffs for recovery of possession of the said property." This was objected to on behalf of the defendants on the ground that the amendment was illegal, and altered the character of the suit. This objection was, however, disallowed, and the case was tried out with the result that the plaintiffs' suit was decreed by the Court of first instance, and that decree was confirmed on appeal by the lower Appellate Court. The defendants have appealed to this Court.

The main question for consideration is whether the amendment of the plaint, in so far as the prayer for recovery of possession was concerned, ought to have been allowed. There is no doubt that the Code gives ample power to the Court for amendment. Order VI, rule 17, lays down that the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The general conditions on which amendments should be granted have been summarised by Mr. Justice Woodroffe in the case of *Upendra Narain Roy* v. *Janaki Nath Roy* (19). The learned Judge observed:—"The Court being desirous of getting at the true facts will allow an amendment subject to three general conditions: *bona fides* on the part of the applicant, possibility of amendment without such prejudice to the other party as cannot be compensated by costs (such as prejudice to rights accrued), and subject to this, that the amendment is not such as to turn a suit of one character into a suit of another character. This statement is not made as being exhaustive, but as embodying what are perhaps the three chief conditions on which amendment may be allowed." See also *Kali Das* v. *Draupadi* (20) and *Rebati Raman Basak* v. *Haris Chandra Basak* (9).

Now what are the facts of the present case? As stated above, the plaintiffs in their plaint asserted that they were in possession, and on that footing claimed damages and injunction; the defendants denied the plaintiffs' title, and pointed out that the suit could not be maintained as framed, as they were out of possession. Then the plaintiffs applied for an amendment of the plaint. The only amendment which they wanted was that there should be a prayer for *declaration of their title*. That was disallowed by the Court of first instance. The Appellate Court by a remand order directed an amendment *in terms of the petition* and that order was carried out.

It was not until the 16th January 1917 that the plaintiffs put in a petition for further amendment, namely, for recovery of possession. It is to be observed that the plaintiffs adduced evidence to show that they were actually in possession of the property and more than three years after the institution of the suit and in spite of the fact that the defendants pleaded that the plaintiffs were out of possession, they persisted in proceeding with the suit without any prayer for recovery of possession. In these circumstances, it is difficult to hold that there was *bona fides* on the part of the plaintiffs, as an omission to claim a prayer for recovery of possession appears to have been deliberate.

In the next place, there is no doubt that the defendants have been prejudiced by the second amendment. It is found that the dispossession of the plaintiffs took place more than six years before the institution of the suit. The suit as originally framed was one for damages and injunction and the prayer for declaration of title was added by the first amendment. No injunction

(19) 47 Ind. Cas. 129; 22 C. W. N. 611 at p. 617; 45 C. 805.

(20) 43 Ind. Cas. 893; 22 C. W. N. 104; 27 C. L. J. 403.

was granted as it was thought unnecessary. The limitation applicable to the claim for damages is three years under Article 39 of the Limitation Act, and the claim for declaration of title added by the first amendment is governed by Article 120. The Court gave a decree for declaration of the plaintiffs' title, and mesne profits as damages. If the plaint had not been amended, for the second time, by adding a prayer for recovery of possession, the defendants could have, upon the findings, succeeded in defeating the plaintiffs' suit as originally framed or even as it stood after the first amendment, on the ground that it was barred by limitation. By the second amendment of the plaint, they were deprived of such a right. It is true that the defendants not having appealed against the order of remand directing amendment, were debarred by the provisions of section 105, sub-section 2 of the Code, from disputing the correctness of the order. But the remand order directed an amendment only so far as the prayer for declaration of title was concerned, and conceding that the Court of first instance had power to order further amendment under the order for re-trial, the defendants are not precluded by the provisions of section 105 from showing that they had been prejudiced by the further amendment made in the course of the re-trial. They might not have objection to the order of remand directing amendment so far as declaration of title was concerned, nor to a re trial, and might not have, therefore, appealed against the said order. But they could not have anticipated that the Court would allow further amendment by adding a prayer for recovery of possession which was contrary to the case made in the plaint, and we do not think that they are precluded by section 105 from raising the question of prejudice caused by the further amendment. The question whether an amendment should be allowed is a matter within the discretion of the Court, but the order for amendment appears to have been made without considering whether the defendants would be prejudiced thereby. There is no doubt that they have been prejudiced.

It is to be observed that in the present case it was not a *bona fide* mistake on the part of the plaintiffs; they were perfectly aware that they were out of possession, especially so, as it appears from the judgment of the Court of first instance that in a criminal case brought by the plaintiffs against the defendants sometime before the institution of this suit, which resulted in the dismissal of the case, the Criminal Court referred the plaintiffs to the Civil Court. Instead of bringing a suit for recovery of possession, they alleged that they were in possession and claimed damages and injunction against the defendants, and adduced evidence to show that they were in possession; and when the Court found that they were not in possession, it was then, as stated above, more than three years after the institution of the suit, that they prayed for amendment claiming recovery of possession, which altered the nature of the suit. Even then they stated that "if in the opinion of the Court it be declared that they were out of possession," then an amendment might be granted. Under Order VII, rule 1, clause (*e*), the plaintiffs shall state the facts constituting the cause of action and when it arose. The plaintiffs were, therefore, bound to state when they were dispossessed and how, in order that the defendants might meet such a case. There was thus, in fact, no proper application for amendment, nor was the cause of action (for recovery of possession) properly stated as required by law.

It is to be observed that the plaintiffs having been found to be out of possession before the institution of the suit, were bound to show that they were in possession within 12 years of the suit, the burden of proof being upon them. But the Courts below have discussed the question whether the defendants have shown that they had been in adverse possession for 12 years, and although there is a finding that the plaintiffs were in possession within 12 years, the Courts below have really proceeded upon the ground that the defendants' adverse possession for 12 years had not been proved, and the finding upon the question of limitation appears to be based upon the decision of the question of adverse possession by the defendants.

In all the circumstances of the case we think that the Court ought not to have allowed the amendment. We are accordingly of opinion that the decrees of the lower

Courts should be set aside and the plaintiffs' suit dismissed. But as the question of title was found in favour of the plaintiffs, we direct that each party do bear its own costs throughout.

B. N. & J. P. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 14 OF 1921.

November 18, 1921.

Present :—Mr. Hallifax, A. J. C.

MADAN SINGH—DEFENDANT—APPELLANT

versus

KESHEOPRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. V, r. 17—Service of summons—Agent or person competent to accept service present—Diligence to effect personal service, whether compulsory.

The application of the words "after using all due and reasonable diligence" in rule 17 of Order V is specially restricted to the case where there is no agent empowered to accept service on behalf of the defendant nor any other person on whom service can be made. [p. 46, col. 2.]

Where there is such a person, the serving officer need not make such diligent efforts to effect personal service, even if the agent or adult member of the defendant's family refuses to accept service on his behalf. It is, however, still necessary to prove that the defendant "cannot be found." [p. 46, col. 2.]

Dwarkabux Ramchandra v. *Norman Crantome Macleod*, 2 N. L. R. 63, *Sakina* v. *Gauri Sahai*, 24 A. 302; A. W. N. (1902) 69, *Rajendro Nath Sanyal* v. *Jan Meah*, 26 C. 101; 2 C. W. N. 574; 13 Ind Dec. (N. S.) 669, distinguished.

Makhan Das v. *Mannu Lal*, 21 Ind. Cas. 614; 35 A. 556; 11 A. L. J. 875, followed.

Appeal against an order of the Subordinate Judge, Raipur, dated the 19th March 1921, arising out of Civil Suit No. 89 of 1919, dated 27th January 1920.

Mr. *M. Gupta*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—The appellant Madan Singh and his father Meharban Singh, who form together a joint Hindu family, executed a mortgage on the 21st of December 1916, on which a suit was instituted against them both on the 2nd of August 1919. Two attempts to serve them with notice of the suit failed, but at the third attempt the notice was served personally on Meharban Singh on the 24th of November 1919. He said his son lived jointly with him but he was at the time staying with his wife's father at a village 3½ miles away in another Tahsil, having gone there eight days before. Madan Singh's notice was offered to him, but he refused to accept it and himself endorsed on it a statement to this effect: "Madan Singh is not at home. Eight days ago he went to Sindhori in the Dhamtari Tahsil. Therefore, this notice with the plaint is affixed. I cannot accept it." A copy of the notice with one of the plaint was accordingly affixed to the door of his house. On the 2nd of December 1919, the date fixed for the settlement of issues, neither defendant appeared and the case proceeded *ex parte*. At the next hearing which was on the 27th of January 1920 *Musammat* Rukhmabai, the mother of Meharban Singh, who lives with him and Madan Singh, appeared with an application to be joined in the suit on the ground that some of the mortgaged property had been made over to her absolutely before the date of the mortgage. The application was rejected as she was considered to be claiming a paramount title, the plaintiff's evidence was heard and a preliminary decree for foreclosure was passed.

On the 14th of September 1920 the decree-holder applied to have his decree made final. Madan Singh was reported as having evaded service of the first notice issued to him by hiding himself inside the house, and the second was affixed to the door of his house on the 26th of October 1920, as he was temporarily absent from the village. The process-server was informed by Meharban Singh's brother Chain Singh that Madan Singh had left the village two months before, that is, about the end of August. The process-server wrote a report to that effect on the back of the summons, which Chain Singh signed. The latter, however, now appears as a witness for Madan Singh to state that Madan Singh had actually left two years before. Both the judgment-debtors, however, appeared on the 13th of November 1920, the date fixed for the hearing. Meharban Singh asked for an extension of time, which was

refused. We are not further concerned with that matter. Madan Singh applied to have the *ex parte* decree against him set aside on the ground that he had not heard of it till ten days earlier and that he wished to plead that he was a minor at the time he executed the mortgage. His father's statement in this connection was recorded on that day and he said: "The report dated 24th November 1919 marked 'A' is in my writing and is signed by me. The summonses were offered to me; but I refused to accept them and they were affixed to the house. Defendant No. 2 was not then at home. Defendant No. 2 is joint with me. He is my son and lives with me, but for the most part he lives with his father-in-law at Sindhori (Dhamtari Tahsil) which is about 33 miles from Marra, my village."

The learned Subordinate Judge has held that the notice of the suit was duly served on Madan Singh in accordance with rule 15 of Order V of the Civil Procedure Code on the 24th of November 1919, when it was accepted by his father. This, however, is based on the mistaken idea that it was accepted by Meharban Singh, who expressly refused to accept it, whereupon the serving officer very properly affixed a copy to the outer door of the house where Madan Singh ordinarily resides. The mode of service is that contemplated by rule 17 of Order V. The learned Judge has further, for reasons stated in his judgment, refused to believe the witnesses who say that Madan Singh was away from Marra for two years or more and has pointed out that even they admit that he came back there occasionally and also kept up a correspondence with his uncle Chain Singh. He found, therefore, that Madan Singh "had information about the decree shortly after it was passed." Under Article 164 of the Schedule of the Limitation Act the starting point of the period of thirty days allowed for an application to set aside an *ex parte* decree is "the date of the decree, or, where the summons was not duly served, when the applicant has knowledge of the decree." The application was held to be too late, whether the original notice of suit was duly served on Madan Singh or not, and was dismissed.

One contention put forward on behalf of Madan Singh in appeal is that even if his application was barred by time and the decree could not be set aside under rule 13 of Order IX, the Court should still have exercised its inherent power to set it aside for the reason that the applicant stated that he wished to plead that he was a minor at the time he executed the mortgage. He appears to have stated in 1921 that he was 19 years of age, and he executed the mortgage as a person of full age in 1916. It does not appear that the plea would have had much chance of success even if it were allowed to be taken, and if *ex parte* decrees were liable to be set aside merely because the judgment-debtor stated one good plea that he proposed to take, every greybeard would be urging that he wished to plead that he was a minor five years ago. That would open up the decree and he could then take any other plea he chose. But here even if Madan Singh succeeded in proving that he was a minor in 1916, that could make no difference to the result of the suit. The mortgage was executed by him and his father as the whole of a joint Hindu family. Whether he was under or over eighteen at the time, the signature of his father was sufficient in those circumstances to bind him, unless he could prove further that the loan was neither taken for the benefit of the family, nor was an antecedent debt of Meharban Singh's not incurred for illegal or immoral purposes. He never suggested anything of the sort, and it was surely not the business of the Court to suggest the pleas to him and then set aside the *ex parte* decree on the assumption that he would take them.

But the main contention in appeal is that the application is not barred by time, because (*i*) notice of the suit was not duly served on Madan Singh and (*ii*) he has proved that he had no knowledge of the decree more than thirty days before he applied. I take the second matter first. The burden of proving that his application, which was made 229 days after the date of the decree, was within time lay on him. He has called witnesses, who say that he was away at Sindhori from November 1918 till November 1920 and that during those two years Sindhori was his ordinary place of residence, and

Marra was not. Most of them admit that during those two years he paid more or less frequent visits to Marra, but the whole of their evidence must be rejected as entirely false in view of the two statements already quoted, which were made by Madan Singh's father Meharban Singh and that made by his uncle Chain Singh. In November 1919 the former said Madan Singh had gone to Sindhori only eight days earlier, and said nothing about his having been living there practically all the time for the past year. Again in November 1920, when Madan Singh, according to himself, had been living in Sindhori for two years and had been back in Marra less than a fortnight and even then had been living with his uncle and not with his father, all on account of quarrels with his father, that father admitted that they were joint and lived together, and had nothing to say about his son's absence of two years but that "for the most part he lives with his father-in-law at Sindhori." Chain Singh also said in October 1920 that Madan Singh had left the village two months before, without saying anything about his having been living at another village for two years. I find that during the years 1919 and 1920 Madan Singh was living at his own home at Marra, with possible occasional visits to Sindhori. His grandmother can only have known about the case through his father, and she was present in Court on the day the decree was passed. I find, therefore, that Madan Singh's grandmother knew of the decree on the day on which it was passed, and that his father knew of it on the following day at the latest. As they both live with him, he must have known of it within a week at the outside, even if he was not present at the Court with his father to support his grandmother on the day it was passed. The application to set aside the *ex parte* decree is, therefore, hopelessly late, even if notice of the suit was not duly served on Madan Singh.

I am further of opinion that the notice of the suit was duly served on Madan Singh. It has been assumed much too readily that the ruling in *Dwarkabux Ramchandra* v. *Norman Orantome Macleod* (1), which quotes *Sakina* v. *Gauri Sahai* (2), and those in *Rajendro Nath Sanyal* v. *Jan Meah* (3) and *Makhan Das* v. *Mannu Lal* (4) deal with service effected as in this case. The first three cases are all of service effected merely by affixing the notice to the door of the defendant's residence in his absence, and it was held that the notice could not be served in that way till after the serving officer had endeavoured to serve it personally with that "due and reasonable diligence" which is specially mentioned in the Code of 1908. But it is to be noticed that the application of the words "after using all due and reasonable diligence" in rule 17 of Order V is specially restricted to the case where there is no agent empowered to accept service on behalf of the defendant nor any other person on whom service can be made, and it is clear that where there is such a person, the serving officer need not make such diligent efforts to effect personal service, even if the agent or adult member of the defendant's family refuses to accept service on his behalf. It is still necessary to prove that the defendant "cannot be found," as was held in *Makhan Das* v. *Mannu Lal* (4), the last of the four cases mentioned above, in which it was not proved that any effort whatever had been made to find the defendant, who might have been just round the next corner. Here, however, the serving officer was informed by the defendant's father that he was 33 miles away, and that seems to me to establish that he could not be found even with more than due and reasonable diligence. At the very least it establishes that he could not be found with that less degree of diligence and pains which would justify the service of the notice on his father under rule 15 of Order V.

When this view of the law was put to the learned Counsel for the appellant as possible, his reply was that there was no distinction between the two modes of service in the old Code of Civil Procedure and all the rulings under that

(1) 2 N. L. R. 63.

(2) 24 A. 302; A. W. N. (1902) 68.

(3) 26 C. 101; 2 C. W. N. 574; 13 Ind. Dec. (N. s.) 669.

(4) 21 Ind. Cas. 614; 35 A. 556; 11 A. L. J. 875.

Code apply equally to them both and lay down that an equal effort to find the defendant himself was essential in both cases. In all the cases I have been able to discover there was no agent or other person on whom service could have been made on the defendant's behalf, but the arrangement of the words in rule 17 of Order V makes it perfectly clear that whatever may have been the correct interpretation of the old Code, the framers of the Code of 1908 meant to lay down that if there was such a person and he refused to accept service, the serving officer was not bound to take such pains to find the defendant himself as if there were no such person. Rule 17 lays down two classes of cases in which service can be effected by affixing the notice to the door of the house. The first is when acceptance is refused by the defendant himself or, when he "cannot be found," by his agent or other proper person. The other is where the defendant cannot be found by the serving officer after he has used all due and reasonable diligence, I hold, therefore, that notice of the suit was duly served on Madan Singh on the 24th of November 1919. His application to have the *ex parte* decree set aside is, therefore, made 199 days after the expiry of the 30 days allowed for it.

Of general reasons for opening up the decree in favour of Madan Singh I can see none. On the contrary there are many why this should not be done. They are too obvious to require specification. The appeal is dismissed and the appellant must pay all the costs.

G. R. D.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 9-S OF 1921.
AND
CIVIL RULE No. 979 OF 1916.
August 18, 1921.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

JIVAN KRISHNA CHAKRAVERTY—
PETITIONER
versus
RAMES CHANDRA DAS AND OTHERS—
OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise to be recited in entirety—Decree not to be passed beyond suit.

When a compromise has been effected between the parties to a suit, the proper course to follow is to recite the compromise in the decree in its entirety, but to pass a decree in accordance therewith only in so far as it relates to the suit. [p. 48, col. 2.]

Hemanta Kumari Debi v. *Midnapore Zemindari Co. Ltd.*, 53 Ind. Cas. 534; 46 I. A. 240; 37 M. L. J. 525 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42: 11 L. W. 301; 31 C. L. J. 298; 22 Bom. L. R. 488; 47 C. 485 (P. C.), referred to.

Application for amendment of a decree of this Court, dated the 22nd November 1917, passed in Appeal from Appellate Decree No. 3230 of 1915, reported as 44 Ind. Cas. 225, being an appeal from a decree of the District Judge, Chittagong, passed in Title Appeal No. 940 of 1914 and dated the 3rd August 1915, reversing that of the Sadar Munsif, First Court, Chittagong, passed in Suit No. 1183/222 of 1913 and dated the 14th September 1914.

FACTS appear from the judgment.

Babu *Pares Chandra Sen*, for the Petitioner.—This matter arises out of an application for amendment of a decree of this Court passed in *Jiban Krishna Chakravarti* v. *Ramesh Chandra Das* (1). In that case the plaintiff was one Jiban Krishna Chakraverty and one of the defendants was one Manindra Lal Das. The plaintiff and Monindra compromised the suit in this Court. In accordance with the terms of that compromise Monindra executed a lease. The appeal was dismissed. We now pray that the decree might be amended to the effect that as between plaintiff and Monindra there was a compromise embodied in the lease which was directed to be recorded at the same time that the appeal was dismissed. Refers to section 152, Civil Procedure Code. The Court has ample

(1) 44 Ind. Cas. 225.

power to amend the decree by the insertion of the compromise as evidenced by the lease. I submit the Court's order would be stultified if the compromise be not recorded in the decree.

Babu *Dhirendra Lal Khastgir* (with him Maulvie *M. Nurul Huque Chaudhury*), for the Opposite Parties.—I submit the compromise was not within the scope of the suit. Refers to Order XXIII, rule 3 of the Code of Civil Procedure. Therefore the decree could not be made to give effect to the compromise.

Babu *Pares Chandra Sen* replied briefly.

JUDGMENT.—We are invited in this Rule to amend the decree of this Court in *Jiban Krishna Chakravarti* v. *Ramesh Chandra Das* (1). That appeal arose out of a suit brought by one Jiban Krishna Chakraverty against several defendants, one of whom was Monindra Lal Das. During the pendency of the appeal in this Court, there was a compromise between the plaintiff and Monindra Lal Das. The terms of the compromise were evidenced in a lease executed by Monindra Lal Das. The plaintiff obtained a Rule calling upon the defendants to show cause why the compromise should not be recorded. The Rule and the appeal were heard by Mr. Justice Chitty and Mr. Justice Smither on the 22nd November 1917. The Rule was made absolute as between the plaintiff and Monindra Lal Das and it was directed that the compromise be recorded. The appeal also was heard, as there were parties to the appeal other than Monindra Lal Das. The result of the appeal was that it was dismissed. The decree was then drawn up in the following terms: "the appeal be, and the same is, hereby dismissed." The plaintiff now seeks to have this decree amended by the insertion of a statement that as between him and Monindra Lal Das there was a compromise embodied in the lease, which was directed to be recorded at the same time that the appeal was dismissed. The application has been opposed by Monindra Lal Das as also by the other defendants. In so far as defendants other than Monindra Lal Das are concerned, the proposed amendment cannot possibly prejudice their position, because the Rule to have the compromise recorded was discharged so far as they were concerned. It is equally clear that Monindra Lal Das cannot object to the amendment of the decree by the insertion of the statement that as between him and the plaintiff there was a compromise embodied in the lease—a compromise which was directed by the Court to be recorded. It has been argued, however, on his behalf that as the compromise was not within the scope of the suit, no decree could be made to give effect thereto under Order XXIII, rule 3, Civil Procedure Code. This objection is based on a misapprehension of the object of this application; the petitioner does not seek by amendment to have a decree enforcing the compromise; he desires solely to have the compromise recited in the decree pursuant to the order that the compromise be recorded. Such a course is supported by the decision of the Judicial Committee in the case of *Hemanta Kumari Debi* v. *Midnapore Zemindari Co. Ltd.* (2). When a compromise has been effected between the parties, the proper course to follow is to recite the compromise in the decree in its entirety, but to pass a decree in accordance therewith only in so far as it relates to the suit.

The result is that this Rule is made absolute and the decree amended. The decree will be amended in the manner following: "Upon the hearing of this appeal in a Division Court on the 21st and 22nd days of November 1917 along with Rule No. 979 of 1916 it is ordered and decreed that the compromise mentioned in the lease annexed to this decree be recorded as between the plaintiff and Monindra Lal Das, and that the appeal be, and the same is, hereby dismissed."

We make no order as to the costs of this Rule.

B. N. & S. D. *Rule made absolute.*

(2) 53 Ind. Cas. 534; 43 I. A. 240; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 31 C. L. J. 298; 22 Bom. L. R. 498; 47 C. 485 (P. C.).

PATNA HIGH COURT.

In the matter of FIRST CIVIL APPEAL No. 120 OF 1921.

December 1, 1921.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Ross.

NAGENDRA NATH GHOSH—
APPELLANT
versus
SAMBHU NATH PANDE AND OTHERS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. V, rr. 10 to 18, O. IX r. 5, O. XLI, r. 18—Service of summons—Duty of appellant to supply identifier—Appeal, dismissal of.

Under law no obligation is cast upon an appellant to supply an identifier when the peon goes to effect service of the summons. The identifier referred to in rule 18 of Order V of the Civil Procedure Code need not necessarily be one supplied by the party. He may be a person in the village knowing the defendant.

No identifier is required for a service of a notice upon a respondent in an appeal pending in the High Court. An appeal cannot be dismissed for an appellant not supplying an identifier.

Messrs. *Saroshi Charan Mitter* and *Baikunth Nath Mitter*, for the Appellant.

Mr. *Narendra Nath Sen*, for the Respondents.

ORDDR.—This matter has been placed before us for orders on account of the notice of the appeal not having been served on the respondent No. 10. On the first occasion the serving peon returned the notice unserved on the 22nd of July 1921, with a report saying "since the Parwana was made over to me no identifier came (to me)" But apparently the peon did not make any effort to find out the respondent and it appears that he did not even go to the village where the respondent resides. On the second occasion, however, the peon did go to the village and reports that he searched for the indentifier, but could not find him; and as he did not know either the respondent or his residence, he was unable to serve the Parwana. The address of the respondent was given in the notice and it is the same as was given in the summons when the respondent in question was a defendant in the Trial Court and that summons was served upon him in accordance with that address. The peon does not state that he made any effort to find out the respondent at the given address of the respondent. Perhaps he would easily have found out the respondent (the address being correct), if he had taken the least pain to enquire from the witnesses whom he names in the service return as being present at the time when he went to the village. It is noteworthy that he does not say that the witnesses did not know the respondent or his residence.

Under the law no obligation is cast upon the appellant to supply an identifier. Order V, rules 10 to 17, lays down the modes in which service of summons upon defendants has to be effected. Rule 18 says that "when a summons has been served under rule 16 (that is, by delivering or tendering a copy of the summons to the defendant personally, etc.) the serving peon shall endorse, etc., on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons." The identifier referred to herein need not necessarily be one supplied by the party. He may be a person in the village knowing the defendant. Even if any identifier was required for the service of a summons upon a defendant, no identifier is certainly required now for a service of a notice upon a respondent in an appeal pending in the High Court. Rule 14, Chapter I, of the General Rules and Circular Orders, originally required the affidavit of the person (if any) identifying the defendant or respondent served with a process of the Court; but as early as March 1917, the word "respondent" in that rule was deleted, so that no longer any affidavit of an identifier is required in case of a service of processes upon respondents. Rule 25, Chapter I, bearing upon the point was also omitted from the General Rules and Circular Orders. Under Order XLI, rule 18, an appeal against the respondent can only be dismissed on the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice. There is no rule to dismiss the appeal on account of the failure of the appellant to give an identifier. Under Order IX, rule 5, a suit may be dismissed on account of the plaintiff, who applies for

the issue of fresh summons, failing to satisfy the Court that he used his best endeavours to discover the residence of the defendant who was not served. In the present case that rule does not apply, as the appellant has supplied address in which the residence of the defendant has been given.

The appeal, therefore, at this stage cannot be dismissed and it must proceed. The appellant is ready to deposit fresh *talbana* and the learned Vakil appearing on his behalf has also expressed his desire to take necessary steps to have the notice served upon the respondent. We direct that the necessary cost be deposited by the appellant by to-morrow. The Court below is directed to see that every effort is made by the peon of that Court to serve the notice upon the respondent. The appellant will assist the peon in this respect. It is unlikely that in this important case the respondent, who has succeeded in the Court below, will ignore the notice and will allow the appeal to go *ex parte*.

J. P. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATIONS NOS. 7 AND 8 OF 1920.

April 29, 1921.

Present :—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

EMNABAI, WIDOW OF **HASSAN,** AND OTHERS —APPLICANTS

versus

FAKIR MAHOMED AND OTHERS— OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXII, r. 7, Sch. II, paras. 15, 16—Jurisdiction, facts ousting, must be patent—Minor—Reference to arbitration on behalf of minor—Sanction of Court not obtained—Reference voidable—Objection to legality of reference and award overruled—Judgment pronounced in accordance with award—Appeal—Revision—Award, finality of—Revision where another remedy available—Court's duty where minors are concerned.

Facts ousting jurisdiction must be patent on the face of the record before it can be predicated of a Court that it has exercised a jurisdiction not vested in it by law in terms of clause *a)* to section 115, Civil Procedure Code. [p. 51, col. 2.]

A reference to arbitration on behalf of a minor without the sanction of the Court is not void but only voidable and it is entirely within the province of the Court, before which an award is filed in pursuance of such a reference, to determine whether the reference was void from its inception. But where an objection as to the legality of the award on the ground of absence of Court's sanction is taken and the Court holds the reference and award to be valid, its decision, even if it is erroneous, is on a point of law and as such is not open to revision, inasmuch as section 115 of the Civil Procedure Code is not directed against conclusions of law or facts in which the question of jurisdiction is not involved. [p. 51, col. 2.]

Balakrishna Udayar v. *Vasudeva Aiyar*, 40 Ind. Cas. 650; 19 Bom. L. R. 715; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W. N. 628; 40 M 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.), followed.

Merali Visram v. *Sheriff Devji*, 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017 and *Ghulam Hussein* v. *Sakinabai*, 19 Ind. Cas. 374; 6 S. L. R. 146, distinguished.

The words "being otherwise invalid" at the end of sub-clause (1) (*c*), paragraph 15, Schedule II, Civil Procedure Code, are intended to give effect to the principle of finality in cases of arbitration, and where the judgment of the Court is pronounced according to the award under paragraph 16 (2), not only there is no appeal but there is no revision as well. Otherwise the principle of finality of awards would be destroyed. [p. 52, cols. 1 & 2.]

Ghulam Khan v. *Muhammad Hassan*, 29 C. 167; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 6 C. W. N. 226; 25 P. R. 1902; 8 Sar. P. C. J. 154 (P. C.), *Lutawan* v. *Lachiya*, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57, *Ajodhya Prasad* v. *Badarul Husain*, 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427, *Batcha Sahib* v. *Abdul Gunny*, 21 Ind. Cas. 308; 38 M. 256; 14 M. L. T. 314; 25 M. L. J. 507; (1914) M. W. N. 142, referred to.

Srikishin-Rochumal v. *Relumal-Pariomal*, 34 Ind. Cas. 845; 9 S. L. R. 183, distinguished.

A High Court will be slow to exercise its powers of revision, unless the party applying to the Court has no other remedy. [p. 53, col. 1.]

Irbasappa v. *Basangowda*, 57 Ind. Cas. 432; 22 Bom. L. R. 746; 44 B. 595, relied upon.

When an order is made on a reference to arbitration, and some of the parties concerned are minors, the Court should endeavour to ascertain, as far as possible, that the reference is for the benefit of the minors, as in the case of compromise, to which minors are parties. [p. 53, col. 1.]

Applications for revision against an order of Dr. De Souza, Additional Judicial Commissioner, Sind, dated the 15th October 1919.

EMNABAI v. FKIR MAHOMED.

Mr. *T. G. Elphinston*, for the Applicants.

Mr. *Dipchand Chandumal*, for the Opponents.

JUDGMNET.

RAYMOND, A. J. C.—This is an application in revision against the order of Dr. De Souza, A. J. C., directing an award to be filed.

One Hassan Eso died in October 1916, leaving him surviving his widow, Emnabai, and two minor daughters, the present applicants. A woman, Zulekhan, alleged that she also was the legitimate wife of Hassan Eso, and that her two minor sons were his legitimate issue. These two minor sons, by their next friend, the Nazir of this Court, filed two suits Nos. 86 and 345 of 1917, the former against Emnabai and her daughters and their own mother, and the latter against the same defendants and the brothers of Hassan Eso. In the first suit plaintiffs prayed for a declaration that they were the sole heirs of Hassan Eso and entitled to the whole property left by him at his death, subject to the maintenance and residence of the defendants and the marriage expenses of Emnabai's daughters, and the second suit was for partition of the property which was in joint possession of Hassan Eso and his brothers. Whilst the suits were pending, references to arbitration were filed in both of them, the parties agreeing to refer their disputes to their respective Pleaders. Both the references bear the same date. In Suit No. 86 the reference does not purport to have been signed on behalf of the minor daughters of Emnabai, and the order of the Court theron is "order of reference to the arbitration as regards all the parties including those who are minors." In Suit No. 345 the reference is signed by Emnabai on behalf of her minor daughters and an order of reference appears also thereon. The arbitrators filed their awards in both the suits, and the substantial objection raised in the lower Court to them was that they were invalid as the Court's sanction to the agreement to refer had not been previously obtained on behalf of the minors concerned and the absence of this sanction rendered the reference null and void and consequently the award was itself nullity. The learned Additional Judicial Commissioner was of opinion that there was no substance in the objection raised and directed the awards in both the suits to be filed. It is against this order that the present application under section 115, Civil Procedure Code, is filed and Mr. Dipchand for the opponents has taken the preliminary objection that the revision application is incompetent. Mr. Elphinston for the applicants has argued that the case is one which comes under clause (*a*) to section 115, Civil Procedure Code, inasmuch as the award being a nullity, the lower Court had no jurisdiction to take action on it and by doing so has exercised a jurisdiction not vested in it by law. Now I take the law to be that facts ousting jurisdiction must be patent on the face of the record before it can be predicated of a Court that it has exercised a jurisdiction not vested in it by law in terms of clause (*a*) to section 115, Civil Procedure Code. Even if Mr. Elphinston's argument was correct that there could be no valid reference to arbitration unless the Court had sanctioned the reference on behalf of the minors, that would not make the reference void but only voidable and it would be entirely within the province of the Court, which made the order of reference, to determine whether the reference was void from its inception. The point before the lower Court was whether a reference purporting to be signed on behalf of minors without obtaining the previous sanction of the Court to the execution of reference was valid, and consequently the award thereon. It may be that the Court was in error in holding that the reference and the awards were valid, but that would amount at most to an erroneous decision on a point of law. But as has often been remarked, Judges have jurisdiction to decide wrongly as well as rightly, and an error of law, does not justify interference by the High Court in its revisional jurisdiction. As said by the Privy Council in *Balakrishna Udayar* v. *Vasudeva Aiyar* (1), section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it; it is not directed against conclusions of law or facts in which the question of jurisdiction is not

(1) 40 Ind. Cas. 650; 19 Bom. L. R. 715; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W. N. 623; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

involved. Mr. T. G. Elphinston relied on the case of *Meroli Viram* v. *Sheriff Devji* (2) as an instance of interference in revision where a Court has exercised jurisdiction not vested in it by law. However, a perusal of the judgment shows this case to be an exceptional one, and the errors were patent on the face of the record and the procedure was entirely unauthorized by law from first to last. In *Ghulam Hussein* v. *Sakinabai* (3), the other case relied upon by Mr. Elphinston, the High Court interfered in revision, as the lower Court "had usurped a function, by its order appointing a Commissionor, which the parties had appointed the arbitrator to perform," and it held that such an order was not an order under section 15 of the Indian Arbitration Act.

A second objection to the entertainment of this application in revision arises on a consideration of paragraphs 15 and 16 of the Second Schedule, Civil Procedure Code. Paragraph 15 enumerates cases where an award may be set aside, and the words "being otherwise invalid" at the end of sub-clause (1) (*c*), empowering a Court to set aside an award on this ground, do for the first time appear in the Code of 1908 and were intended to supersede the Calcutta and other decisions, which allowed an appeal from a decree based on an invalid award, and to give effect to the principle of finality in cases of arbitration enunciated by their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (4), as observed in Mulla's Civil Procedure Code. If an award is, therefore, invalid in law, a party has the right to impeach it and ask the Court to set it aside under paragraph 15, but if this application is refused and judgment is pronounced according to the award, then under paragraph 16 no appeal can lie from the decree on the judgment, except so far as the decree is in excess of or not in accordance with the award. In the present case it is not alleged, much less proved, that the decree is in excess of or not in accordance with the award, an appeal, therefore, certainly does not lie. Is an application for revision then permissible? If an application for revision were allowed in cases of the nature before us, then the principle of finality, which is sought to be introduced in awards, would be destroyed. In the Privy Council case of *Ghulam Khan* v. *Muhammad Hassan* (4) their Lordships express a strong opinion in favour of finality of awards. And in the case of *Lutawan* v. *Lachiya* (5) the Chief Judge in his judgment at page 74* observed: "it seems to me that it was the clear intention of the Legislature by this amendment of the Code that objections to the award on the ground of invalidity from any cause whatever should be decided by that Court (the Court making the order of reference) and by no other Court." This view was accepted in a later decision in the case of *Ajodhya Prasad* v. *Badarul Husain* (6), where it was held that in view of paragraphs 15 and 16, Schedule II, Civil Procedure Code, the question whether there had been a valid reference to arbitration was a question reserved for the decision of the Trial Court and ought not to be made the subject of the revisional jurisdiction of the High Court. In the case of *Batcha Sahib* v. *Abdul Gunny* (7) it was held that when an application is made to set aside an award and judgment is pronounced according to the award, the judgment so pronounced is final under clause 16 (2) and that a revision petition to set aside an award is more objectionable than an appeal.

Mr. Elphinston laid great stress on the judgment in the case of *Srikishin Rochumal* v. *Kelumal Pariomal* (8), as indicating that the High Court could interfere under section 115, Civil Procedure Code, to rectify the proceedings of the lower Court even when a judgment is given in terms of the award. It must be noted that the circumstances under which the High Court interfered in this case are essentially different from those in the present case and may be gathered from the remarks at page 18† of the judgment. The High Court held that revision of the proceedings of the lower Court was not forbidden by *Ghulam Khan's*

(2) 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017.

(3) 19 Ind. Cas 374; 6 S. L. R. 146.

(4) 29 C. 167; 29 I. A. 51; 12 M. L. J. 77; 4 Bom L. R. 161; 6 C. W. N. 226; 25 P. R. 1902 (P. C.); 8 Sar. P. C. J. 154.

(5) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

(6) 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427.

(7) 21 Ind. Cas. 308; 38 M. 256; 14 M. L. T. 314; 25 M. L. J. 507; (1914) M. W. N. 142.

(8) 34 Ind. Cas. 845; 9 S. L. R. 183.

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†Page of 9 S. L. R.—[*Ed.*]

case (4) in cases where the Trial Court, *after the award has been delivered* to it, commits a material irregularity by the adoption of a procedure opposed to law, and that revision on such grounds does not impugn the award but rather the procedure of the Court in dealing with the award. In the present case it is the award that is sought to be impugned, and not the procedure of the Court in dealing with the award after presentation to it.

Lastly, in this case it must be observed that the applicants are not without a remedy by suit, and in my opinion it is this remedy that they should have adopted. In the case of *Irbasappa* v. *Basangowda* (9) it was laid down that the High Court will be slow to exercise its powers of revision, under section 115, Civil Procedure Code, unless the party applying to the Court has no other remedy. It will not exercise these powers where the proceedings which are sought to be revised are purely summary proceedings which do not finally decide the disputes between the parties.

On all these grounds I am of opinion that the preliminary objection that the application for revision is incompetent must be upheld and the applications dismissed with costs.

In conclusion I would observe that when an order is made on a reference to arbitration, and some of the parties concerned are minors, the Court should endeavour to ascertain, as far as possible, that the reference is for the benefit of the minors, as in the case of a compromise, to which minors are parties.

KENNEDY, J. C.—I agree.

S. D. *Application dismissed.*

(9) 57 Ind. Cas 432; 22 Bom. L. R. 746; 44 B. 595.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 5 OF 1921.

December 19, 1921.

Present:—Mr. Hallifax, A. J. C., and Mr. Dhobley, A. J. C.

R. B. Seth JIWANDAS AND ANOTHER—APPLICANTS—APPELLANTS

versus

Musammat JANKI—NON-APPLICANT—RESPONDENT.

Court of Wards—Guardian, simple money-bond executed by—Acknowledgment of pre-existing debt—Liability of minor—Personal decree—Arrest—Civil Procedure Code (Act V of 1908), s 56—C P Court of Wards Act (XXIV of 1899), s. 31—Ratification—Mortgage—Personal liability of mortgagor.

A decree for the payment of money can be granted on a simple money-bond executed by the guardian of a defendant during his minority for an antecedent debt due by him, which could have been recovered from his estate at the time [p. 56, col. 2; p. 57, col. 1.]

The guardian of a minor as also the Court of Wards cannot create a personal liability in the ward, but he has a right to acknowledge a pre-existing liability on the part of the ward in respect of which a decree could be passed and for this to execute a bond on the basis of which a decree against the minor may be passed [p. 56, col. 2; p. 57, col. 1.]

Muhammad Mumtaz Ali Khan v. *Farhat Ali Khan*, 23 A. 394 at p 404; 5 C. W. N. 881; 28 I. A. 190; 8 Sar. P. C. J. 85 (P. C.), *Waghela Rajsanji* v. *Shekh Masludin*, 11 B 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P C. J. 16; 6 Ind. Dec (N. S.) 364 (P. C.), *Gulab Singh* v. *Raja Gokuldas*, 19 Ind. Cas. 521; 9 N. L. R 117; 17 C. L. J. 6 9; 17 C. W. N. 918; 15 Bom L R. 613; (1913) M. W. N 542; 14 M. L. T. 55; 40 C. 784; 25 M. L. J. 179; 40 I. A. 117 (P. C.), referred to.

Waghela Rajsanji v. *Shekh Masludin*, 11 B. 551; 14 I. A 89; 11 Ind Jur 315; 5 Sar P. C. J. 16; 6 Ind Dec (N. S.) 364 (P. C.), *Tukaram Manaji* v. *Ramchandra Hari Peshkar*, 2 N. L. R. 25, *Jhitibai* v. *Tejmal*, 4 Ind Cas. 35 13 N. L. R. 109 *Subramania Ayyar* [*Krishnaswami Ayyar*] v *Arumuga Chetty*, 26 M. 330, *Sobhanadri Appa Rau* v *Sriramulu*, 17 M. 221; 6 Ind. Dec (N S.) 152, *Bachubai* v. *Shamji Jadowji*, 9 B. 536 at p. 551; 10 Ind Jur. 222; 5 Ind. Dec. (N. S.) 357, *Indur Chunder Singh* v. *Radhakishore Ghose*, 19 C. 507; 19 I. A. 90; 6 Sar. P. C. J. 185; 9 Ind. Dec. (N S.) 782, distinguished.

A personal or money-decree does not necessarily carry with it a right to arrest the judgment-debtor. [p. 55, col, 2; p. 56, col. 1; p. 57, cols. 1 & 2.]

Per *Hallifax, A. J. C.*—The powers of a Court of Wards over the property of a ward are the ordinary powers of the guardian of a minor, supplemented by certain additional powers conferred by the C. P. Court of Wards Act, and there is nothing in that Act conferring power on the Court of Wards to bind the ward's estate by a simple money-bond, so that a decree for the payment of money could be obtained on it, its powers in this respect being co-extensive with those of an ordinary guardian of a minor. [p. 56 col. 2.]

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Section 31 of the Court of Wards Act does not forbid ratification of agreements by a ward, after restoration of his estate, made on his behalf by the Court of Wards while the estate was under its management, as the section deals only with promises made by the ward personally. [p. 57, col. 1.]

In every mortgage there is a personal covenant to pay, unless the contrary is expressly stated or appears by necessary implication from the terms of the bond. Where there is no express covenant, that necessary implication arises out of the terms of most foreclosure and many usufructuary mortgages, but not out of those of a mortgage for sale. [p. 55, col. 1.]

Ram Narayan Singh v. *Adhindra Nath Mukerji*, 38 Ind. Cas. 932; 44 C. 388; 21 M. L. T. 12; 15 A. L. J. 107; (1917) M. W. N. 94; 32 M. L. J. 39; 25 C. L. J. 121; 21 C. W. N. 383; 19 Bom. L. R. 194; 44 I. A. 87 (P. C.), relied upon.

The term "personal decree," though frequently used in commentaries, is not a statutory term and it is not every personal decree that includes the right to arrest a judgment-debtor, for example, a personal decree when passed against a woman does not involve any liability to arrest. [p. 55, col. 2; p. 56, col. 1.]

There is no provision of law which would protect a judgment-debtor from arrest under a decree for the payment of money properly passed against him, solely on the ground that the decree was based on a document executed on his behalf by his guardian during his minority. [p. 56, col. 2; p. 57, col. 1.]

Per *Dobbley*, A. J. C.—The proposition that no money-decree is possible which does not carry with it a right to arrest the judgment-debtor is not correct. There are some decrees in which that right does not exist, the remedy of the decree-holder being only against the property of the judgment-debtor. A money-decree against a female or against the legal representative of the deceased debtor are instances in point. [p. 57, cols. 1 & 2.]

Appeal against a decree of the Additional District Judge, Hoshangabad, dated the 16th November 1920, in Civil Suit No. 15 of 1911.

Dr. *H. S. Gour*, Messrs. *J. C. Ghosh* and *J. Sen*, for the Appellants.

Mr. *V. Bose*, for the Respondent.

JUDGMENT.

HALLIFAX, A. J. C.—The only question involved in this appeal is whether the plaintiffs, who hold a decree for sale on a mortgage and have sold the mortgaged property in execution, are entitled to a money decree under Order XXXIV, rule 6 of the Code of Civil Procedure. After assuming the management of the defendant's estate the Court of Wards acknowledged a debt due to the plaintiffs by the grandfather and father of her deceased husband, and as security for that debt executed the mortgage in suit in their favour on her behalf. The mortgage suit was filed after the Court of Wards had relinquished the management of the estate. In the lower Court it has been held that the plaintiffs are not entitled to a money decree, firstly, because there was in the mortgage-deed no personal covenant to pay the mortgage-money, and secondly, because the Court of Wards could not enter into any contract, the result of which would be to throw a personal liability on the ward. Against this decision the plaintiffs have appealed.

The view taken by the learned Additional District Judge is supported by the following passage in the judgment of Drake-Brockman, J. C., in *Gulab Singh* v. *Raja Seth Gokuldas* (First Appeal No. 29 of 1906): "There seems to be no good reason for refusing to pronounce in this litigation upon the question whether the defendants will be personally liable for any deficit in the sale-proceeds of the mortgaged property. The Court of Wards had all the ordinary powers of a guardian over a ward's property, supplemented by certain additional powers given by Statute; *Muhammad Mumtaz Ali Khan* v. *Farhat Ali Khan* (1). But those additional powers do not include binding a ward by a personal covenant, and it is well-settled that an ordinary guardian cannot contract in the name of a ward so as to impose on him a personal liability; *Waghela Rajsanji* v. *Shekh Masludin* (2). I, therefore, hold that it will not be open to the plaintiffs hereafter to obtain a decree under section 90, Transfer of Property Act, against the defendants personally."

The facts of that case were very similar to those before us now, and the mortgage there also was security for a debt due by the ward at the time of its execution. If the view expressed is to be accepted as correct, the present appeal must be dismissed. The case went before the Privy Council in appeal and the judgment of their Lordships, reported as *Gulab Singh* v. *Raja Gokuldas* (3) confirmed that of this Court. This

(1) 23 A. 394 at p. 404; 5 C. W. N. 881; 28 I. A. 190; 8 Sar. P. C. J. 85 (P. C.).

(2) 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.).

(3) 19 Ind. Cas. 521; 9 N. L. R. 117; 17 C. L. J. 619; 17 C. W. N. 918; 5 Bom. L. R. 613; (1913) M. W. N. 542; 14 M. L. T. 55; 40 C. 784; 25 M. L. J. 179; 40 I. A. 117 (P. C.).

particular point, however, did not and could not arise before their Lordships, as the appeal before them was by the defendant in whose favour it had been decided by this Court. The appellants' learned Counsel was, therefore, right in saying that the view of the learned Judicial Commissioner could not be said to have received the approval of their Lordships and that the question was still open and required re-consideration.

It was pointed out by their Lordships of the Privy Council in *Ram Narayan Singh* v. *Adhindra Nath Mukerji* (4) that, in considering the question if there is any personal liability on the part of a mortgagor for payment of that portion of the loan and interest which remains unsatisfied out of the mortgaged property, "it must be borne in mind (*i*) that a loan *prima facie* involves such a personal liability; (*ii*) that such a liability is not displaced by the mere fact that security is given for the re-payment of the loan with interest; but (*iii*) that the nature and terms of such security may negative any personal liablity on the part of the borrower." In every mortgage there is a personal covenant to pay, unless the contrary is expressly stated or appears by necessary implication from the terms of the bond. Where there is no express covenant, that necessary implication arises out of the terms of most foreclosure and many usufructuary mortgages, but not out of those of a mortgage for sale. There are in fact in this, as in practically all simple mortgages, two separate contracts engrossed on one piece of paper. One is a simple money-bond, reciting the fact of the loan and the liability of the debtor to re-pay it by a certain time and under certain conditions. The other is a mortgage bond hypothecating certain immoveable property as security for that re-payment. This becomes clearer when it is remembered that two different periods of limitation are allowed for the enforcement of the two remedies. Now we are no longer concerned with the mortgage-bond at all. For all present purposes the suit can be regarded entirely as one filed by the plaintiffs against the defendant after the relinquishment of the management of her estate by the Court of Wards, on a simple money-bond executed on her behalf in their favour by the Court of Wards during that management, for a sum then due by her for which a decree for the payment of money could have been obtained against her at that time and executed by the attachment and sale of her property. The question for consideration then is narrowed down to this. Can a decree for the payment of money be granted in such a suit?

The issue has been clouded in argument by the use of the term "personal decree." This is frequent in commentaries but, as far as I am aware, is not to be found in the text of the Civil Procedure Code or in any published judgment. The terms there used are "a decree for the payment of money" and "personal liability" and "a decree against the defendant personally." Used in the sense of a decree enforcing a personal liability or a decree for the payment of money, the expression "personal decree" is un-objectionable, but, as often happens with convenient phrases, its restricted sense is forgotten and arguments are based on its own wider meaning. Here, for instance, because the decree claimed by the plaintiffs was called a "personal decree," it was assumed that their claim was for a decree which could be executed by the personal arrest of the defendant. It was then asserted that it was illegal and impossible to arrest a judgment-debtor on a decree for the payment of money based on a document executed by his guardian during his minority, and also that every "personal decree" must include the right to arrest the judgment-debtor. The necessary result of these premises, if they were correct, would, of course, be that no decree for the payment of money could be passed in such a case as this is. The premises are, however, clearly incorrect. The plaintiffs could not ask for a decree empowering them to arrest the defendant, because section 56 of the Civil Procedure Code exempts all women from arrest in execution of a decree for the payment of money, and they did not in fact ask for such a decree. Further, I am aware of no provision of law which would protect a judgment-debtor from arrest under a decree for the payment of money properly passed against him, solely on the ground that the decree was based on a

(4) 38 Ind. Cas. 932: 44 C. 388; 21 M. L. T. 12; 15 A. L. J. 107; (1917) M. W. N. 94; 32 M. L. J. 39; 25 C. L. J. 121; 21 C. W. N. 393; 19 Bom. L. R. 194; 44 I. A. 87 (P. C.).

document executed on his behalf by his guardian during his minority. And finally section 53 of the Code furnishes an example, amongst others, of the possibility of what has been called a "personal decree" which does not involve any liability to arrest.

I am in entire agreement with the *dicta* quoted above in the passage from the judgment of Drake-Brockman, J. C., in respect of the powers of the Court of Wards over the property of a ward. They are the ordinary powers of the guardian of a minor, supplemented by certain additional powers conferred by Act XXIV of 1899 (C. P. Court of Wards). And there appears to be nothing in that Act conferring power on the Court of Wards to bind the ward's estate by a simple money-bond, so that a decree for the payment of money could be obtained on it. If, therefore, the guardian of a minor has not that power, the Court of Wards cannot have it. The question for consideration is then still further narrowed down to this. Can a decree for the payment of money be granted on a simple money-bond executed by the guardian of a defendant during his minority for an antecedent debt due by him, which could have been recovered from his estate at the time?

The learned Advocate for the appellants, in urging that this question is to be answered in the negative, relies on the ruling of their Lordships of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin* (2), on which the judgment of this Court in the case quoted above was based, as also those in *Tukaram Manaji* v. *Ramchandra Hari Peshkar* (5) and *Jhitibai* v. *Tejmal* (6). But what was there laid down by their Lordships is that the guardian cannot *create* a personal liability in the ward. Here the personal liability was already in existence, and the execution of the bond did little more than extend the period of limitation. Their Lordships conceived "that it would be a very improper thing to allow the guardian to make covenants in the name of the ward, so as to impose a personal liability upon the ward." The covenant made by the guardian here did not impose any personal liability on the ward, but merely confirmed an existing liability.

(5) 2 N. L. R. 25.
(6) 41 Ind. Cas. 85; 13 N. L. R. 109.

In the case of *Subramania Ayyar* [*Krishnaswami Ayyar* v. *Arumuga Chetty* (7) the Privy Council ruling was distinguished in the same way by the High Court of Madras. In granting a decree for money to the extent of the defendant's share in the ancestral estate on a promissory note executed on his behalf during his minority by his mother the learned Judges, Sir Arnold White, C. J., and Mr. Justice Benson said: "At the time of the execution of the note the defendant's share of the ancestral estate was liable in respect of the original debt. His guardian had authority to acknowledge this liability, provided it was not barred by limitation. See the case of *Sobhanadri Appa Rau* v. *Sriramulu* (8). The Privy Council cases relied on by the appellant, *Bachubai* v. *Shamji Jadowji* (9), *Indur Chunder Singh* v. *Radhakishore Ghose* (10), are not in point. In these cases a guardian purported to contract on behalf of a ward so as to impose a personal liability on the latter, there being no pre-existing liability on the part of the ward at the time the guardian entered into the contract." [The citation of the case of *Bachubai* v. *Shamji Jadowji* (9) appears to be the result of some mistake, as the report of the case begins on page 536 of the Volume and that of the judgment on page 552, and it is not a Privy Council case and has nothing whatever to do with the point under discussion]. The same distinction is to be found in the judgment of Iemay, J. C. in *Tukaram Manaji* v. *Ramchandra Hari Peshkar* (5), and on a careful perusal of that of Stanyon, A. J. C., in *Jhitibai* v. *Tejmal* (6), already mentioned, though the head-note* of the published report of the latter case is misleading.

The defendant also seems to be liable from another point of view. After her estate had been restored to her by the Court of Wards, she executed the document filed as Exhibit P. 2, by which she agreed to sell the mortgaged property and other property to the plaintiffs in full satisfaction of the debt then due on the mortgage. This agreement

(7) 26 M. 330.
(8) 17 M. 221; 6 Ind. Dec. (N. S.) 152.
(9) 9 B. 536 at p. 551; 10 Ind. Jur. 222; 5 Ind. Dec. (N. S.) 357.
(10) 19 C. 567; 19 I. A. 90; 6 Sar. P. C. J. 185; 9 Ind. Dec. (N. S.) 782.

*Head-note of 13 N. L. R.—[*Ed.*]

fell through, but it is an express promise to pay the debt, though in a particular way, and amounts to a ratification of the personal liability. Such a ratification is not forbidden by section 31 of the Court of Wards Act, as that section deals with promises made by the ward personally and not with those made by the Court of Wards on behalf of the ward. The result is that the order of the lower Court is to be set aside and the plaintiff must be given a decree ordering the defendant to pay them the balance still due on the mortgage-decree. The costs of the proceedings in both Courts will be paid by the respondent.

DHOBLEY, A. J. C.—I agree with my learned brother that the appeal should be allowed and the plaintiffs given a decree for the balance still due on the mortgage-decree. There was already an existing debt which the creditors could have realised from the property of the ward after obtaining a decree against her. The debt was of such a nature as to make the property in her hands liable for its satisfaction. The Court of Wards by executing a simple money bond for that debt did not in any way increase the ward's liability, but merely continued it, by acknowledging it and extending the period of limitation for its recovery. I may, however, observe that for the purposes of the present case it is unnecessary to decide or even to express an opinion on the question as to whether in such cases the creditor can, on the minor attaining majority or on the Court of Wards releasing the management of the ward's estate, proceed against him personally, that is, by his bodily arrest, or whether his remedy will be confined to his proceeding only against the property. This question does not arise in the present case. The creditor has not asked and could not ask for the judgment-debtor's arrest, as she is a female and, therefore, exempt from arrest. A decision on this general question either way does not in the least affect the result of the present appeal. The proposition put forward by the respondent's learned Advocate that no money-decree is possible which does not carry with it a right to arrest the judgment-debtor, is not correct. There are some decrees in which that right does not exist, the remedy of the decree-holder being only against the property of the judgment-debtor. A money-decree against a female or against the legal representative of a deceased debtor are instances in point. In the last case the creditor can proceed only against the assets of the deceased in the possession of the judgment-debtor which he has not duly applied, except in the special case of his failing to satisfy the Court of such due application.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 1 OF 1920.

August 27, 1920.

Present:—Sir Asutosh Mookerjee, KT, Acting Chief Justice, Mr. Justice Fletcher and Mr. Justice Richardson.

ANILABALA CHOWDHURANI—APPELLANT

versus

DHIRENDRA NATH SAHA—RESPONDENT.

Lunacy Act (IV of 1912), ss. 37, 38, 62—Lunacy—Inquisition application—Jurisdiction—High Court and District Court—Civil Procedure Code (Act V of 1908), s. 20—"Reside," meaning of—Animo residendi.

In a case where an alleged lunatic is subject to the jurisdiction of a High Court under section 37 of the Lunacy Act, the District Court has no jurisdiction under section 62, even though the person may reside within the local limits of the jurisdiction of the District Court. The jurisdictions of the High Court and the District Court are not concurrent, but the jurisdiction of the High Court excludes that of the District Court [p. 60, col. 1.]

An alleged lunatic lived in Calcutta during nine or ten months on an average every year and two or three months at Pabna at his ancestral house. At the time of making an application for his inquisition in lunacy in the Court of the District Judge of Pabna he was in Pabna ;

Held, that the alleged lunatic had two places of residence, one in Calcutta and the other in Pabna, but that as resident in Calcutta he was subject to the jurisdiction of the High Court under section 38 of the Lunacy Act and that he did not cease to be subject to the jurisdiction of the Calcutta High Court by his going to Pabna and that, consequently, the District Court at Pabna had no jurisdiction under section 62 to entertain the proceedings for his inquisition, [p. 63, col. 2.]

Sophia Orde v. *Skinner*, 3 A. 91 at p. 101; 7 I. A. 196; 7 C. L. R. 295; 3 Suth. P. C. J. 788; 4 Ind. Jur 476; 4 Sar. P. C. J. 178; 2 Ind Dec. (N. S.) 28 (P. C.); *Srinivasa Moorthy* v. *Venkatavarada Ayyangar*, 11 Ind Cas. 447; 34 M 257; 15 C. W. N. 741; 8 A. L. J. 774 13 Bom. L. R. 520; (1911) 2 M. W. N. 375; 14 C L. J. 64; 21 M. L. J. 669 ; 10 M. L. T. 263 (P. C.) relied on.

Grimstone, Ex parte, (1772) Ambl. 706; 27 E. R. 458, *Burford (Corporation of)* v. *Lenthall,* (1743) 2 Atk. 551; 26 E. R. 731, *Fitzgerald, In re,* (1805) 2 Sch. & Lef. 432; 1 Ll. & G. 20, *Manikchund* v. *Johnson,* (1785) Morton 131; 1 Ind. Dec. (o s.) 954, *Vencataspur* v. *East India Co.,* (1816) 2 Strange (N. c.) 199; 5 Ind. Dec. (o. s.) 336, *Maharanee of Lahore, In the matter of,* (1848) Taylor 428; 2 Ind. Dec. (o s.) 256, *R.* v. *North Curry,* (1825) 4 B. & C. 953 at p. 959; 107 E R. 1313; 7 D. & R. 424; 4 L. J. (o s) K. B. 65, referred to.

The term "residence" may be used in two senses, the one denoting the personal habitual habitation, the other the constructive, technical and legal habitation. When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides: the places of his personal and legal residence are the same. When, on the other hand, a person has no permanent habitation or family, but dwells in different places as he happens to find employment, there can equally be no doubt as to the place where he resides: he must be considered as residing where he actually or personally resides. But some individuals have permanent habitations, where their families constantly dwell, yet they pass great portions of their time in other places; such persons have a legal residence with their families and a personal residence in the other places, and the word "reside" may, with respect to such persons, be used in relation to either their personal or their legal residence. [p. 62, col 1.]

Kumud Nath Roy v. *Jatindra Nath,* 9 Ind. Cas. 189; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399, *Breull, Ex parte, Bowrie, In re,* (1880) 16 Ch. D. 484 at p. 487; 50 L. J. Ch. 384; 43 L. T. 580; 29 W. R. 299, *Ford* v. *Drew,* (1879) 5 C. P. D. 59; 49 L. J. C. P. 172; 41 L. T. 478; 28 W. R. 137; 44 J. P. 58, *Lewis* v. *Graham,* (1888) 20 Q. B. D. 780; 57 L. J. Q. B. 376; 59 L. T. 35; 36 W. R. 574, *Madho Prasad* v. *Walton,* 20 Ind. Cas 370; 18 C. W. N. 1050, *Mahomed Shuffli* v. *Laldin Abdula,* 3 B. 227; 2 Ind. Dec. (N. s.) 153, *Gosvami Shri* v. *Shri Govardhanlalji,* 14 B 541; 7 Ind. Dec. (N. s.) 825, *Bright* v. *Bright,* 4 Ind. Cas. 419; 36 C 964, *Ram Paul Singh, In re,* 8 C. L. R. 14, *DeDomet, In the matter of,* 21 C. 634 10 Ind. Dec. (N. s) 1053, *Radha Gobinda* v. *Nabadwip Chandra Pal,* 31 Ind. Cas. 10; 19 C. W. N. 1027, *Hawley, In re,* (1866) 1 Daly 533, *Walcot* v. *Botfield,* (1854) Kay 534; 101 R. R. 719; 18 Jur. 570; 2 W. R. 393; 2 Eq. R. 758; 69 E. R. 226, *Fillingham* v. *Bromley,* (1823) Turn. & R. 530; 24 R. R. 136; 37 E. R. 1204, *Moir, In re, Warner* v. *Moir,* (1884) 23 Ch. D 605; 53 L. J. Ch. 474; 50 L. T. 10; 32 W.R. 377, *Wright, In re, Mott* v. *Issett,* (1907) 1 Ch. 231; 76 L. J. Ch 89; 95 L. T. 697, *Douglas* v. *Mayor,* (1853 2 Duer 110, *People* v. *Tax Commissioner,* (1891) 16 N. Y. Sup. 834, *Start* v. *Leonard,* (1875) 37 N. J. L. 732, *Newcomb, In re,* (1907) 192 N. Y. 238 at p 250, *Gulf Railway Co.* v. *Overton,* (1903) 107 S. W 71 at p 79; *Vencatasa* v. *Sashachella,* (1803) 1 Strange (N. c) 146; 5 Ind. Dec. (o. s.) 77, *Duhan* v. *Mendes,* (1809) Morton 147; 1 Ind. Dec. (o s.) 967, *Madoo* v. *Balloo,* (1818) Morton 149; 1 Ind. Dec. (o. s.) 963; *Ramalingam* v. *Sashian,* (1813) 2 Strange (N. c.) 80. 5 Ind. Dec. (o. s.) 274, *Heatley* v. *Macarthur,* (1823) Morton 159; 1 Ind. Dec. (o. s.) 974; *Ram Lochun* v. *Guddadhur,* (1818) 2 Morley 162, 3 Ind. Dec. (o s.) 882, *Ramenderdeb* v. *Kistno Mohan,* (1819) 2 Morley 186; 3 Ind. Dec. (o. s.) 899; *Ward* v. *Hem Turrickchunder,* (1819) 2 Morley 171; 3 Ind. Dec. (o. s.) 888, *Samachurn* v. *Hurrynath Roy,* (1821) Morton 176 *note*; 1 Ind Dec. (o s.) 936, *Khamah Dossee* v. *Sibpersaud,* (1836) Morton 191; 1 Ind. Dec. (o. s) 989, *Golucknauth* v. *Raj Kissen,* (1841) Fulton 401; 1 Ind Dec. o. s. 883, *Nishadiney* v. *Kali Kristo,* (1864) Coryton 24, *Srinivasa Moorthy* v. *Vencatavarada Ayyangar,* 29 M. 239; 16 M. L. J. 238; 1 M. L. T. 71, referred to.

The word "residence" should not be construed narrowly as having always a reference to *animo residendi.* In the case of a lunatic it should be interpreted as implying not intelligent residence, but bodily presence [p 63, cols. 1 & 2.]

Whithorn v *Thomas,* (1814) 7 Man. & G. 1; 8 Scott. N. R. 783; 14 L J. C. P. 38; 8 Jur. 1008; 63 R R. 633; 135 E. R. 1, *Edinburgh Parish Council* v. *Local Government Board of Scotland,* (1915) A. C. 717; 84 L. J. P. C. 121; 113 L. T. 50; 79 J. P. 289; 13 L. G. R. 918, *Edinburgh Parish Council* v. *Local Government Board of Scotland,* (1914) S C. 241; 51 Sc. L. R. 192, *Kallonas* v. *Collector of Backergunge (Durant* v. *Chandra Nath),* 11 W. R. 109; 2 B. L. R. 246, referred to.

Letters Patent Appeal against the judgment of Mr. Justice Teunon and Mr. Justice Beachroft, in Appeal from Order No. 139 of 1910, reported as 57 Ind. Cas. 768.

Babu *Mahendra Nath Roy* (with him Babus *D. L. Kastgir, Pramatha Nath Banerjee* and *Tarakeswar Nath Mitter*), for the Appellant.

Babu *Dwarka Nath Chukerbutty* (with him Babus *Prakash Chandra Pakrasi, Bipin Behari Ghose* and *Biraj Mohan Majumdar*, for the Respondent.

JUDGMENT.

MOOKERJEE, A. C. J.—This is an appeal under clause 15 of the Letters Patent from the judgment of the two Judges of a Division Court, who were equally divided in opinion, in the matter of an appeal under section 83 of the Indian Lunacy Act, 1912, from an order made by a District Court in a proceeding for judicial inquisition as to the alleged lunacy of one Dhirendra Nath Saha Chaudhuri. The District Court held that it had no jurisdiction under section 62 to direct an inquisition. Mr. Justice Teunon has held that the view taken by the District Court is correct and that the proceedings should have been instituted under section 37 on the Original Side of this Court. Mr. Justice Beachcroft has held, on the other hand, that the District Court had jurisdiction under section 62 to entertain the application when made and should have exercised the powers vested in it. The solution of the question raised depends upon the true construction of the provisions of the Indian Lunacy Act, 1912,

But before we examine these provisions, it is desirable to set out the facts found by the District Judge, which have not been challenged before us.

The alleged lunatic is a member of a family of Saha Chaudhuries, whose ancestral abode is at Parsadanga in the District of Pabna. The family residence at Parsadanga was partitioned in 1901 between the grandfather of the alleged lunatic and his two co-sharers, and was assigned to the shares of the latter. Gobinda, the grandfather of the alleged lunatic, appears to have entertained an intention at one time to build a suitable family residence at Parsadanga, for his branch of the family; but this was not carried into effect owing to the death of his son Harendra. What actually happened was that Gobinda came to live in Calcutta, where he had a house in Hatkhola. Here he carried on a lucrative business in paddy and grains, and acquired considerable house property in Calcutta. During the last 13 years of his life, he lived in Calcutta, and his grandsons (the alleged lunatic and his brother Surendra) lived with him. Since the death of Gobinda in 1913, his two grandsons have separated from their uncle Jogendra and have continued to live in Calcutta, although they are accustomed to go once or twice every year to Pabna and Parsadanga to look after their landed property. The evidence shows that on an average they lived about nine or ten months every year in their Calcutta house, and about two or three months a year at Pabna and Parsadanga. The womenfolk of the family live in the Calcutta house, and it is only the men who visit the district occasionally. The petitioner Anilabala was married to Dhirendra, the alleged lunatic, about ten years before the commencement of these proceedings. She lived with him only in the Calcutta house, except in March 1917, when she took him to live with her in her father's house at Pabna. There, on the 22nd May 1917, Dhirendra executed a trust-deed in favour of Anilabala. Soon afterwards, his brother Surendra came to Pabna and managed to take him away from Anilabala to his own house. There on the 10th July 1917, Surendra caused Dhirendra to revoke the previous trust-deed and to execute a fresh trust-deed in his own favour. On the 14th August 1917, Anilabala instituted these proceedings in the Court of the District Judge at Pabna under the Indian Lunacy Act, 1912. On that date, Dhirendra was at Parsadanga; but on the next day, apparently as soon as the institution of the lunacy proceedings became known, he hurriedly left in charge of two men and reached Calcutta on the 16th August 1917. The question arises, whether in these circumstances, the District Court had jurisdiction to entertain the application.

The Indian Lunacy Act, 1912, which was enacted to consolidate and amend the law relating to lunacy, repealed the Lunacy (Supreme Courts) Act, 1858, and the Lunacy (District Courts) Act, 1858. The Act is divided into four parts. The first part contains one chapter which deals with preliminary matters. The second part contains two chapters which deal with the reception, care and treatment of lunatics. The third part treats of judicial inquisition as to lunacy, in two separate chapters, devoted respectively to proceedings in lunacy in and outside Presidency towns. The fourth part contains four chapters which deal with miscellaneous matters.

The fourth chapter, which treats of proceedings in lunacy in Presidency towns, begins with section 37. That section lays down that the Court having jurisdiction under the chapter shall be the High Court of Judicature at Fort William, Madras and Bombay. Section 38, sub-section (1), then authorises the High Court to direct an inquisition whether a person *subject to the jurisdiction of the Court*, who is alleged to be lunatic, is of unsound mind and incapable of managing himself and his affairs. Section 43, sub-section (1), authorises the Court, if the alleged lunatic is not within the local limits of its jurisdiction, to direct the inquisition to be made before the District Court within whose local jurisdiction the alleged lunatic may be. It is thus plain that the Legislature contemplated that a person, subject to the jurisdiction of the High Court for purposes of judicial inquisition as to alleged lunacy, may not be within the local limits of the jurisdiction of the Court and may be within the local jurisdiction of a District Court. It will be observed that section 38 does not formulate

the test to be applied to determine whether a person is or is not subject to the jurisdiction of the High Court for purposes of judicial inquisition as to alleged lunacy. In this respect the law is left as it was under sections 1 and 8 of the Lunacy (Supreme Courts) Act, 1858. The fifth chapter, which treats of proceedings in lunacy outside Presidency towns, commences with section 62, which provides as follows :

" Whenever any person, not subject to the jurisdiction of any of the Courts mentioned in section 37, is possessed of property and is alleged to be a lunatic, the District Court within whose jurisdiction such person is residing, may upon application, by order direct an inquisition, for the purpose of ascertaining whether such person is of unsound mind and incapable of managing himself and his affairs."

It is thus plain that before a District Court can institute inquisition as to a person possessed of property and alleged to be a lunatic, it must be established not merely that such person is residing within the jurisdiction of that Court, but also that he is not subject to the jurisdiction of any of the High Courts mentioned in section 37. This confirms the view that the Legislature undoubtedly contemplated, as we have already seen from sections 38 and 43, that a person subject to the jurisdiction of a High Court for the purposes of judicial inquisition as to alleged lunacy may reside within the local limits of the jurisdiction of a District Court. Consequently, in a case where an alleged lunatic is subject to the jurisdiction of a High Court under section 37, the District Court has no jurisdiction under section 62, even though the person may reside within the local limits of the jurisdiction of the District Court. To put the matter briefly, the jurisdictions of the High Court and the District Court are not concurrent, but the jurisdiction of the High Court excludes that of the District Court; on the other hand, if the alleged lunatic resides in two districts, the jurisdictions of the two Courts are concurrent and not mutually exclusive. In this respect, the law as embodied in the preamble and section 2 of the Lunacy (District Courts) Act, 1858, has been substantially reproduced in the Indian Lunacy Act, 1912. It follows, accordingly, that before it can be affirmed that the District Court was competent to entertain the present proceedings, the question must be investigated whether the alleged lunatic was or was not subject to the jurisdiction of this Court within the meaning of section 38 (1).

Section 38, as already stated, does not define the test to be applied to determine whether a person is or is not subject to the jurisdiction of the High Court for the purpose of judicial inquisition as to lunacy. But if we look at the nature of the proceedings, it is clear that they are directed primarily against the person and only secondarily against his property. The right of the Court to learn judicially whether a person is or is not of unsound mind is inferred from the right to his care and custody, provided he is insane. In England, the custody and control of the persons of insanes and idiots was vested in the King as *parens patriæ*; consequently, the authority to direct an inquisition to be taken was also his, but was delegated to the Chancellor as the personal representative of the Crown by means of an official instrument called the "Sign Manual" and was exercised by the Chancellor alone and not by the Court of Chancery: *Grimstone, Ex parte* (1), *Burford (Corporation of)* v. *Lenthall* (2) and *Fitzgerald, In re* (3). The jurisdiction in lunacy originally was thus in theory distinct from the general Chancery jurisdiction under the Great Seal; but once the fact of insanity had been adjudged in any particular case, a further jurisdiction then arose in the Court of Chancery to supervise and control the official conduct of the committee appointed to look after the person and property of the individual who had been adjudged as a lunatic. Consequently, the essential nature of the proceedings is that the authority vested in the Court is exercised in the first instance over the person of the individual concerned. Such authority over the person may, unless otherwise directed by Statute, be ordinarily exercised in the case of residents within the local limits of the jurisdiction of the Court. It may also be exercised over non-residents, if

(1) (1773) Ambl. 706; 27 E. R. 458.
(2) (1743) 2 Atk. 551; 26 E. R. 731.
(3) (1805) 2 Sch. & Lef. 432; 1 L. L. & G. 20.

there is statutory provision to that effect. From this point of view, we may reasonably hold that the authority vested in the High Court under section 38 (1) may be exercised over individuals who reside within the local limits of the jurisdiction of the Court, but it need not be held at the same time that the exercise of the authority is restricted to such persons; for, as is well-known, the Supreme Court had jurisdiction over British subjects even though they were resident in a part of the province beyond the local limits of its jurisdiction: *Manikchund* v. *Johnson* (4), *Vencataspur* v. *East India Co.* (5) and *Mohrranee of Lahore, In the matter of* (6). The two questions which thus require examination in the present case are, *first*, was the alleged lunatic subject to the jurisdiction of this Court for the purposes of section 38 of the Indian Lunacy Act, by reason of residence within its local limits, and, *secondly*, if he was a resident and so subject to the jurisdiction of the Court, did he cease to be subject to the jurisdiction of the Court, when he went to the district of Pabna in March 1917. In our opinion, the first question must be answered in the affirmative and the second in the negative.

It is fairly clear that the alleged lunatic must be deemed to have been a resident of Calcutta and subject to the jurisdiction of this Court within the meaning of section 38 of the Indian Lunacy Act before he went to Pabna in 1917. The terms "reside" and "residence" have been the subject of judicial consideration on diverse occasions and in relation to a variety of circumstances. The expression "to reside" has been held to signify "to dwell permanently or for a considerable time," "to have a settled abode for a time," "to abide continuously," "to have one's domicile or home," "to remain for a long time." The term "residence" has been taken as equivalent to "the abiding or dwelling in a place for some continuance of time," and it has been said that to constitute a residence there must be a settled fixed abode or intention to remain permanently, at least for a time, for business and other purposes. In *R.* v. *North Curry* (7) quoted in *Kumud Nath Roy* v. *Jatindra Nath* (8) it was said that the word "resides," where there is nothing to show that it is used in a more extensive sense, denotes a place where an individual eats, drinks, sleeps, or where his family or his servants eat, drink and sleep *Breull, Ex parte, Bowie, In re* (9), *Ford* v. *Drew* (10), *Lewis* v. *Graham* (11) and *Madho Prasad* v. *Walton* (12). These and other cases show that the term "residence" is an elastic word, of which an exhaustive definition cannot be given; it is differently construed according to the purpose for which enquiry is made into the meaning of the term; the sense in which it should be used is controlled by reference to the object: *Mahomed Shuffi* v. *Laldin Abdula* (13) and *Gosvami Shri* v. *Shri Govardhanlalji* (14). Thus, for instance, under section 3 of the Indian Divorce Act, it was ruled in *Bright* v. *Bright* (15) that in a petition for dissolution of marriage, where the husband and the wife had no permanent residence, the petition could be entertained by the Court having jurisdiction over the place where they last resided together, though for a short period. A narrower view has, on the other hand, been taken as to the true meaning of section 5 of the Indian Insolvent Act, 1848 (11 and 12 Vict. c. 21): *Ram Paul Singh, In re* (16) and *DeDomet, In the matter of* (17). Again, with reference to sections 321 and 322 of the Bengal Municipal Act, 1884, it has been ruled in *Radha Gobinda* v. *Nabadwip Chandra Pal* (18) that a house, in which a person occupied rooms, though he was absent occasionally on duty, might well be regarded as his residence. In this connection, it may be

(4) (1785) Morton 131; 1 Ind. Dec. (o. s.) 954.
(5) (1816) 2 Strange (N. C.) 199; 5 Ind. Dec. (o. s.) 886.
(6) (1848) Taylor 428; 2 Ind. Dec. (o. s.) 256.
(7) (1825) 4 B. & C. 953 at p. 959; 107 E. R. 1313; 7 D. & R. 424; 4 L. J. (o. s.) K. B. 65.
(8) 9 Ind. Cas. 189; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399.
(9) (1880) 16 Ch. D. 484 at p. 487; 50 L. J. Ch. 384; 43 L. T. 580; 29 W. R. 299.
(10) (1879) 5 C. P. D. 59; 49 L. J. C. P. 172; 41 L. T. 478; 28 W. R. 137; 44 J. P. 58.
(11) (1888) 20 Q. B. D. 780; 57 L. J. Q. B. 376; 59 L. T. 35; 36 W. R. 574.
(12) 20 Ind. Cas. 370; 18 C. W. N. 1050.
(13) 3 B. 227; 2 Ind. Dec. (N. S.) 153.
(14) 14 B. 541; 7 Ind. Dec. (N. S.) 825.
(15) 4 Ind. Cas. 419; 36 C. 964.
(16) 8 C. L. R. 14.
(17) 21 C. 634; 10 Ind. Dec. (N. S.) 1053.
(18) 31 Ind. Cas. 10; 19 C. W. N. 1027.

observed that a comprehensive definition based on the Roman Law (Dig. 50, tit. 1, 16, 20, 27, 203; Code tit. 39, 7), was suggested in the case of *Hawley, In re* (19): "a man's residence is the place where his family dwells or which he makes the chief seat of his affairs or interests." But, whatever, definition may be framed or adopted, there is one fundamental point of view which must not be overlooked. The term "residence" may be used in two senses, the one denoting the personal habitual habitation, the other the constructive, technical and legal habitation. When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides: the places of his personal and legal residence are the same. When, on the other hand, a person has no permanent habitation or family, but dwells in different places as he happens to find employment, there can equally be no doubt as to the place where he resides: he must be considered as residing where he actually or personally resides. But some individuals have permanent habitations, where their families constantly dwell, yet they pass great portions of their time in other places; such persons have a legal residence with their families and a personal residence in the other places, and the word "reside" may, with respect to such persons, be used in relation to either their personal or their legal residence. From this point of view, it is manifest that one may have two places of residence, in one of which he resides during one portion of the year, in the other during the remaining portion; what may be said to be the place of personal residence during one portion of the year thus becomes the place of legal residence during the remainder of the year and *vice versa*. Reference may in this connection be made to the judgment of Wood, V. C., in *Walcot* v. *Botfield* (20), where it was ruled that a person may be said to have more than one residence if he has houses in different places at each of which he keeps an establishment, each may be called his residence, though he may not go to one of these places for some years. The same view had been taken by Lord Eldon in *Fillingham* v. *Bromley* (21). Generally, if a person has two or three establishments, every one of them may be called his residence, and not less so because he may not go there for some time. If he keeps an establishment in it, the place is still his residence, and thus he may be said to have his residence in two or three different counties. The question is entirely distinct from that of domicile, which is often wholly independent of actual residence: *Moir, In re, Warner* v. *Moir* (22) and *Wright, In re, Mott* v. *Isett* (23). Instances are not by any means rare in the United States where the Courts have held that a person may have two residences; thus, in *Douglas* v. *Mayor* (24), as the plaintiff lived in New York city in the winter and spring and in the country in summer and autumn, it was ruled that he was entitled to privileges (and consequently subject also to liabilities) on the footing that he had a residence in both places: *People* v. *Tax Commissioner* (25), *Start* v. *Leonard* (26), *Newcomb, In re* (27), *Gulf Railway Co.* v. *Overton* (28). We do not refer to these cases as authorities in any way binding on this Court, but they are helpful as showing that in other jurisdictions the Courts have held that it is not inconsistent with first principles that a man may have two places of residence.

In the case before us there can be no room for serious controversy that the alleged lunatic, who lived in Calcutta during nine or ten months on an average every year and two or three months at Pabna and Parsadanga, had residences in both places, so as to become subject to the jurisdiction of both Courts. As regards the High Court, it is plain that his residence was sufficient to make him subject to its jurisdiction; this conclusion, as appears from a long series of cases, is consistent with what was understood to be the law more than a century ago: *Vencatasa* v. *Sashachella* (29),

(19) (1866) 1 Daly 533.
(20) (1854) Kay 534; 101 R. R. 719; 18 Jur. 570; 2 W. R. 393; 2 Eq. R. 758; 62 E. R. 226.
(21) (1823) Turn. & R. 530; 24 R. R. 136; 37 E. R. 1204.
(22) (1884) 25 Ch. D. 605; 53 L. J. Ch. 474; 50 L. T. 10; 32 W. R. 377.
(23) (1907) 1 Ch. 231; 76 L. J. Ch. 89; 95 L. T. 697.
(24) (1853) 2 Dur. 110.
(25) (1891) 16 N. Y. Sup. 834.
(26) (1875) 37 N. J. L. 732.
(27) (1907) 192 N. Y. 238 at p. 250.
(28) (1908) 107 S. W. 71 at p. 79.
(29) (1803) 1 Strange (N. C.) 146; 5 Ind. Dec. (O. S.) 77.

Duhan v. *Mendes* (30), *Madoo* v. *Balloo* (31), *Ramalingam* v. *Sashian* (32), *Heatley* v. *Macarthur* (33), *Ram Lochun* v. *Guddadhur* (34), *Ramenderdeb* v. *Kistno Mohan* (35) and *Ward* v. *Hem Turrickchunder* (36). There are, moreover, several instances where it was recognized that a man might have two residences, one in Calcutta and the other outside Calcutta: *Samachurn* v. *Hurryno Roy* (37), *Khamah Dossee* v. *Sibpersaud* (38), *Golucknauth* v. *Raj Kissen* (39) and *Nishadiney* v. *Kali Kristo* (40). This was also recognized by the Judicial Committee in *Sophia Orde* v. *Skinner* (41), where Sir James Colvile observed that a man might have more than one dwelling place so as to become subject to the jurisdiction of each of the Courts within whose local jurisdiction his dwelling place was situated. To the same effect is the decision of the Judicial Committee in *Srinivasa Moorthy* v. *Venkatavarada Iyenger* (42) where they affirmed the decision of the High Court of Madras in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar* (43).

We may here advert to a consideration which was mentioned in the course of argument, namely, that residence, its continuance and abandonment, all imply intention: in other words, that residence is acquired by *animo residendi*, is lost by leaving the place where one has acquired a permanent home and removing to another place *animo non-revertendi*, and is gained by remaining in such new place *animo residendi* [*Withorn* v. *Thomas* (44)]. From this point of view, it was urged that in the case of a lunatic, no question of residence can arise, as no intention can be attributed to him. In our opinion, there is no real substance in this contention. A similar question was raised with regard to the residence of a pauper lunatic under section 5 of Poor Law (Scotland) Act, 1898 *Edinburgh Parish Council* v. *Local Government Board of Scotland* (45). It was ruled by the House of Lords, affirming the decision of Lord Dundas in *Edinburgh Parish Council* v. *Local Government Board of Scotland* (45), that such a construction should not be put on the Statute and that residence should be interpreted to import in such a case not intelligent residence but bodily presence. A similar view underlies the decision in *Kallonas* v. *Collector of Backergunge* (47) (11 W. R. 109) also reported as *Durant* v. *Chandra Nath*, 2 B. L. R. 246, where proceedings under Act XXXV of 1858 were taken against a person who had been for a number of years in involuntary confinement in a lunatic asylum.

In the case before us there can be no room for doubt that the alleged lunatic had two places of residence, one in Calcutta and the other in Pabna; that as resident in Calcutta, he was subject to the jurisdiction of this Court under section 38 of Indian Lunacy Act, 1912; that when in 1917 he went from his residence in Calcutta to his residence in Pabna, he did not cease to be subject to the jurisdiction of this Court; and that consequently the District Court at Pabna had no jurisdiction under section 62 to entertain the proceedings initiated by his wife.

The result is that the order of dismissal made by the District Judge must be affirmed and this appeal dismissed. Each party will pay his own costs both in the District Court and in this Court.

FLETCHER, J.—I agree.

RICHARDSON, J.—I agree.

J. P.

Appeal dismissed.

(30) (1809) Morton 147; 1 Ind. Dec. (o. s.) 967.
(31) (1818) Morton 149; 1 Ind. Dec. (o. s.) 968.
(32) (1813) 2 Strange (N. C.) 80; 5 Ind. Dec. (o. s.) 274.
(33) (1823) Morton 159; 1 Ind. Dec. (o. s.) 974.
(34) (1818) 2 Morley 162; 3 Ind. Dec. (o. s.) 882.
(35) (1819) 2 Morley 166; 3 Ind. Dec. (o. s.) 899.
(36) (1819) 2 Morley 171; 3 Ind. Dec. (o. s.) 888.
(37) (1821) Morton 176 *note*; 1 Ind. Dec. (o. s.) 986.
(38) (1836) Morton 181; 1 Ind. Dec. (o. s.) 989.
(39) (1841) Fulton 401; 1 Ind. Dec. (o. s.) 883.
(40) (1864) Coryton 24.
(41) 3 A. 91 at p. 101; 7 I. A. 196; 7 C. L. R. 295; 3 Suth. P. C. J. 788; 4 Ind. Jur. 476; 4 Sar. P. C. J. 178; 2 Ind. Dec. (N. s.) 28 (P. C.).
(42) 11 Ind. Cas. 447; 34 M. 257; 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M. W. N. 375; 14 C. L. J. 64; 21 M. L. J. 669; 10 M. L. T. 253; 38 I. A. 129 (P. C.).
(43) 29 M. 239; 16 M. L. J. 238; 1 M. L. T. 71.
(44) (1844) 7 Man. & G. 1; 8 Scott. N. R. 783; 14 L. J. C. P. 38; 8 Jur. 1008; 66 R. R. 613; 135 E. R. 1.
(45) (1915) A. C. 717; 84 L. J. P. C. 121; 113 L. T. 50; 79 J. P. 289; 13 L. G. R. 918.
(46) (1914) S. C. 24; 51 Sc. L. R. 192.
(47) 11 W. R. 109; 2 B. L. R. 246.

MAUNG PO THAUNG v. MUTHIAH CHETTY.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 127 OF 1921.

July 15, 1921.

Present:—Mr. Saunders, J. C.

MAUNG PO THAUNG—APPELLANT

versus

P. L. N. R. M. MUTHIA CHETTY AND ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage-deed—Attestation by scribe and mortgagee—Indication.

Where a mortgage-deed is signed by the scribe and the mortgagee, but there is nothing to show that they subscribed as attesting witnesses, the deed is without attestation.

Ram Bahadur Singh v. *Ajodhya Singh*, 34 Ind. Cas. 370; 20 C. W. N. 699; 1 P. L. J. 129; 3 P. L. W. 93, followed.

Badri Prasad v. *Abdul Karim*, 19 Ind. Cas. 451; 35 A. 254; 11 A. L. J. 260, *Nageshwar Prasad* v. *Bachu Singh*, 53 Ind. Cas. 79; 4 P. L. J. 511, referred to.

Mr. *Vasudevan*, for the Appellant.

JUDGMENT.—This was a suit by a Chetty to enforce a mortgage. The mortgage had been executed by the defendant Ma On Bwin, her husband and her sister. The husband was dead and so was the sister at the time of suit, and Ma On Bwin was sued both as mortgagor and legal representative of her deceased husband, while Maung Po Thaung was sued as legal representative of Ma Tun E, his deceased wife. Ma On Bwin admitted the plaintiff's claim, but Maung Po Thaung denied all knowledge of the mortgage and put the plaintiff to proof of it. The mortgage was by a registered document, the sum secured being Rs. 225, and it was executed on the 30th of April 1917, at which time the provisions of section 59 of the Transfer of Property Act were in force in Upper Burma. The First Court, holding the document had not been attested by two witnesses, dismissed the plaintiff's suit. Upon appeal the Judge of the lower Appellate Court held that the scribe and the mortgagee, having both signed the document, should be regarded as the attesting witnesses, and decreed the plaintiff's suit. Against this decree the defendant Maung Po Thaung now comes to this Court in second appeal under section 13 of the Upper Burma Civil Courts Regulation. The Judge of the lower Appellate Court appears to have entirely overlooked the provisions of section 68 of the Evidence Act by which, when it became necessary to prove the instrument of mortgage, it was necessary that at least one attesting witness should be called for the purpose of proving its execution. Even, therefore, if the plaintiff and the scribe could be properly treated as attesting witnesses, it is clear that the instrument was not proved. But there is, further, no evidence upon the record to show that the writer of the document and the mortgagee were attesting witnesses, that is to say, that they were present when the instrument was signed by the mortgagors; and even if they had been present, there is authority for the view that, as neither of these persons signed as an attesting witness, they cannot be held to have acted in that capacity. In the case of *Badri Prasad* v. *Abdul Karim* (1) it was held that, to be an attesting witness within the meaning of section 68 of the Indian Evidence Act, the witness must have seen the document executed and have signed it as a witness. In *Nageshwar Prasad* v. *Bachu Singh* (2) it was held by a Bench of the Patna High Court that a person who signs a document as a scribe must prove specifically that, in signing as a scribe, he intended to sign as a witness. In *Ram Bahadur Singh* v. *Ajodhya Singh* (3) the same High Court held that a scribe who had been present and seen a mortgage-deed executed was not an attesting witness, as he did not subscribe as a witness. I have no doubt that this view of the law is correct. In this case the writer of the document signed it and added the words "writer under license No. 20," the mortgagee also signed his name under the word "mortgagee." It appears to be the case, therefore, that here there was no attesting witness. The appeal must, therefore, be allowed, and the plaintiff's suit must be dismissed with costs throughout.

N. H. *Appeal allowed.*

(1) 19 Ind. Cas. 451; 35 A. 254; 11 A. L. J. 260.
(2) 53 Ind. Cas. 79; 4 P. L. J. 511.
(3) 34 Ind. Cas. 370; 20 C. W. N. 699; 1 P. L. J. 129; 3 P. L. W 93.

TEKCHAND *v.* MAHADEO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 337-B OF 1920.

December 15, 1921.

Present:—Mr. Kotval, A. J. C.

TEKCHAND—PLAINTIFF—APPELLANT

versus

MAHADEO—DEFENDANT No. 1

—RESPONDENT.

Contract Act (IX of 1872), ss. 148, 160, *scope of—Directions by pawnor's assignee not binding on pawnee—Directions to be definite and reasonable—Cause of action for pledge, where arises.*

Under section 160 of the Contract Act it is the pawnor, and not his assignee, who can give directions to the pawnee about the delivery of the pledged property [p 65, col. 2.]

The use of the words "without demand" in section 160 of the Contract Act indicates that the directions referred to in it are directions given before the purpose for which the goods were pawned has been accomplished Section 148, however, covers the case of directions given after the purpose is accomplished. The directions, in order to be binding, must be definite and reasonable. [p. 65, col. 2.]

The place, where the cause of action in respect of a pledge arises, must be determined with reference to the terms of the original contract. [p. 66, col. 1.]

Appeal against a decree of the District Judge, Amraoti, dated the 31st July 1920, in Civil Appeal No. 3 of 1920.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *M. B. Kinkhede*, for the Respondent.

JUDGMENT.—Five items were borrowed by defendant No. 2 from the father of defendant No. 1 on different dates in the year 1915 on pledges of different ornaments. It has been found by the lower Appellate Court that the first pledge was made in Amraoti and the rest in Nagpur. On the 5th July 1917 defendant No. 2 sold one of the pledged ornaments for Rs. 1,000 to the pawnee, the price being appropriated towards the "pledge account." On the 22nd August 1917 the plaintiff purchased from defendant No. 2 the pledged ornaments and on the 23rd he sent the following telegram to defendant No. 1, his father, the pawnee, having died in the meantime:—

"Bring or send sealed pawned articles of Balkrishna Gir Rao Aurangabadkar. I purchased them. After 24 hours plaint will be presented. Ganorkar Pleader for Teku Bhai."

Defendant No. 1 having failed to comply with the notice, the present suit was brought in the Court of the Munsif, Amraoti, for recovering the ornaments on payment of such amount as may be found to be due.

The lower Appellate Court held that the Amraoti Court had no jurisdiction with regard to the pledges other than the first one and dismissed the suit so far as it related to them.

Grounds Nos. 5 and 6 of the memorandum of appeal to this Court are general. Ground No. 4 urges that the finding that the last three pledges were made in Nagpur is inconsistent with defendant No. 2's statement as a witness that he was in Nagpur for two or four months only. The first of these three pledges was made on the 26th September 1915 and the last on the 14th December 1915, and I see no real inconsistency between the finding and the statement.

The argument advanced in connection with the first three grounds is as follows:—

"By the application of Rs. 1,000, the price of the *nath*, to the payment of the pledge account, first four debts at least were satisfied on the 15th July 1917 and under section 160 of the Contract Act it became the duty of the pawnee to deliver the ornaments pledged or to return them according to the pawnor's directions. As the plaintiff gave directions to the pawnee to deliver them in Amraoti, the pawnee became bound to deliver them there and the cause of action, therefore, arose in Amraoti." Now as a matter of fact it was not the pawnor who gave directions to the pawnee about the delivery of the ornaments. The section does not contemplate directions by the pawnor's assignee. If the plaintiff became entitled to the ornaments by purchase, he should have got the pawnor to direct the pawnee to deliver the ornaments to him. The defendant was not bound to recognize or accept the plaintiff as the assignee on his word alone, and that too communicated in a telegram. Again, the use of the words "without demand" in that section seems to indicate that the directions referred to in it are directions given before the purpose for which the goods were pawned has been accomplished. Section 148, however, seems to cover the case of directions given after the purpose is accomplished.

Further assuming that the plaintiff could validly give the directions, I am of opinion that the directions must be definite and reasonable. The directions in the telegram

cannot be considered to be snob. Plaintiff was not entitled to ask the pawnee to 'bring' the ornaments to Amraoti. As to sending them, no mode of despatch is prescribed and no offer is made to pay the expenses thereof. The 'sealed pawned articles' are asked for, but the *nath* was already sold and one set of articles, the subject of the last pawn, had not become deliverable. The learned Pleader for the appellant contends that it is open to the pawnor to name any place he chooses for delivery of the goods pledged and it is incumbent on the pawnee to deliver them at that place, and if he fails to do so the cause of action arises at that place. In fact he claims in so many words that the law gives him the discretion to fix the place of litigation which may arise in connection with the pledge after the directions are given. The place where the cause of action arises must be determined with reference to the terms of the original contract. I do not think that when the law states that the pawnee shall deliver according to the directions of the pawnor, it can have intended to give the pawnor the power of altering it to any other at his discretion.

The judgment of the lower Appellate Court is correct. The appeal fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 640 OF 1920.

July 1, 1921.

Present: Mr. Saunders, J. C.

MA SHWE THIT—APPELLANT

versus

MAUNG PO AUNG (DECEASED), BY HIS LEGAL REPRESENTATIVES, MA NYUN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 1—Malicious prosecution and obstruction of right of way—Damages, suit for—Death of defendant—Tort—Personal action.

A suit was filed for damages for (1) malicious prosecution and (2) for obstruction of right of way. Before the suit came on for hearing the defendant died. There was no suggestion that the estate of the wrongdoer had benefited by his act of wrongful obstruction:

Held, 1) that the action was in each case for tort and was a personal action; [p. 66, col. 2.]

(2) that defendant's liability for his wrongful acts died with him. [p. 67, col. 1.]

3 that as defendant's estate was not benefited by his wrongful act, no legal remedy could be pursued against it. [p. 67, col. 1.]

Haridas Ramdas v. *Ramdas Mathuradas*, 13 B. 677; 7 Ind. Dec. (N. S.) 449 and *Nga Kyet Sein* v. *Mi Kyin Mya*, 34 Ind Cas. 249; U. B. R. (1916), II, 105; 9 Bur. L. T. 38; 10 Bur. L. T. 8, referred to.

Appeal.

Mr. *J. C Chatterjee*, for the Appellant.

Mr. *Vasudevan*, for the Respondents.

JUDGMENT.—The plaintiff filed a suit against one Maung Po Aung for damages for malicious prosecution and also for obstructing her right of way which the plaintiff had over the defendant's land, and thereby preventing the plaintiff from cultivating her land and reaping the crops upon it, by which act the plaintiff suffered damages as set out in the plaint. Before the suit came on for hearing the defendant died, and the suit was then dismissed on the ground that the right to sue did not survive and that the suit abated. A similar view was taken by the lower Appellate Court, and the plaintiff now comes to this Court in second appeal under section 100 of the Civil Procedure Code. It is admitted by the learned Advocate for the appellant that as far as the suit was a suit for damages for false and malicious prosecution it did abate; but a distinction is sought to be drawn between this cause of action and that which was founded upon the interference by the deceased defendant with the plaintiff's right to pass over his holding and to cultivate her land. It is stated in the grounds of appeal that this part of the suit was not a personal action and that the legal representatives of the deceased defendant were liable for his wrongful act. I do not, however, think that this distinction can be sustained. The action was in each case for tort and appears to have been a personal action. There is no doubt that in English Law with few exceptions the rule is generally accepted as stated, for instance, in the Law of Torts by Pollock, 7th Edition, page 61, "if one doth a trespass to me and dieth, the action is dead also, because it should be inconvenient to recover against one who was not party to the wrong." The general rule is stated in the Latin phrase *actio personalis moritur cum persona*. "The personal action dies with the person," and although the learned author refers to it as a barbarous rule, the exceptions to it are few and slight, and it appears to

have been given effect to by the Courts in this country. In the case of *Haridas Kamtas* v. *Ramdas Jathuradas* (1) where the plaintiff sued to recover damages for wrongful arrest and malicious prosecution and the defendant died during the pendency of the suit, it was held that the suit abated and, apart from the statutory exceptions which may exist, it was pointed out that the only cases in which apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to be those in which property, or the proceeds or value of property, belonging to another have been appropriated by the deceased person and added to his own estate or moneys. In that case, as in the present, there is no suggestion that the estate of the wrong doer benefited by his wrongful act. This principle was applied in the case of *Nga Kyet Sein* v. *Mi Kyin Mya* (2). I am of opinion, therefore, that in this case the defendant's liability for his wrongful acts died with him and the appeal must be dismissed with costs.

S. D. *Appeal dismissed.*

(1) 13 B. 677: 7 Ind. Dec. (N. S.) 449.
(2) 34 Ind. Cas. 249; U. B. R. (1916), II, 105; 9 Bur. L. T. 38; 10 Bur. L. T. 8.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 470 OF 1920.
November 28, 1921.
Present:—Mr. Batten, J. C.

MOTIRAM—PLAINTIFF—APPELLANT
versus
HARI—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (XI of 1898), ss. 93, 95—Disputes between neighbouring tenants—Jurisdiction of Revenue Officer—Revenue Officers, powers of, to award costs—Costs not awarded—Civil suit to recover costs, maintainability of.

The C. P. Tenancy Act is an Act mainly to provide for the relations between landlords and tenants and contains no provisions for settling disputes between neighbouring tenants, who must have recourse to the Common Law [p. 68, col. 1.]

Section 93 of the C. P. Tenancy Act is not intended to be a precursor of suits between neighbouring tenants. [p. 68, col. 1.]

Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may be made the subject of consideration as to damages in a subsequent suit. [p. 68, col. 1.]

Mahram Das v. *Audhia*, 18 A. 452; A. W. N. (1886) 18; 8 Ind. Dec. (N. S.) 65, relied upon.

All Revenue Officers holding enquiries of the nature described in section 95 of the C. P. Tenancy Act, which includes enquiries under section 93 of the Act, have, by rules having the force of law, been given the powers of Civil Courts in the matter of costs and if they do not award costs, they must be held to have disallowed them and a subsequent suit for the recovery of the costs incurred in the revenue proceedings will not lie. [p. 68, col. 1.]

Appeal against a decree passed by the District Judge, Nimar, dated the 16th August 1920, in Civil Appeal No. 114 of 1920.

Mr. *A. Bhagwant*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—Two questions arise in this appeal. The first is raised by the second ground of appeal. The lower Appellate Court has disallowed mesne profits for three years ending with the year 1918-19 because it finds that the encroachment did not take place until March 1919. This finding is not impeached. This being so, the claim for mesne profits up to June 1919 cannot be entertained in the absence of any loss alleged or proved between March and June.

The other ground of appeal renews the claim for Rs. 8 which has been disallowed by the District Judge. The plaintiff is a tenant, and the defendant is a neighbouring tenant who, it is found, in March 1919 encroached on ·07 acre of the plaintiff's holding. Under section 93 of the Central Provinces Tenancy Act, 1898, the plaintiff applied to a Revenue Officer asking that the extent of his holding might be ascertained; he named the present defendant, his neighbouring tenant, as the non applicant. The Revenue Officer made an enquiry in which the evidence of a Commissioner was taken, and a record was made, showing that there was a deficit of ·07 acre in the plaintiff's holding. On this the plaintiff has brought the present suit, which includes a claim for Rs. 8 which he had to pay as the Commissioner's fee in the revenue proceedings. I am of opinion that the Revenue Court acted without jurisdiction in entertaining the plaintiff's application, where the neighbouring tenant was named as the non-applicant. I would read section 93 with sections 15 and 67 of the Tenancy Act, 1898. Before making an application under section 15 the tenant or the landlord, as the case may be, would naturally wish to ascertain the facts before making an

application for the alteration of the rent and section 93, in my opinion, provides the material for this. The Tenancy Act is an Act mainly to provide for the relations between landlords and tenants, and contains no provisions, unless this be one, for settling disputes between neighbouring tenants as such. They must have recourse to the Common Law. Section 93, in my view, is not intended to be a precursor of suits between neighbouring tenants. This view finds support in clause (2) of section 93, which makes the record admissible in subsequent proceedings between landlord and tenant or persons claiming under them. A neighbouring tenant is not a person claiming under the landlord within the meaning of this clause.

However this may be, even if the Revenue Officer had jurisdiction to entertain the application as laid, the plaintiff cannot in this suit recover the Rs. 8 which were costs in the proceedings following the application. If the Revenue Officer had jurisdiction, but no power to make any order as to costs, the present suit would no doubt lie. It is observed in *Mahram Das* v. *Ajudhia* (1): "Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may, in my opinion, be made the subject of consideration as to damages in a subsequent suit."

The Revenue Officer in this case had power to award costs; as he did not do so, he must be held to have disallowed them, and a subsequent suit will not lie. All Revenue Officers holding enquiries of the nature described in section 95 of the Tenancy Act, which includes enquiries under section 93, have, by rules having the force of law, been given the powers of Civil Courts in the matter of costs. The rules are to be found at page 310 of the Central Provinces Revenue Manual, 5th Edition, Volume I. The appeal is dismissed with costs.

G. R. D. *Appeal dismissed.*

(1) 8 A. 452; A. W. N. (1886) 189; 5 Ind. Dec. (N. S.) 165.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 404 OF 1920.

August 4, 1921.

Present:—Mr. Brown, J. C.

MAUNG PO SAUNG AND OTHERS—APPELLANTS

versus

MA MUN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal, copy of decree not filed with—Appeal admitted and argued—Copy of decree filed after limitation—Appeal, validity of—Jurisdiction, want of—Objection.

Rule 1 of Order XLI, Civil Procedure Code, makes it obligatory on the appellant to file a copy of the decree with the memorandum of appeal. [p. 69, col. 1.]

A Court is bound to take cognizance of the fact that it has no jurisdiction, however that may be brought to its notice and at whatever stage of the proceedings. [p. 69, col. 2.]

A memorandum of appeal was filed without a copy of the decree appealed against. The appeal was admitted and finally argued. But before writing the judgment the Judge noticed that there was no copy of the decree on the record. Upon this the Judge gave time to the appellant, who filed a copy of the decree long after the period of limitation for filing an appeal had expired. The question was raised whether that copy could be accepted or whether the appeal should fail:

Held, that there was no proper appeal before the Court until long after the period allowed by the law of limitation and that the Court could not overlook this defect because of the fact that the appeal had, as a matter of fact, been admitted and argued. [p. 69, col. 2.]

Appeal.

Mr. *J. C. Chatterjee*, for the Appellants.

Mr. *J. N. Basu*, for the Respondent.

JUDGMENT.—The memorandum of appeal in this case was filed on the 6th July 1920. It was noted in the diary by the Registrar on the occasion of its being filed that the decree of the District Court (which is the decree appealed against) was not filed. This note was apparently overlooked when the case came on for hearing as to admission. The appeal was admitted and was finally argued before me. On looking through the papers prior to writing the judgment, and after the hearing of the appeal had been concluded, I noticed that there was still no copy of the decree on the record. I then gave further time for further application in the matter. A copy of the decree has since been filed, but the question arises whether that copy can be accepted, and whether the appeal must not entirely fail.

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Rule 1 of Order XLI of the Code of Civil Procedure lays down that every appeal shall be preferred in the form of a memorandum, and shall be accompanied by a copy of the decree appealed from. In the case of *Qasim Ali Khan* v. *Bhagwanta Kuar* (1) the memorandum of appeal was filed within the time allowed by the law of limitation, but a copy of the decree was not filed until after the expiry of that period. It was held that there was no appeal before the Court until the copy of the decree was filed, and that the appeal must be dismissed A similar view of the law has been taken in a number of Calcutta cases. In the case of *Hem Chandra Bakshi* v. *Jadub Chandra Bakshi* (2) Maclean, C. J., remarked, where the circumstances were similar: "I think that the memorandum of appeal is bad, and it ought not to have been accepted by this Court, and that consequently, there is no appeal which can be properly entertained by us." In the case of *Binapani Debi* v. *Sashibhushan Sinha* (3) the judgment states: "that the production of a copy of the decree is essential has not been and cannot be disputed.....The memorandum of appeal must consequently be rejected." And in the case of *Prosonno Kumari* v. *Ram Chandra* (4) the same learned Judge remaks (referring to the failure to attach a copy of the decree to the memorandum of appeal): "it has not been disputed on behalf of the appellant that this is a fatal defect and that the Court has no power under the Code to exempt the appellant from the production of a copy of the decree against which the appeal is preferred."

It is contended on behalf of the appellant that the first sentence of rule 1 of Order XLI stands by itself, and that the appeal is preferred on the presentation of a memorandum. But the rule must be read as a whole, and it is quite clear that the rule makes it obligatory on the appellant to file a copy of the decree with the memorandum. If such memorandum is not filed, then the appeal cannot be accepted by the Court. The judicial pronouncements of the Indian Courts on the point are very clear, and I have not been referred to any authority for a contrary view. I can see no good reason for not following these decisions. I hold that there was no proper appeal before this Court when the parties were heard. The copy of the decree was filed only after an interval of about a year from the filing of the memorandum of appeal, and by that time the period allowed by the law of limitation for the filing of an appeal had long expired. Nor do I think that I can overlook this defect simply because the appeal was, as a matter of fact, admitted and argued. If there was no appeal before the Court, the Court had no jurisdiction to entertain the matter, and I think that the Court is bound to take cognizance of the fact that it has no jurisdiction, however that may be brought to its notice and at whatever stage of the proceedings. Finally, it is suggested that the Court should admit the appeal now under the provisions of section 5 of the Indian Limitation Act. It does not seem to me that there is any material before the Court which would justify me in holding that there has been sufficient cause for the failure to file the appeal until about a year, after the period allowed by the law of limitation. It was noted at the time of presentation of the memorandum that the copy of the decree was wanting, and there is no affidavit of any kind explaining the reason for not supplying the deficiency. I must hold that there was no proper appeal before the Court until long after the period allowed by the law of limitation.

I dismiss this appeal with costs.

N. H. *Appeal dismissed.*

(1) 42 Ind. Cas 838; 40 A. 12; 15 A. L. J. 801.
(2) 17 Ind. Cas. 99; 16 C. L. J. 116.
(3) 17 Ind. Cas. 119; 16 C. L. J. 133.
(4) 17 Ind. Cas. 155; 17 C. L. J. 66.

PRIVY COUNCIL.

APPEAL FROM PATNA HIGH COURT.

November 11, 1921.

Present:—Lord Buckmaster, Sir John Edge, Mr. Ameer Ali, Sir Lawrence Jenkins.

Raja Rai BHAGWAT DAYAL SINGH —APPELLANT

versus

RAM RATAN SAHU AND OTHERS— RESPONDENTS.

Hindu Law—Alienation by widow—Reversioner's suit—Portion of purchase-money paid towards mortgages binding on estate—Purchaser's right to interest—Interest to run concurrently with mesne profits—Permanent improvements—Reasonable sum to be paid to person dispossessed—Law's delays.

BHAGWAT DAYAL SINGH v. RAM RATAN SAHU.

Where a sale by a Hindu widow is set aside, the person dispossessed is entitled to sums paid towards mortgages binding on the estate with interest, such interest to run concurrently with the mesne profits. He is also entitled to reasonable compensation for improvements effected so as to increase the value of the property, even though he was not the person who actually effected those improvements. The increased rent that is properly attributable to improvements can be properly set off against the mesne profits, even although the improvements were not actually executed by the person in possession at the moment when the decree for possession was made. [p. 70, col 2; p. 71, cols 1 & 2.]

Delay in administration of justice commented upon. [p. 72, cols. 1 & 2.]

Appeal against a decree of the Patna High Court (Chamier, O. J., and Jwala Prasad, J.,) partly affirming and partly modifying a decree of the Subordinate Judge, Palamau.

Mr. *Dunne*, *K. C.* (with him Mr. *Dube*), for the Appellant.

Mr. *DeGruyther*, *K. C.* (with him Mr. *Eddis*), for the Respondents.

JUDGMENT.

LORD BUCKMASTER.—Twenty six years ago in the month of November 1895 one, Raja Rai Bhagwat Dayal Singh, bought three villages known as Chianki, Ganke, and Lalgara, which were situate within the jurisdiction of the Subordinate Judge of Palamau in the District of Ranchi. Together with these villages he bought litigation, which has ensued from that day until this. He found that the villages were occupied by persons who claimed an absolute title under conveyances that had been made by a Hindu widow with a limited estate. It was consequently necessary for the Raja to take proceedings for the purpose of obtaining possession. He accordingly instituted a suit which was heard before the Subordinate Judge, who allowed his claim to possession and also mesne profits as from the proper date. That judgment was made the subject of an appeal to the High Court of Judicature at Fort William in Bengal and upon that appeal the judgment was reversed. From the decree of the High Court at Fort William an appeal was brought before their Lordships, who restored the judgment of the Subordinate Judge. They advised that the appeal should be allowed, and that the appellant should recover possession together with mesne profits, which were to be ascertained in the execution proceedings; but they did something more, which has caused the first of the questions that has been argued upon the present appeal. It appeared that although the persons whom the purchaser in 1895 ejected had no title to the property against the Raja, yet the widow had, before the sale under which they claimed, raised money for necessities, ancestral worship, and other similar matters for all of which she was perfectly entitled to charge the estate. Mortgages had been executed to secure these monies, and when the properties were sold by the widow, these mortgages were paid off. The Subordinate Judge, when the matter first came before him, decided that certain parts of these mortgages which he gathered together under two heads, amounting in the one case to Rs. 11,198, and in the other to Rs. 6,400, should be allowed, and that these sums should carry interest at the rate of 6 per cent. When the matter was before their Lordships, they confirmed the finding of the Subordinate Judge, both as to possession and as to those sums, and found that the sums that were to be paid should carry interest at 6 per cent. per annum.

The first question that has been raised upon this appeal is as from what date the 6 per cent. should run. The proceedings have emerged from a finding originally made by the Subordinate Judge, who held that according to the true construction of this order the interest should run from the date of his own original decree, but the High Court of Judicature at Patna has said that the effect of the order is to take the interest back to the date of the mortgages. It is unnecessary for their Lordships to settle in detail the question which led to that conclusion, for this reason that the order of their Lordships on the former appeal was the subject of review, and an application was made to them for the purpose of ascertaining what it was that was meant by the allowance of interest at 6 per cent. when no date was mentioned as the date from which it should run, and upon the matter coming again before their Lordships on the 11th February 1909 upon an application by the respondents for modification of the judgment, they made it clear that what they meant was that the interest should run concurrently with the mesne profits; that as one sum was allowed on the one hand for the mesne profits, the sum for interest should be allowed upon the other. This relieves

their Lordships entirely from the necessity of considering what, without the assistance of that interpretation, they might have decided that the order meant, and they can only express their sincere regret that the litigant parties in these proceedings did not think right at the earliest moment to have obtained the information which has not been placed before a single one of the Courts from whom this dispute has proceeded; and indeed was only placed before their Lordships this morning after the case had been part heard. It at any rate disposes entirely of the first part of the appeal, and the order that is appealed from in that respect must be modified so as to bring it into agreement with the declared intention of their Lordships in the earlier proceedings. But this does not dispose of the whole of the appeal, for there still remains a further matter for consideration that arises in this way. When the inquiry was directed with regard to the mesne profits, a question arose as to whether part, at least, of the mesne profits had not been due to permanent improvements that had been executed upon the property by the purchasers whose title had been dispossessed by the Raja, who had bought in November 1895. There has never been any contention before their Lordships as to the right to obtain some allowance in respect of these improvements, if in the circumstances of this case such a right was capable of being established. The Commissioner before whom the matter was first heard disposed entirely of the two villages, Chianki and Ganke, with regard to which no further question now arises; but with regard to Lalgara he stated that the purchaser from the widow had made improvements, and that in consequence of these improvements the *jama* of the village was raised to Rs. 2,400. There seems no doubt that these improvements were in their very nature of a permanent character. They were the erection of tanks for the purpose of irrigation, and the construction of a dyke. It seems quite impossible to believe that any estate that had received the advantage of seven or eight big tanks and the irrigation consequent upon their use would not have had the *jama* thereby increased. The learned Commissioner in his determination made a finding that the amount of the mesne profits for which the person in possession would be made liable amounted to a sum which in respect of this village was Rs 35,057 and he then added that if he was entitled to a deduction for the improvement, then a deduction of Rs. 4,000 should be made therefrom, and if not, it should not. In other words, what he attempted to do was to make the deduction for the capital spent in the improvements and not the amount by which the mesne profits themselves had been increased by the expenditure. The matter then went back before the Subordinate Judge, and he confirmed the report of the Commissioner as a matter of form. The case then came before the High Court of Judicature at Fort William, and they dealt with the objections and remanded the matter with this direction:—

"Neither party will be entitled to challenge the figures arrived at by the Commissioner nor the findings arrived at by him, except that with regard to the improvements, the judgment-debtors will be at liberty to show on the materials on the record that the Commissioner has not given them credit for any particular improvement which they are justly entitled to. But they will not be entitled to take exception to the findings of the Commissioner as to their value, and no fresh Commission will be issued nor any further evidence will be allowed to be given by the parties."

It appears that the further objections that were taken upon this remand were first of all to the allowance of any money at all and, secondly, it was argued that an allowance could not be made because the improvements had in fact been executed by the person who had been the original purchaser from the vendor who had the limited estate, and that he had again sold and that it was the purchaser from him who was in possession at the time when the final purchase of the property was made. Their Lordships are of the opinion that there is no substance in these contentions. The increased rent that is properly attributable to the improvements can be properly set off against the mesne profits, even although it was (the improvements were?) not actually executed by the person in possession at the moment when the decree for possession was made, and the only question that is left is to determine whether or no any sum should

be allowed. The Subordinate Judge held that there should be no sum allowed at all, and the High Court at Patna has fixed a sum of 10 per cent on the rents. With regard to the adequacy or the accuracy of a 10 per cent. allowance, their Lordships are not in a position to speak ; they cannot possibly know the circumstances, but the sum of 10 per cent. appears to be a perfectly fair and reasonable sum to allow in the circumstances of this case. The facts found by the Commissioner are those upon which all the judgments must proceed, and among these is the statement that the improvements have increased the value. Their Lordships are clearly of opinion that that is not only the finding of the Commissioner, but that it is the only reasonable inference that can be drawn from the character of the improvements, and they, therefore, think, in that respect, that the judgment of the High Court must be affirmed.

That disposes of all the matters upon this appeal, but their Lordships cannot part with this case without expressing once more their regret as to the interminable course of litigation in India. It cannot be for the welfare of any community that the purchaser of property bought in good faith should be liable to endless quarrels arising out of his purchase, which continue, as they do in this case, and as they must in many, beyond the period of his natural life. The man who bought this property never knew what it was to be free from the anxiety of a law suit until the day he died ; even then the litigation was not ended, and has been pursued until the present appeal. This has itself taken four years to come here from the High Court, and of course no explanation has or ever can be offered of why these delays occur. Their Lordships refer once more to this matter in the earnest hope that a condition of things which they regard as constituting a serious blot upon the administration of justice should be removed.

With regard to the costs of this appeal, their Lordships have given careful consideration to what order justice requires, and they have come to the conclusion that there ought to be no costs of the appeal or of the cross-appeal; that the costs of the High Court, although the order of the High Court has been varied, should in the circumstances of this case be allowed to stand. They will, therefore, humbly advise His Majesty that the order of the High Court be varied to the extent that has been already indicated, namely, by declaring that the interest of 6 per cent. should run concurrently with the mesne profits, but that the costs should be dealt with as above mentioned.

K. V. L. N. *Order varied.*

Solicitors for the Appellant:—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitors for the Respondents:—Messrs. *Pugh and Co.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 393-B OF 1919.

December 23, 1921.

Present:—Mr. Dhobley, A. J. C.

Shaikh CHOTU—DEFENDANT—APPELLANT

versus

Mir AKABAR ALI—PLAINTIFF—RESPONDENT.

Berar Inam Rules 1859, *class III, r. V—Inam Estates in Berar—Devolution—Lineal descendants—Descendants through females included—Muhammadan Law*—"Farzandan," *meaning of.*

The devolution and incidents of an Inam Estate in Berar are regulated by the Berar Inam Rules of 1859, subject to the Sanad or certificate or other document evidencing the special terms of the grant in the particular case. [p. 73, col. 1.]

The Berar Inam Rules were made for the settlement of Jagir and Inam claims throughout Berar, both by declaring the grants the Government of India was prepared to recognize, and treating each recognition as a fresh starting point to provide conditions for its future enjoyment and devolution. [p. 74, col. 1.]

Krishnaji v. *Nilkanth*, 36 Ind. Cas. 518; 12 N. L. R. 150 at p. 54, followed.

In the Province of Berar an old "Sanad" from the Muhammadan Government of the time granting a personal or subsistence grant or Inam is not binding on the Government of India and the real starting point of the grant, so far as the Government of India is concerned, is the time when the grant is first recognised by it under the Berar Inam Rules of 1859. [p. 74, col. 1.]

Where a maintenance grant given by a Muhammadan Ruler in perpetuity to the grantee and his children (*bafarzandan*) was recognised by the Government of India without using the word "*farzand*" or the expression "lineal descendants" in the certificate of recognition:

Held, (1) that the condition "*bafarzandan*" mentioned in the original grant was not continued by necessary implication when the grant was recognised; [p. 74, col. 2.]

CHOTU *v.* AKABAR ALI.

(2) that the recognition intended merely to continue the grant and not its original conditions: [p. 74, col. 2.]

(3) that under the circumstances the devolution should be governed by the personal law of the parties subject to any limitation imposed by the Inam Rules; [p. 74, col. 2.]

(4) that the case fell under class III of the Berar Inam Rules and was governed by rule V in which the expression "direct lineal heirs" was not intended to be used in the restricted sense in which the word "*farzandan*" is used in Muhammadan Law and that consequently a daughter's son was a lineal descendant. [p. 74, col. 2.]

Obiter.—The term "*farzandan*" according to the interpretation put upon it by the writers on Muhammadan Law means offspring or lineal descendants and includes daughters but not the children of daughters, inasmuch as lineage is derived from the father and not from the mother. [p 73, col. 2.]

Appeal against a decree of the Additional District Judge, Akola, dated 4th September 19 9, in Civil Appeal No. 64 of 1919.

Mr. *M. Y. Shareef*, for the Appellant.

Mr. *K. V. Deoskar*, for the Respondent.

JUDGMENT.—The only question involved in this litigation is as to whether in this particular Jagir a daughter's son can be an heir capable of inheriting it. The devolution and incidents of an Inam Estate in Berar are regulated by the Berar Inam Rules of 1859, subject to the Sanad or certificate or other document evidencing the special terms of the grant in the particular case. See *Krishnaji* v. *Nilkanth* (1). It is, therefore, necessary first to ascertain the history of this Jagir.

The original grant is evidenced by a Sanad of the Hijri year 1177, approximately corresponding to the year 1760 A. D., issued in the name of Syed Shah Hussein Darwesh for maintenance (*madadmash*) in perpetuity of himself and of his children (*bafarzandan*) In the Inam enquiry of 1866, the grant was confirmed by the Government in the names of (1) Syed Ahmadulla, and (2) Syed Badshah, who were the original grantee's grandsons, their fathers being his sons by different wives. The records show that Syed Ahmadulla died during the pendency of that enquiry and that his eight-annas share in the Jagir was recorded in the names of his two daughters. It will thus be seen that daughters were recognized as heirs capable of inheriting the Jagir and that there was no intention on the part of the Government to exclude female heirs from inheritance. The parties to the present litigation belong to Syed Badshah's branch, the plaintiff being his son's son and the defendant being his daughter's son. On the death of Syed Badshah his daughter Kadra Bi, who was the defendant's mother, got her proportionate share in the Jagir as her father's heir and was in possession thereof till her death. The present litigation is in respect of that share. The defendant claims that share as his mother's heir, while the plaintiff's contention is that it should now go back to the main family, the defendant being incapable of inheriting it.

Before discussing whether the devolution of the Jagir in this case is governed by the terms of this Sanad of 1760, we must first ascertain its exact terms. The original grant of 1760 was for maintenance and was a perpetual one. It was for the maintenance of the original grantee and of his children, *bafarsandan*. The term *farzandan* includes daughters. The question is whether it includes daughter's children as well. It means offspring or lineal descendants. We are to construe the term according to the interpretation put upon it by the writers on Muhammadan Law. Macnaughten in his Principles and Precedents of that law on pages 331-332 of the Eighth Edition says that a descendant in a female line is not ranked among the *farzandan* or offspring of his ancestor. He observes that the descendants of a man's daughter are not the lineal descendants of that man, lineage being derived from the father, and not from the mother. Similarly, Ameer Ali in his Muhammadan Law at pages 360 362 of the First Volume (Fourth Edition) says that though the term *farzand* includes daughters, the term lineal descendants does not include the children of daughters, unless those children are the offspring of husbands, who are lineal descendants of the person. The word "lineal descendants" is an English word and it appears that the learned author translated the Persian word *farzand* as lineal descendants. The defendant cannot, therefore, be called a *farzand* or lineal descendant of Syed Badshah. If the terms and conditions of the original Sanad of 1760 be held to govern the devolution of this Jagir, the defendant shall have to be excluded from getting a share in it by inheritance, though his mother had inherited it and though under the personal law he was the mother's legal heir.

(1) 33 Ind Cas. 518; 12 N. L. R. 150 at p. 154.

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The Berar Inam Rules were made "for the settlement of Jagir and Inam claims throughout Berar, both by declaring the grants the Government of India was prepared to recognize, and treating each recognition as a fresh starting point to provide conditions for its future enjoyment and devolution" [*Krishnaji* v. *Nilkanth* (1), quoted above, page 154*]. Though there was an old Sanad of 1760 from the Muhammadan Government of the time, it was not binding on the Government of India. The real starting point of the Inam, so far as the Government of India is concerned, was when the Inam was first recognized by it under the Rules of 1859. It does not appear that any Sanad or title-deed was issued during the Inam enquiry as required by rule XV. The only documents which are on the record of the present suit are (1) the certificate granted in 1871, recording the Jagir in the names of the two daughters of Syed Ahmadulla in eight-annas share and of Syed Badshah in the remaining eight annas (Exhibit P 2), a copy of claim in respect of this village preferred by Syed Badshah (Exhibit C III) and (3) copy of the final recommendation made by the Resident in the Inam enquiry (Exhibit C-IV). Of these Exhibit C-III is not at all important. The Exhibit C-IV shows that the Resident's recommendation was accepted by the Government in its letter No. 396, dated 3rd December 1866. That letter is not forthcoming. It appears that in accordance with the final sanction of the Government, the certificate (Exhibit P-2) was issued. The Resident's recommendation does not expressly show if the grant was confirmed and recognized under the terms of the original Sanad of 1760. The recommendation was thus worded—"The documents are declared valid by the Nizam Government and I recommend that the grant should be upheld in perpetuity as follows, *viz.*, to one-half to the representatives of the first marriage and one-half to the second and third marriages, that is, to the parties represented in this case by the claimants styled No. 1 and No. 2." In the certificate (Exhibit P 2) there are columns 14 and 15, headed: "For what purposes granted" and "Tenure and conditions attached to the continuance of the grant" respectively. In column 14, the entry is—"*madadmash*, for personal maintenance." In column 15, only the names of the two daughters of Syed Ahmadulla and of Syed Badshah as eight-anna share each are recorded and the grant was recorded as being upheld in perpetuity. No other conditions or terms are given there.

As already stated, the *farzandan* includes daughters but not daughter's children. *Prima facie*, the devolution of the Jagir would be according to the personal law, subject to the limitations, if any, mentioned in the Inam Rules and also subject to conditions, if any, of the grant. As stated above, there were no special conditions imposed when the grant was recognized. The word *farzand* or the expression "lineal descendants" is not used in the certificate. The question is whether the condition *bafarzandan* mentioned in the original Sanad of 1760 was by necessary implication continued when the grant was recognized in 1866. In my opinion, it was intended merely to continue the grant and not its original conditions. The Resident's recommendation too does not make mention of any conditions. My view, therefore, is that in the present case, the devolution is to be governed by the personal law of the parties, subject to any limitations imposed by the Inam Rules.

This Inam came under Class III, as personal or subsistence grant and not under Class I, of Personal Jagir. The devolution in this case is thus governed by rule V. Under that rule, succession is limited to direct lineal heirs and a daughter's son comes under that class. The English expression "lineal descendants" is not confined to descendants through males. This expression was not intended to be used in the restricted sense in which the word *farzandan* is used in Muhammadan Law. A direct descendant, even though a female, is a "lineal descendant." That a daughter's son was not intended to be excluded is clear from the mention of a "widowed daughter without issue" as a terminal heir in the second sub-clause of clause 3 of rule V. See also foot-notes under this rule published on page 251 of the Berar Revenue Manual, Volume II. The defendant was not, therefore, excluded and is entitled to inherit his mother's share which had come to her as her father's heir.

On this view of the case, the plaintiff's suit must fail. The appeal is allowed and

*Page of 12 N. L. R.—[*Ed.*]

the plaintiff's suit is dismissed with all costs of the three Courts on him.

S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1635 OF 1918.
February 25, 1921.
Present:—Mr. Justice Walsh.
MUSTAFA KHAN AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
Musammat DULARI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Adverse possession by co-owner—Acquiescence, effect of.

Every case of an adverse possession by a co-sharer must be considered on its own facts, and the principle that the possession of one co-sharer is in law the possession of all, should not be pressed too far. [p. 76, col. 1.]

Where the co-owners, who are mere cousins by marriage, succeed to a certain property, and one of them occupies more than his share, under circumstances which do not suggest in any way that he is doing so on behalf of the other, or in any other way than wrongfully, it cannot be said that he does not really oust adversely the other co-sharer from the portion so occupied. [p. 76, col. 1.]

There are cases in which consent to usurpation is not inconsistent with its becoming adverse, as for instance, where a person consents to usurpation not thinking it worthwhile to interfere. [p. 76, col. 1.]

Ahmad Raza Khan v. *Ram Lal*, 26 Ind. Cas. 922; 18 A. L. J. 204; 37 A. 203, *Corea* v *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836, *Ram Parson Upadhia* v. *Sheikh Kalab Husain*, 36 Ind. Cas. 100, referred to.

Second appeal from a decision of the District Judge, Farrukhabad, dated the 5th of August, 1918.

Mr. *Raza Ali*, for the Appellants.

M. *Abu Ali* for Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—This is a difficult case, although the amount in dispute is trivial, and it is difficult because I have to decide not only whether the finding is one of fact, but whether the finding of fact is one which could lawfully be arrived at under all the circumstances of the case; and my difficulty is not diminished by the very slight assistance which I got from either of the judgments of the lower Courts. The lower Appellate Court has held that the plaintiffs are entitled to succeed as to property A, but that they are barred by limitation as to property B. I am quite satisfied, although I am not much impressed by the judgment of the learned Judge, that he did find and intended to find adverse possession from 1902 by the defendant *Musammat* Dulari. In disposing of the plaintiffs' case as to property A, he has dealt specifically with the evidence of adverse possession. Turning from that question to the same question as regards property B, he says: "I am not satisfied that the plaintiffs' rights are not barred by possession of the widow from 1902, and I think that the evidence does show such possession." I am satisfied that he meant to find adverse possession as a fact. It is to be borne in mind that he is affirming a finding of the First Court, not making an original finding himself, and there are one or two passages in the First Court's judgment which have been relied upon by Mr. Abu Ali for the respondents, which go very much to support that view. The First Court said: "that Abdulla died in 1902; that Suleman and Shabadat had died before, and that the plaintiffs' father, Abdulla, both took their property (he obviously meant, took the property of both), and that on the death of Abdulla, defendant No. 1, that is, Dulari, got all the property which was in the possession of Abdulla. Then he goes on to examine the subsequent conduct of the parties and, using rather slovenly language, he points out what the plaintiffs might have proved if they had really been in adverse possession. I think he meant that they were unable to negative the defendants' adverse possession. So that the matter came up to the lower Appellate Court with a finding on this subject which the lower Appellate Court was only concerned to affirm. I notice that there is a cross-objection by the defendants but, in my view, it is a finding of fact as regards A just as much as regards B, and the finding is that the plaintiffs' claim is not barred.

The point that has troubled me is the argument of Mr. Raza Ali for the appellants based upon the second ground of appeal, that at the time of the death of Abdulla in 1902, the parties were co-owners and near relations and the possession of one co-owner is in law the possession of all the co-owners. I recognise the principle. It has been laid down with great force in a variety of cases, which I do not intend to examine in detail and which I refer to merely out of respect to the argument ad-

dressed to me. There is the case of *Ahmad Raza Khan* v. *Ram Lal* (1), following the Privy Council decision in the case of *Corea* v. *Appuhamy* (2), the well-known Ceylon case. I do not agree that the Privy Council did not base their decision upon the Ordinance. I think they did. But I think that the case is distinguishable from the case before me, the principle being applied there as against a brother who on behalf of himself and his sisters took possession of derelict property. The case that puzzles me most is the case of *Ram Parson Upadhia* v. *Sheikh Kalab Husain* (3), in which Mr. Justice Rafique uses language which appears to be applicable to almost every case which can arise. The case here, of course, is one of a widow remaining in possession of property which her husband had already occupied partly to the exclusion of the plaintiffs or their father, and under circumstances which did not suggest in any way that she was either doing it for them or on their behalf or in any way other than wrongfully if they chose to assert their rights. Well there are co-owners and co-owners and it is possible to press this principle too far. The co-owner in this case was a mere cousin by marriage as regards the share of two of the deceased men, and a sort of cousin by marriage of the plaintiffs, and I am not prepared to say that there are not cases in which a person owning a share in certain property and usurping more than his share has not really ousted adversely the person entitled to his share, and I am not prepared to say that there are not cases in which consent to such conduct may not be consistent with adverse possession. If a brother of mine takes more than his share on my father's death, and I, not thinking it worthwhile to interfere, consent to his remaining in possession of more than his share, is it to be said that, because I acquiesced, the possession was not adverse? Mr. Raza Ali was forced to admit that in this case if the conduct of the widow had continued till her death and after her death by her descendants for 100 years, and if his clients had come after 100 years, his argument would be precisely the same, that she and her descendants had been holding for and on behalf of their co-sharers. Another point which might differentiate this case from other cases is that in this particular case there has been a strenuous fight over the date of the death, which was immaterial if the plaintiffs' case really was that the possession was not adverse but in trust for or on behalf of their interests. I think the decision here, having regard to all the circumstances of the case, cannot be said to be wrong in law, and being a finding of fact, the appeal must be dismissed with costs.

The cross-objection is similarly dismissed with such costs as the law allows.

N. H. *Appeal dismissed.*

(1) 26 Ind. Cas. 922; 13 A. L. J. 204; 37 A. 203.

(2) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

(3) 36 Ind. Cas. 100.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1173 OF 1919.

August 13, 1920.

Present :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

SOUDAMINI DASYA CHOUDHURANY, EXECUTRIX TO THE ESTATE OF HER HUSBAND, LATE RAGHUNATH DAS— PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

*Bengal Alluvion and Diluvion Act (IX of 1847), ss. 3, 6—Assessment—Special survey—Notice under s. 6 can be amended—*Thak *boundary, evidentiary value of.*

There is no provision in Act IX of 1847 which requires that before an assessment of revenue is made under the Act, there must be a special survey carried out under the terms of section 3 of the Act. There is nothing to show that the assessment contemplated by section 6 could not be based upon a survey carried out for a purpose other than that contemplated by section 6. Where there was a survey for the purposes of Settlement under the Bengal Tenancy Act, the result of that survey could be utilised to form the foundation of assessment under section 6 of the Bengal Alluvion and Diluvion Act. [p. 77, col. 2.]

Secretary of State for India in Council v. *Kumar Narendra Nath Mitter*, 61 Ind. Cas. 91; 32 C. L. J. 402, referred to.

A notice served for the purposes of assessment under section 6 of Act IX of 1847 can be amended. [p. 78, col. 1.]

The mere circumstance that the river-bed is shown to be included within the *thak* boundaries of a particular estate, does not necessarily lead to the inference that at the time of the Permanent Settlement the bed of a large navigable river was as a matter of fact settled with the Zemindar. [p. 78, col. 1.]

Jagadindra Nath Roy v. *Secretary of State for India*, 30 C. 291; 30 I. A 44; 7 C. W. N. 193; 5 Bom. L. R. 1 (P. C.), relied upon.

Appeal against a decree of the Additional Subordinate Judge, Bakarganj, dated the 7th of March 1919, affirming that of the Munsif, Fourth Court at Patuakhali, dated the 31st March 1917.

FACTS appear from the judgment.

Dr. *Sirat Chandra Basak* (with him Babu *Upendra Lal Roy*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for declaration that certain *dearah* proceedings by Government were void and the assessment was illegal. The Courts below have dismissed the suit. The question is this. As there has been no survey under section 3 of Act IX of 1847, the proceedings are void. The area was originally 5 acres; subsequently it was changed to 13 acres. They cannot claim anything more than 5 acres. The *thak* map is of no avail as between the Government and a private person. Refers to sections 1 to 3 of Act IX of 1847. As regards my second point I would draw your Lordships' attention to section 6 of the Act. Section 3 says that there should be no measurement within 10 years. Before the assessment the first notice was served. Then a second map was prepared and they now demand revenue for 13 acres. The survey was completed and approved of before the second notice was served.

Babu *Ram Charan Mitra* (with him Babu *Surendra Chandra Guha*), for the Respondent, was not called upon to reply.

JUDGMENT.

MOOKERJEE, A. C. J.—This is an appeal by the plaintiff in a suit for declaration that the disputed lands are included in a permanently settled Taluk Mohammad Hayat held by her, and that the proceedings taken by the Secretary of State for India in Council for assessment of revenue thereon are *ultra vires*. The Court of first instance dismissed the suit on the merits. Upon appeal that decree has been affirmed by the Subordinate Judge. On the present appeal, that decree has been assailed on three grounds: *First*, that the proceedings under Act IX of 1847 were *ultra vires*, because they were not based on a special and new survey carried out, as contemplated in section 3; *secondly*, that the proceedings under Act IX of 1847 were *ultra vires*, because the notice which was at first served upon the appellant was subsequently modified, and the quantity of land which was ultimately held liable to assessment with revenue was much larger than the quantity mentioned in the initial notice, and *thirdly*, that the Courts below have not given due effect to the entry in the *thak* map, which shows that the river by the recession of which the disputed lands have been formed was included within the boundaries of the *taluk* held by the plaintiff. In our opinion there is no foundation for these contentions.

As regards the first point, it is clear that section 3 of Act IX of 1847 empowers the Government to direct new surveys of riparian lands at intervals of not less than ten years, and section 6 contemplates assessment of increments of land to revenue-paying estates. But there is no provision in the Act which requires that before an assessment is made, there must be a special survey carried out under the terms of section 3. There is nothing to show that the assessment contemplated by section 6 could not be based upon a survey carried out for a purpose other than that contemplated by section 6. In the present instance there was a survey for the purposes of Settlement under the Bengal Tenancy Act. It would be, in our opinion, unreasonable to hold that the result of that survey could not be utilised to form the foundation of assessment under section 6. We find that this view was adopted by both the Judges who decided the case of *Secretary of State for India in Council* v. *Kumar Narendra Nath Mitter* from which an appeal was subsequently preferred under clause 15 of the Letters Patent on a different point (Letters Patent Appeal No. 1 of 1920), *Secretary of State for India in Council* v. *Kumar Narendra Nath Mitter* (1).

(1) 61 Ind. Cas. 91; 32 C. L. J. 402.

RAM LAKHAN SINGH v. MEWA LAL.

As regards the second point, no authority has been cited in support of the proposition that a notice served for the purposes of assessment under section 6 cannot be amended. No doubt section 3 contemplates periodical surveys at intervals of ten years or longer periods of time, but before an assessment has actually been completed, there is no reason why an error, if any, committed in the first instance should not be rectified. It is obvious that if a contrary view were taken, it might in some instances prejudice the Secretary of State for India in Council and in other instances prejudice the person to be assessed with rent, because it is conceivable that the entry in the intital notice might by an error be smaller or larger than the area which is actually in his possession and liable to assessment of rent.

As regards the third point, it is plain that the mere circumstance that the river bed is shown to be included within the *thak* boundaries of a particular estate does not necessarily lead to the inference that at the time of the Permanent Settlement the bed of a large navigable river was as a matter of fact settled with the Zemindar [*Jagadindra Nath Roy* v. *Secretary of State for India* (2)].

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

B. N. *Appeal dismissed.*

(2) 30 C. 291; 30 I. A. 44; 7 C. W. N. 193; 5 Bom. L. R. 1 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 120 OF 1921.

February 8, 1921.

Present :—Mr. Justice Walsh and Mr Justice Ryves.

RAM LAKHAN SINGH—APPELLANT

versus

Lala MEWA LAL—RESPONDENT.

Execution of decree—Application consigned to record room—First application, nature of—Limitation.

Where execution proceedings are consigned to the record room behind the back of the decree-holder and without any default on his part, a further application, though in the form of a new application for execution, is really a continuance of the older application. [p 79, col 1.]

Yaqub Ali v. *Durga Prasad*, 30 Ind. Cas. 877; 37 A. 513; 13 A. L. J. 760, relied upon.

Execution second appeal from a decision of the District Judge, Allahabad, dated the 1st of November 1919.

Dr. *S. M. Sulaiman*, for the Appellant.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. A decree absolute for sale of landed property was passed on the 23rd of September 1910. The decree-holder applied for execution on the 26th of April 1911. That was infructuous. A second application was made on the 15th of April 1914. That application was dismissed with costs, because the decree-holder failed to comply with certain orders which the Court had made. Another application was made on 4th of September 1914 for sale. As some of the property was ancestral, the Court ordered the case to be sent to the Collector for sale. This was done on the 15th of September 1914. Before the sale was completed, the Civil Court, on the 14th of May 1915, passed an order staying the sale. Thereupon, on the 24th of May, the Collector sent the record back to the Civil Court which, on the 25th May 1915, passed an order to the effect that the proceedings be entered on the register of decided cases and placed in the record room.

This order was passed behind the back of the decree-holder. Finally an application out of which this appeal arises was made on the 12th December 1917. Both Courts have held that this application was within time. It was argued before us that it was not, and the argument was based on what, we think, was merely a slip of the pen in the judgment of the learned District Judge. He twice in his judgment mentions the penultimate application as being that made on the 14th of April 1914. We think it is quite clear that he meant the 14th of September 1914. If the penultimate application had been that of the 14th of April 1914, then, in our opinion, the argument of the appellant would have been unanswerable. This application was made certainly more than three years after that

date, but that was not the application on which the decree-holder relied as saving limitation. The learned District Judge has quoted the order passed which, he says, was on the application of the 14th of April 1914. As a matter of fact it was passed on the application of the 14 h of September 1914. Reliance has been placed by the respondents on the case of *Yaqub Ali* v. *Durga Prasad* (1). That was a much stronger case than this. The facts were somewhat similar. The record had been sent in that case also to the Collector and had been sent back. Thereupon the Court asked the decree-holder to take certain steps and on failure of his doing so, the application for execution was struck off and the file was sent to the record room. There it was held that a further appplication, though in the form of a new application for execution, was really a continuance of the older application. We cannot distinguish that case from the present. In the present case the execution proceedings were consigned to the record room behind the back of the decree-holder and without any default on his part and without really deciding it. It seems to us, in this view of the case, that the learned District Judge was right and we, therefore, dismiss the appeal with costs, including in this Court fees on the higher scale.

J. P. *Appeal dismissed.*

(1) 30 Ind. Cas. 877; 37 A. 518; 13 A. L. J. 760.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

November 17, 1922.

Present:—Lord Buckmaster, Lord Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

MUHAMMAD HAFIZ AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Mirza MUHAMMAD ZAKARIYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage, simple—Mortgage for term—Option to sue for interest or principal and interest—Suit for interest alone after expiry of term—Subsequent suit for principal and interest, maintainability of—Cause of action, what is.

The cause of action is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. [p. 82, col. 1.]

A simple mortgage-deed, containing no express covenant for the payment of the principal and interest, provided that the interest would be paid monthly and if no interest was paid for six months the creditor would be entitled to sue for interest alone or for both principal and interest. No interest was paid and after three years—the expiry of the period of the mortgage—the mortgagee, relying on the cause of action arising on the non-payment of interest for six months, sued for interest alone and got a decree. Subsequently he sued for the principal and the further interest that had accrued due:

Held, that the subsequent suit was barred by Order II, rule 2 of the Civil Procedure Code. [p. 81, col. 2.]

Chand Kour v. *Partab Singh*, 15 I. A. 156 at p. 157; 16 C. 98; 5 Sar P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65, *Rajah of Pittapur* v. [*Suriya Rau*] *Sri Rajah Venkata Mahipati Surya*, 12 I. A. 116; 8 M. 520; 9 Ind. Jur. 274; 4 Sar. P. C. J. 638; 3 Ind. Dec. (N. S.) 356, *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar*, 21 B. 267 at p. 270; 11 Ind. Dec. (N. S.) 181, referred to.

Appeal from a decree of the Allahabad High Court (Piggott and Walsh, JJ.), reversing a decree of the Subordinate Judge, Agra.

FACTS are sufficiently stated in their Lordships' judgment. The Trial Judge decreed the plaintiffs' claim and the High Court dismissed it: hence this appeal.

Mr. *Hyam*, for the Appellants.—Under the bond I had a right either to call in the mortgage or to sue for interest only. Clause 3 extends this option even after three years. Clause 7 contemplates a different action.

[LORD BUCKMASTER.—In fact both causes of action existed when you sued. The questions are (*a*) can you contract out of the Statute, and (*b*) have you done so?]

We have arranged our dispute in such a way that the Statute does not apply. The cause of action in the first suit is not the same as in the second. In our plaint, we alleged that we had a right to sue for interest alone.

[LORD BUCKMASTER.—The question is, could you take that option?]

Cause of action refers entirely to the ground set forth in the plaint as the cause. *Chand Kour* v. *Partab Singh* (1), *Yashvant*

(1) 15 I. A. 153 at p. 157; 16 C. 93; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65.

Narayan Kamat v. *Vithal Divakar Parulekar* (2). It is not necessary that every suit shall include every cause of action. *Rajah of Pittapur* v. [*Suriya Rau*], *Sri Rajah Venkata Mahipati Surya* (3).

[LORD CARSON.—How can you ask that the property shall be sold twice?]

JUDGMENT.

LORD BUCKMASTER.—In this appeal their Lordships have not had the advantage of hearing Counsel for the respondents, but owing to the full and able argument of Mr. Hyam they have been placed in complete possession of the facts.

The appeal arises out of a mortgage suit. The appellants and the second, third and fourth respondents represent together the mortgagee. The first respondent was himself one of the mortgagors and represents the other. The mortgage-deed in question was executed on the 11th September 1910, and was a simple mortgage but it took an unusual form. It created security for the re-payment to the mortgagees of Rs. 14,000, principal and interest at the rate of 8 annas per cent. per month, it then provided by clause 2 that the interest should be paid on the bond as each month went by, and that if the interest was not paid for six months, the creditor should be competent to realise only the unpaid amount of interest due to him, or the amount of principal and interest both by bringing a suit in Court without waiting for the expiration of the time fixed, and that the mortgagors should take no objection to such proceedings. The time fixed was that mentioned in clause 7, which provided that if the amount secured by the bond, with interest, should not be paid after the expiration of three years, the creditor should be entitled to realise by bringing a suit for the whole of the amount of the principal and interest, together with other incidental expenses, and again the clause concluded by provision that the mortgagors should have no objection, and, if they took objection to such proceedings, it should be regarded as false.

Three years elapsed after the deed had been executed and no interest was paid, with the result that in April 1914 the mortgagee had the power, so far as the terms of the deed were concerned, either to bring an action for the purpose of realising the security in order to obtain re-payment of the full principal money and the interest, or simply of the interest alone. He selected the latter course, and on the 16th April 1914 he instituted a suit which set out, with perfect fairness and clearness, the provisions of the bond and the fact that he had elected to pursue the remedies that the bond gave him in respect only of the interest that was then due. The amount of that interest was Rs. 3,010, and in respect of that sum, and no more, he paid the Court-fees upon the plaint. The learned Judge before whom this suit was brought made a decree on the 11th August 1914, granting the relief that was claimed, but he appears to have overlooked the peculiar character of the mortgage, for he made a decree which, upon the face of it, was not the decree that the plaintiff had asked for, and certainly not the decree to which the defendants could, on any hypothesis, be entitled. What he did was this: He declared that the amount due to the mortgagee for principal, interest and costs was Rs. 3,270-12-0, a statement that the consideration of the plaint itself would have shown to be manifestly inaccurate, for it was perfectly plain from the proceedings that the amount of Rs. 3,010 was the amount claimed as due and this was for interest alone and did not include one single rupee in respect of the principal, which still remained at the sum of Rs. 14,000. He then provided that if the defendant paid into Court the amount so declared to be due, which was the amount of the interest and costs, on or before the 11th February 1915, the mortgagees should deliver up the documents relating to the property, and, if required, re-transfer it to the defendant free from the mortgage and from all incumbrances created by the mortgagees or any persons claiming under them. Paragraph 2 of the decree proceeded upon the same footing, and provided that if the money was not paid in there should be a sale, out of the money realised the claim for Rs. 3,270 should be satisfied, and after that the balance of the money in Court should be paid out to the mortgagor.

(2) 21 B. 267 at p. 270; 11 Ind. Dec. (N. S.) 181.
(3) 12 I. A. 116; 8 M. 520; 9 Ind. Jur. 274; 4 Sar. P. C. J. 38 3 Ind. Dec. (N. S.) 356.

MUHAMMAD HAFIZ v. MUHAMMAD ZAKARIYA.

The result of this decree would have been that the mortgagor could have secured complete redemption by payment of money which, by common consent, was nothing but interest on the sum that he owed and the costs. It is impossible to consider how it was that such a decree passed either the vigilance of the Pleader who was appearing for the plaintiff or the consideration of the Court, for such a decree was not the decree asked for nor that which, in the circumstances, ought to have been made.

Apparently the money was paid into Court, but the mortgagor never asked for re-transfer of the property, and the property, therefore, apparently remaining still subject to the mortgage, the representatives of the mortgagee who had died proceeded, on the 23rd January 1915, to institute the proceedings out of which this appeal has arisen, seeking relief similar to, but not the same as, that formerly claimed. It was stated that the amount due on the mortgage was the principal moneys and the interest that had accrued due, less the amount which had been provided by the proceedings formerly taken, and they sought realisation of the security and consequential relief. To that suit objection was taken that it was not competent to the mortgagees by reason of rule 2 of Order II of the Code of Civil Procedure. The learned Judge before whom the matter came, being obviously impressed by the injustice which would be done if effect was given to such a defence, decided in favour of the plaintiffs, but upon appeal to the High Court that judgment has been reversed and judgment entered for the defendant; from the judgment of the High Court the present appeal lies.

Now the whole question depends upon considering whether the terms of rule 2 of Order II do really bar the plaintiffs from the relief that they seek, and no one would be anxious to stretch or strain the language of that rule in order to cover a case where, if it be made applicable, it is obvious that the plaintiffs may suffer a substantial wrong. The rule runs in these terms:—

(1) "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

There are other provisions of the Order to which reference need not be made, because, in their Lordships' opinion, the exact provision of rule 2, sub-section 1, which has been read, covers and fits the present dispute. What was the cause of action that the plaintiffs possessed when the proceedings were first instituted? It was the cause of action due either to the fact that the interest had been unpaid for more than six months, or that the three years had elapsed, and the principal was also unpaid, and in either case they could have sued for realisation to provide for the whole amount secured by the deed.

The plaintiffs now purported to proceed under clause 2 of the deed, but even in that case the non payment of the interest was the sole cause upon which they were entitled to ask either for the limited relief that was sought or the larger relief which they abstained from seeking. It is also important to point out that the only relief that could be sought in both cases was realisation of the mortgage security, for the mortgage was a simple mortgage containing no express covenant for the payment of the principal and the interest.

Their Lordships think, therefore, that the rule covers the present dispute, and it is only necessary, in deference to the careful argument that is placed before the Board, to refer to one or two of the authorities to which the learned Counsel called attention. The first was *Chand Kour* v. *Partab Singh* (1), and that can be dealt with very simply. In that case what happened was that a Hindu widow having sold the whole of the estate, and a suit being instituted to set aside the sale, the proceedings were objected to upon the ground that before the sale was effected other proceedings were instituted to obtain an injunction to prevent the sale taking place. It was pointed out that the actual cause and circumstances which gave rise to the dispute were different in both cases, because in the one all that could be alleged was an intention, and all the relief that could be sought was an injunction. In the other, the matter alleged was an act done and the relief sought was the restoration of the property that had been sold. In the case of *Rajah of Pittapur* v. [*Suriya Rau*] *Sri Rajah Venkata Mahipati Surya* (3) it is said that the cause of action means the cause

of action for which the suit is brought, and it does not say that every suit includes every cause of action. Their Lordships see no reason to attempt to qualify or to extend those words, because they are in fact nothing but a repetition of the exact words of the Code; the cause of action is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. The case of *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar* (2) really illustrates this view, for there the learned Judge held that both the causes of action and the remedies were distinct.

Their Lordships, in expressing this opinion, have in mind the fact that, owing possibly to faulty advice, or, it may be, to a misapprehension of their strict legal rights, the plaintiffs are in hazard of losing Rs. 14,000 in respect of a transaction which, so far as can be seen, was a perfectly straightforward transaction effected at a reasonable rate of interest. Whether there be any means now, according to the law in India, of remedying what does appear to be a misapprehension underlying the decree that was made on the 11th August 1914, their Lordships are not prepared to say, but if such opportunity can be afforded consistently with the well-known rules establishing practice in India, their Lordships see no reason to doubt that it will receive considerate attention by the Court before whom it is brought.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

J. P. *Appeal dismissed.*

Solicitor for the Appellants.—Mr. *H. S. L. Polak.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 239 OF 1920.

July 27, 1921.

Present :—Mr. Justice Spencer and Mr. Justice Ramesam.

TARIGOPULA NAGIAH—DEFENDANT—APPELLANT

versus

KOMINENI SESHAMMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XX, r. 1—Notice announcing result of case posted on notice board—Compromise—Petition—Court, jurisdiction of.

The posting of a notice upon the notice board of a Court announcing the result of an appeal is not a sufficient compliance with the requirements of Order XX, rule 1, Civil Procedure Code, as to the pronouncement of judgments in open Court, and the appeal is still pending for want of a delivered judgment, and the Court has jurisdiction to entertain a petition of compromise

Bai Dahi v. *Hargovandas*, 30 B. 455; 8 Bom L. R. 229, followed.

Appeal against an order of the District Judge, Guntur, dated 17th March 1920, in Insolvency Appeal No. 282 of 1920 in Appeal Suit No. 311 of 1919.

Mr. *V. Ramadoss*, for the Appellant,

Mr. *P. Narayanamurti*, for the Respondents.

JUDGMENT.—We do not consider that the posting of a notice upon the notice board of the Court announcing the result of the appeal was a sufficient compliance with the requirements of Order XX, rule 1, Civil Procedure Code, as to the pronouncements of judgments in open Court.

We agree with the view taken by the Bombay High Court in *Bai Dahi* v. *Hargovandas* (1) that the practice of omitting to pronounce judgment in open Court is both inconvenient to the parties and in direct opposition to an express provision of the law.

When the Vakils addressed the District Judge on Monday, the 15th March 1920, as to the appeal, the appeal was still pending for want of a delivered judgment. The District Judge had thus jurisdiction at that time to receive a petition of compromise and

(1) 30 B. 455; 8 Bom. L. R. 229.

to pass the necessary orders upon it. His order declining jurisdiction must now be set aside; and he is directed to take the petition on file and dispose of it according to law.

Costs of this civil miscellaneous appeal in this Court will be borne by respondents.

M. C P.
J. P. *Appeal allowed.*

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL DECREE NO. 211 OF 1919.
March 15, 1921.
Present:—Justice Sir George Woodroffe, Kt., and Mr Justice Walmsley.
Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT
versus
KRISHNA CHANDRA DEB—DEFENDANT—RESPONDENT.

Assam Land and Revenue Regulation (I of 1886), s. 97—Partition of portion of estate, application for, maintainability of—Jurisdiction—"Actual possession of interest," meaning of.

Under the Assam Land and Revenue Regulation, a Revenue Court has jurisdiction to entertain an application for partition of a portion of a revenue-paying estate, where the applicant has no interest in the remaining portion. [p. 84, col. 1.]

The words "in actual possession of the interest" in section 97 of the Assam Land and Revenue Regulation simply mean that at the time of the application it must not appear that the interest of the person seeking partition has been transferred or been otherwise lost. They do not signify that the applicant should be in *actual physical possession of the land* [p. 84, col. 1.]

Appeal against a decree of the Officiating Subordinate Judge, Second Court, Sylhet, dated the 23th May 1919.

FACTS appear from the judgment.

Babu *Gobinda Chandra De Roy* (with him Babu *Birendra Kumar Das*), for the Appellant.—The defendant made an application for the partition of the whole estate, omitting seven villages on the ground that my client had no interest in them. But I beg to submit that such an application is not entertainable, regard being had to provisions of the Assam Land and Revenue Regulation. The partition proceedings instituted in the Revenue Court are, therefore, *ultra vires*. Moreover, there is another difficulty in the way of the defendant. As the defendant was not in actual possession of the interest in respect of which he wanted to have a partition, the provisions of the Assam Land and Revenue Regulation stand in his way. Here 'actual possession cannot mean anything other than physical possession of the land.

Refers to *Abdul Khaliq Ahmed* v. *Abdul Khaliq Chowdhry* (1), *Gouri Krishna* v. *Sabanunda Sarma* (2).

In *Brojendra Kishore Roy* v. *Kali Kumar Chowdhury* (3) and *Yasin Ali* v. *Radha Gobinda* (4) partition applied for was in respect of the entire estate.

Babu *Hamendra Kumar Das*, for the Respondent.—I submit that the partition proceedings have been *intra vires* and within jurisdiction. "Actual possession of the interest" does not necessarily and in all circumstances mean actual physical possession of the estate. There is nothing in the Assam Land and Revenue Regulation which prevents the Revenue Court from entertaining my client's application for partition of the joint lands. My learned friend has cited cases haphazard. He knows, as anybody else, that these cases do not help him in the least in strengthening his position. *Gouri Krishna* v. *Sabanunda Sarma* (2), on which my learned friend particularly relied, is clearly distinguishable.

Babu *G. C. De Roy* replied.

JUDGMENT.

WOODROFFE, J.—We have heard this case at very great length. The suit is one for declaration that certain partition proceedings instituted in the Revenue Court are illegal, without jurisdiction and contrary to the provisions of the Assam Land and Revenue Regulation which govern the present case, and for an injunction on the defendant restraining him from proceeding with the partition. The application was for a partition of the whole estate, leaving out seven villages on the ground that the plaintiff had no interest in them. The Court was asked to deal with matters in which both parties had joint interest. That appears to be a reasonable application, but it is objected that it is not one which can be entertained under the provisions of the Regulation to which I have referred. An objection was taken in the Revenue Court and rejected. On appeal to the Deputy Commissioner the appeal was dismissed. On appeal to the Commissioner the

(1) 23 C. 514; 12 Ind. Dec. (N. S.) 342.
(2) 32 C. 1036; 1 C. L. J. 421.
(3) 46 Ind. Cas. 967; 46 C. 236.
(4) 55 Ind. Cas. 180; 47 C. 354; 30 C. L. J. 489.

FUDU SAHU v. SARBAN.

appeal was again dismissed. On recourse to the Civil Court, the suit was dismissed and there has been an appeal to us, in which the question which has been agitated these four times is sought to be agitated again. In my opinion the Court did not act without jurisdiction in entertaining this application. It is then said that assuming that the Court had got jurisdiction, the case is not within the provisions of the Regulation, because it is said that the defendant was not, within the meaning of the Regulation, in actual possession of the interest in respect of which he sought the partition; and the meaning which is sought to place upon the words "actual possession" is "physical possession of the land;" but the Regulation does not speak of land. The Regulation speaks of actual possession of the interest, by which I understand that at the time when the application is made, it must not appear that the interest has been transferred or been otherwise lost. The Court will only entertain applications by persons who have actual interest which would justify an application and the Court's entertainment of it.

Then we come to the question of fact. As I have said, on an interpretation of the section, it will not be necessary to show that there was actual physical possession, but it is open to the appellant, as he has attempted to do, to show that the defendant had no actual interest by reason of the fact that the defendant had lost his interest by reason of the plaintiff's adverse possession for a period of twelve years. This has been attempted to be shown as regards three plots of land; sole possession has been alleged as regards Chak No. 179 Mouzah Sankarsena, Chak No. 2 Jiladpur, and in respect of Mouza Srimangal. As regards this latter land, the appeal has been faintly pressed. The evidence is slight and there is no document in support of the plaintiff's claim to absolute exclusive possession of the land. As regards this land and others, it appears that they were *jungli* lands within the period of twelve years of the application; and there is evidence also by the plaintiff's witnesses supporting the defendant's case as regards possession.

In my opinion the Subordinate Judge is right in the conclusion at which he has arrived, namely, that the plaintiff has not shown that he has adversely possessed the lands for twelve years and thus extinguished the title of the defendant. The partition, therefore, must go on, on the assumption that the defendant has title in the lands which are the subject-matter of the partition.

The question which has been raised by the appellant, namely, that he has a special claim for the allotment to him on such partition of particular pieces of land, on the ground that they are in possession of his tenants, that the lands have been improved and so forth, is a matter which will be open to him to put forward upon the partition. He can then put forward his claim and if he establishes a case, no doubt, the Commissioner of partition will give effect to his wishes.

The appeal is dismissed with costs.

WALMSLEY, J.—I agree.

N. H. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 470 OF 1920.

December 13, 1921.

Present:—Justice Sir John Bucknill, Kt.

FUDU SAHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SARBAN—DEFENDANT—RESPONDENT.

Easement—Riparian right—Servient tenement, whether can acquire easement as against dominant tenement.

FULU SAHU v. SARBAN.

Easement exsits for the benefit of the dominant tenement alone and the servient owner acquires no right to insist on its continuance or to ask for damages for its abandonment [p. 89, col. 2; p. 90, col. 1]

Bimal Chandra Chakravarti v. *Chandra Kanta Chakravarti*, 22 Ind. Cas. 514; 19 C. L. J. 45, followed.

But where a land has been receiving water through an artificial water-course constructed on a neighbour's land for a long time, he may rest his claim to continue to receive such water on some lost grant or old arrangement [p. 90, col. 2.]

Altafuddin Aftab) Chowdhury v. *Asa Khadem (Asokhadeen)*, 20 Ind Cas. 315; 18 C. L. J. 13 : 17 C. W. N. 1066, followed.

Appeal from a decision of the Subordinate Judge, Bhagalpur, dated the 3rd March 920, reversing that of the Munsif, Bhagalpur, dated the 23rd December 1918.

Messrs. *S. Sultan Ahmed* and *C. C. Das*, for the Appellants.

Messrs. *P. K. Sen* and *Jagannath Prasad*, for the Respondent.

JUDGMENT.—This was a matter in second appeal. The appeal is made by the plaintiffs from a decision of the Subordinate Judge of Bhagalpur, dated the 3rd March 1920, reversing a decision of the Munsif of the same place, dated the 23rd December 1918. The facts in the case are very simple, but the points of law which are involved present considerable difficulty. They have been argued with great ability before me by Counsel both for the appellants and for the respondent. The circumstances which gave rise to the present litigation may be shortly explained as follows:

In Mauza Sadanandpur Baisa, Thana Kahalgaon, in the District of Bhagalpur it is common ground that the plaintiffs own some land on which is situated a large tank This land lies south and west of a big plot of land which belongs to the defendant. The defendant's land (which is square in shape) has, at its northern limits, a *bund*; at its southern limits it also has a high, large and old *bund*. North of all this property lie hills, and a good deal of water comes down from this hilly water-shed and flows, following the slope of the ground, from north-east to south-west. The plaintiffs tank (which is of course used for irrigation purposes) gets filled with water probably in more than one way. In the first place, water comes straightaway down into it from the north; secondly, when some quantity of water impinges on the northern side of the defendant's northern embankment, this water is said, to some extent, to divide into two parts and whilst some of it runs to the east, some of it runs to the west; after having passed the western side of the defendant's northern embankment, it would then flow down south and, no doubt, to some extent finds its way into the plaintiffs' tank. With these two sources or possible sources of supply this litigation is not concerned. It is in connection, however, with the third and most important source from which the plaintiffs' tank receives its supply with which this case before me *is* only concerned. The northern embankment of the defendant's land catches and holds up a large quantity of water; this water is said to be discharged artificially through what are known as Pulgurs, which, I understand, are tunnels or pipes made of hollow palm tree trunks; the water thus discharged runs from the defendant's northern embankment across the defendant's land and impinging against the northern face of the defendant's southern embankment, where there appears to be quite a large burrow pit, accumulates there in great quantity. At the south eastern end of the defendant's southern embankment there is a channel through which water can at a certain level escape. At the south-western end, the water, on reaching a certain height, flows in a westerly direction, and, then southerly, falling, almost immediately, though passing for a short distance through a third party's land, into the plaintiffs' tank. It is a little difficult, without a simple sketch map, to explain verbally the exact situation of the properties in relation to each other and the exact directions in which the water is said to flow; but there is a sketch map on page 14 of the paper book which substantially enables a clear view of the position to be understood at a glance. It will then clearly be apprehended that if the defendant chose to cut in her southern embankment an opening (if it went sufficiently deep and was of sufficient size), it would entirely prevent any of the water which accumulates on the northern face of the defendant's southern embankment from moving westward and finding its way into the plaintiffs' tank; it is obvious, at a glance, that, supposing the defendant's southern embankment was deeply cut (let us say for

example, in the centre), all the accumulation of water would, following the slope of the ground, run away due south over property which belongs to a Mr. Grant and which is known as Jagir Muhammad Khan Naik. Now that is what has really happened; and the plaintiffs brought this action asking for a declaration that they were entitled to this flow of water from the western end of the defendant's southern *bund* and they also prayed for a perpetual injunction, against the defendant, restraining her from cutting the southern *bund* in such a manner as to cause disruption of the right which the plaintiffs claim. I need not, in detail, go into the various issues which were raised (at any rate at this stage) but will merely say, here, that the Munsif found substantially in favour of the plaintiffs and gave them, substantially, the order for which they asked. The Subordinate Judge, disagreeing with the Munsif, reversed the Munsif's decision.

There are really three important points which have been strenuously argued before me. The Subordinate Judge held that the suit should fail on the ground that the plaintiffs had not joined certain necessary parties; it is contended that in this the Subordinate Judge was in error. Secondly, the Subordinate Judge expresses the opinion that the matter had not already been concluded by the effect of a judgment in a certain suit decided in 1878; and it is contended before me that he is again, here, wrong. Thirdly, the Subordinate Judge held that the plaintiffs had not made out any claim supportable in law to the water in question; and, here, again, the appellants maintained that the Subordinate Judge has made a legal mistake.

As to the first point (*i. e.*, the alleged non-joinder of parties), it was contended by the defendant that the suit could not proceed and should have been dismissed; because the plaintiffs had not joined either Mr. Grant (who owned the land lying to the south of the defendant's land and who, as I have pointed out before, no doubt would receive on his land, through the cutting of the defendant's southern *bund* made by the defendant, much of the water which had previously flowed in a westerly direction and which would have otherwise debouched on to the plaintiffs' land); and, secondly, and this is perhaps more important, because the plaintiffs have not joined as defendant one Dip Narayan Sinha, who held a Jagir to the west of the defendant's Jagir and through a short portion of whose land it is common ground that the water passes on its way into the plaintiffs' tank. The Munsif, although he thought that it was incumbent upon the plaintiffs to implead both Mr. Grant and Mr. Dip Narayan Sinha, on the ground that it was obvious that they were interested in what had taken place, thought that such non-joinder was not fatal to the suit in view of the provisions of Order I, rule 9 of the Civil Procedure Code. The Subordinate Judge, whilst not thinking that the omission to join Mr. Grant was fatal to the suit, thought that the failure to join Mr. Dip Narayan Sinha, who was much more definitely interested, because, admittedly, the water used to pass through a portion of his property, was fatal to the suit. It is of course common ground that no order passed in this suit could possibly affect Mr. Grant or Mr. Dip Narayan Sinha—they not having been made parties to the action.

As for the bearing of Order I, rule 9, upon the question generally, I think this rule must always be read subject to the fundamental restriction upon it that the Court is not going to waste its time in trying an action in which, after its hearing and decision, the result of its order made must or may clearly be infructuous or useless owing to the non-joinder of parties who were really necessary for the proper adjudication of the suit. So far, however, as the class of cases such as this is concerned, I think that the case of *Madan Mohan Chakravarty* v. *Sashi Bhusan Mukherji* (1) well lays down what is the position. Mr. Justice N. R. Chatterjea there says: "If a way passes over 50 different parcels of land owned by 50 different persons, and the owner of the 50th parcel obstructs the way on his own land and the owners of the remaining parcels do not raise any obstruction nor even deny plaintiff's right, I do not think the latter are necessary parties or can be joined in a suit against the person who obstructs the way." I think this is quite a correct view to take of the

(1) 31 Ind. Cas. 549; 19 C. W. N. 1211.

law. It is pointed out here that so far as Mr. Dip Narayan Sinha is concerned he has always permitted this flow of the water to pass across his property; he has never dissented from it and further it is said that he supports the plaintiffs' case.

With regard to Mr. Grant, I agree with the Subordinate Judge that there is no reason why his absence from the case as a party is in any way fatal to the suit. I think, therefore, that on this point, namely, that the non-joinder of Mr. Dip Narayan Sinha justifies the dismissal of the plaintiffs' suit, he is wrong.

The second point is one of some difficulty. The plaintiffs have brought their action against the defendant claiming that she has no right to cut her southern *bund* in such a way as to interfere with the flow of water from the north into the plaintiffs' tank. To this the defendant, in substance, replies that she has a right to cut the *bund* whenever and wherever she wishes and that the plaintiffs have acquired no right to the water and never could acquire any right to any of it. With the claim and defence the pleadings close as is here perhaps, unfortunately, usual. But in support of their claim and to confute the defendant's allegations the plaintiffs produced documents, showing conclusively that they were the owners of the Jagir upon which their tank was situated and that they had purchased this Jagir from one Chama Mandar. In fact there was no further dispute after the production of these *kobalas* as to the validity of the plaintiffs' title as to this land or tank.

What, however, was of great and perhaps of far more importance was that the plaintiffs also produced copies of judgments given in 1878: one dated the 19th February by the Munsif of Bhagalpur and the other by the Officiating Judge of the same place, dated the 29th July of the same year, when hearing the matter on appeal from the Munsif. What is still more important, however, is that the action was, admittedly, brought by one Matuki Mandar as plaintiff and he was the husband, now deceased, of the lady who is the defendant in the present suit and the respondent before me. The action was brought against Chama Mandar (who is the predecessor in-title of the present plaintiffs) and also against Mr. Grant, who has already been referred to by me as the owner of the Jagir Muhammad Khan Naik which lies to the south of the defendant's land. The facts which were disclosed in that case have a most noticeable and important legal bearing upon the position which is the subject-matter of the litigation now before me. It is shown there that at that date, over 40 years ago, there existed, then, an important embankment which is the subject matter of the present proceedings. The plaintiff there (that is, the present defendant's predecessor-in-title) was complaining that the defendant No. 1 in that suit who was Chama Mandar (the present plaintiffs' predecessor in-title) had filled up an extensive cutting in the *bund* (which *bund* then existed, as now) on the present defendant's land and which cutting had been excavated by the then plaintiff (Matuki Mandar); he there alleged that through this cutting water used to flow to the Jagir of Mr. Grant and that the object of Chama Mandar (and incidentally of Mr. Grant) in filling up this cutting was that he wished illegally to get his tank on his own Jagir filled with water. It must, I think, be taken with confidence that the tank which Chama Mandar desired to be filled up in this way was the same tank as that which is referred to in the present proceedings. It is clear that Matuki Mandar's object in cutting the embankment was to prevent his own land from being more or less inundated by water. Chama Mandar in that suit maintained that there never was any cutting in the middle of the *bund*, but that there always had been a cutting higher up to the east of the *bund* from which the surplus water drained away and that he had always enjoyed the flow of water from the western end of the *bund* into his tank. It will be thus seen that the issues which were raised in that case were not only between the same parties as in the present case (that is to say, between the plaintiffs' predecessor-in-title and the defendant's predecessor-in-title), but that they related to the very self-same question which is now being agitated between their title successors. It is true that Mr. Grant's name appears in that case as a defendant, but this is not, in my opinion, material. The Munsif in the 1878 case held that the plaintiff was entitled to succeed to a cer-

tain linear extent in the case; *i. e.*, that he was to be permitted to keep open a passage of six cubits in length at the centre of the *bund*—a curious but apparently empirical decision. But the Officiating Judge came to quite a contrary opinion; he holding that the plaintiff had no legal rights whatever, but that the *bund* itself was an ancient one and that Matuki Mandar had no right to make any cutting which would have the effect of depriving Chama Mandar of the filling up of his tank by the waters coming from the western end of the *bund*. It will be thus seen that, assuming, as I do, that substantially the same question and one between the predecessors of the same parties as are now engaged in the present litigation was decided in a previous case, the position is rather a curious one: and it is necessary to examine closely what bearing that former decision has upon the position, in the present litigation, both on that of the plaintiffs and of the defendant. It may be and is urged, first of all, so far as its bearing upon the position of the present plaintiffs is concerned, that if, by this former decision, the question now at issue had been finally determined in favour of the present plaintiffs' predecessor, the present action ought not to be entertained, for the reason that the proper course for the present plaintiffs to have adopted would have been to have taken the appropriate steps to enforce the rights of their predecessor under the judgment which was in his favour. On the other hand, it is contended that, so far as the former judgment affects the defendant, in the present proceedings it is conclusive and estops her from setting up in this connection the defence that she has a right to make a cutting (as is complained of) in the *bund* in such a way as to interfere with the rights which the present plaintiffs and their predecessor have so long enjoyed and which were secured to them and him by the order of 1878.

Let us then first of all consider the position of the plaintiffs so far as it is affected by the previous litigation. In that suit their predecessor was not a plaintiff but was a defendant. The plaintiff was seeking for a declaration that he was entitled to cut the *bund*—the plaintiff here (whose predecessor was one of the two defendants there) was resisting his claim; he (the predecessor of the present plaintiffs) got no declaratory order in his favour, as the result of the suit was simply that the plaintiff's claim was dismissed The effect of the judgment, however, was that the here defendant's predecessor was stated by the Court to have no right to cut the *bund* in such a way that the here plaintiffs' predecessor should be deprived of the water in question. I confess that I cannot see, on careful examination, how the plaintiffs here could have proceeded in the old action in any way; they had had no decree in their favour, as all that had happened was that the (here) defendant's predecessor in title had brought an action in which his claim was dismissed. The present plaintiffs' predecessor had nothing to complain of, as he had filled up the cutting which had been made in the *bund* to his detriment and his action has been held to be, under the circumstances, not illegal. Nor had he nor had the present plaintiffs anything to complain of in the position which has existed since that time up till now. When, however, now, the former plaintiff litigant's successor has cut the *bund* in a manner which is prejudicial to the rights which the present plaintiffs and their predecessor have enjoyed, then directly this *bund* was cut by the present defendant, there accrues injury to the plaintiffs. It is true that it has been found in the previous suit that this cutting of the dam was injurious to the present plaintiffs' predecessor: but I can see nothing illegal in the plaintiffs now, when the *bund* is again cut, seeking to replace what has been a negative judgment in their predecessor's favour (that is to say, merely a judgment dismissing an action brought against him) by at any rate a permanent injunction against the present defendant restraining her from cutting the embankment in such a manner as to derogate from the plaintiffs' rights. Nor do I see why they should not now as plaintiffs seek for a positive declaration which they ask as to their rights. I do not well see in what exact fashion it would have been open to the plaintiffs here to have proceeded in any process taken out by them in connection with proceedings under the 1878 judgment; in that, their predecessor had nothing except a bare judgment in his favour and no declaratory order or

decree. If he had been in the position of a plaintiff and had obtained a declaratory order perpetuating his right and an injunction, no doubt it might have been a proper course for him or his successor (when it was found that the person against whom such decrees were obtained was disobeying its terms) to proceed against such person by way of application for committal or attachment in order that the Court might punish such person for disobeying its orders. But, here the present plaintiffs' cause of action only seems to me to arise when the defendant again cut the *bund*; and I fail to see any good legal reason why, on that taking place, the plaintiffs should not apply for an injunction to the Court, and, also, if they so wish, for a declaration; armed with both of which they will in future be able more easily to restrain the defendant or her successors from committing what is apparently an illegal act.

Next as to the effect of this decision in the previous suit upon the position of the defendant. I think, broadly speaking, it was unnecessary and perhaps impracticable for the plaintiffs directly to plead what had taken place in the previous suit. They might possibly have done so, but I do not think it was obligatory upon them so to do. What, however, in my opinion, is clear that they can do is that, when they were met by the statement in the defence of the present defendant that they have acquired no right and that she (the defendant) can cut the *bund* as she likes, they are entitled to adduce any evidence (and would be entitled, if there had been a further course of pleading than obtains in this country, to plead in reply) that the defendant was estopped from setting up this defence because it had already been decided *inter partes* in a previous suit that she (the defendant—or her predecessor) was not entitled to cut the embankment. On this point, therefore, I have come to the conclusion, first of all, that the plaintiffs' procedure in this suit is not incorrect and I doubt if it was possible for them to have moved under the previous suit of 1878; and, secondly, that the defendant is estopped by the decision in the previous suit from putting forward the defence against the plaintiffs' claim that she is entitled to cut the *bund* as she pleases. This, therefore, really concludes the matter.

But so much important and careful argument was devoted to the third point and I have myself given to it so much consideration that I do not like to allow it to be passed by without some expression of my view upon it. The defendant here contends that the plaintiffs could never have and never have acquired in law any such right as that which they claim; because she and her predecessors have always controlled, in fact, the flow of water which impinges upon the northern face of her southern embankment, that is to say, by means of the artificial channels in her northern embankment; and it is said that where such a state of circumstances exists—that is to say that, where the enjoyment by one person of something given to him through the courtesy of another person depends upon that other person's will and permission, the person who enjoys such favour can *never* acquire as against his courtesy grantor a prescriptive right; or, if one likes to call it so, can never claim an easement in connection with the enjoyment of an amenity controlled by the permission of the grantor. There is a great deal, of course, to be said for this form of argument and the kind of principle which is thus enunciated is well shown in the case of *Ballare Mandal* v. *Bepin Behari Mandal* (2). In that case, water had, for many years, accumulated on high land and had found its way down across the lands of the defendants on to the lands of the plaintiff which lay at a somewhat lower level. On the defendants having stopped the flow of water on to the plaintiff's land, the plaintiff brought a suit to restrain the defendants from so stopping it on the allegation that by their so doing they had caused serious damage to him. It was held that the plaintiff had no right which he could enforce in law; as *his* case was really the case of a servient tenement endeavouring to retaliate by claiming an easement against the owner of a dominant tenement. Also in the case of *Bimal Chandra Chakravarti* v. *Chandra Kanta Chakravarti* (3) one finds the same proposition somewhat similarly put forward: "Easement exists for the benefit of the dominant tenement alone and the servient owner acquires no right

(2) 46 Ind. Cas. 24.
(3) 22 Ind. Cas. 514; 19 C. L. J. 45.

to insist on its continuance or to ask for damages on its abandonment." In that case the plaintiff and the defendants were neighbouring owners of land. Towards the west of the land of the defendants there was a pathway by which water passed, during the rainy season, through a channel on the land of the defendants, and, after crossing the land of other neighbours went upon the land of the plaintiff. It was said in that case that this state of affairs had existed for over 20 years. However, the defendants in the action stopped the flow of water on to the plaintiff's land and kept it for their own use. It should be mentioned that the water in question was surplus rain water which had accumulated on various properties. The plaintiff, thereupon, brought an action against the defendants for a declaration of a right of easement, but it was held that as the plaintiff could not establish any right to the use of the surplus water before it reached the land of the defendants, he had no claim to any easement and could acquire no rights to the water the enjoyment of which was the basis of his case. So too we find the case of *Altafuddin (Aftab) Chowdhury* v. *Aso Khadem (Asokhadeen)* (4). In that case, again, the plaintiffs and the defendant were adjoining owners of land. The defendant used to discharge water from his land through a channel on his own property into the land of the plaintiffs. The defendant, however, stopped that channel up and as a result the plaintiffs got no more water. It was held *there* that the plaintiffs could not acquire any right of easement. It is certainly very difficult to differentiate altogether the circumstances in the present appeal from some of the three decisions which I have quoted, but although it is, no doubt, difficult to quarrel with their legal soundness, I think that the real fundamental legal basis upon which the idea of easement is founded is well expressed in the case of *Ramessur Persad Narain Singh* v. *Koonj Behary Pattuk* (5). This was a case in the Privy Council. In that case the defendants and the plaintiff were neighbouring proprietors; the latter had a large artificial reservoir from which by a channel a property belonging to the plaintiff had been for a long period irrigated. The defendants, however, erected some embankments which had the effect of stopping the flow of water to the plaintiff's land, whereupon he brought an action against the defendants claiming that he had a right to this water and asking that the defendants should be compelled to remove certain of these embankments, which they had erected and which diverted the water from his properties. It was admitted in this case that the user was of very ancient date. Their Lordships of the Privy Council stated that a very old and enforceable right to water flowing on to a man's land through an artificial water-course constructed on a neighbour's land may rest on some lost grant or some old arrangement, proved or which may be presumed from or with the owner of the land from which the water may be artificially brought; or may be based on some other legal origin inferential from the environment and circumstances: such a right may be presumed from the time, manner and circumstances under which the easement has been enjoyed.

In the case now before me there are several considerations which may well be mentioned in connection with this point. In the first place, there is no doubt that the relative position of the two parties has lasted for a great length of time; we find it the same in 1878 and even then the position was of a very old epoch. It is said that all easements must have their origin in something in the nature of a permissive factor, and in this case the circumstances are such which, I think, would justify one in drawing an inference that there had been at some time or other an arrangement between the owners of these two lands (and perhaps other contemporary owners) under which the position which has endured for so very many years was started.

It may be observed, here, also, that the defendant's predecessor in title in the suit in 1878 does not seem to have raised this question, although it was undoubtedly a most material matter and one which might have influenced the position then very markedly; for it was, then, open to the defendant's predecessor to have proved that he controlled by means of sluices the flow of water from his northern embankment to the plain at the north of his southern embankment whence the water ran

(4) 20 Ind. Cas. 315; 18 C. L. J. 131; 17 C. W. N. 1066.

(5) 4 C. 633; 6 I. A. 33; 3 Sar. P. C. J. 856; 3 Ind. Jur. 179; 2 Shome L. R. 194; 2 Ind. Dec. (N. S.) 402 (P. C.).

to the present plaintiffs' tank, and if he had in 1878 then exhibited this feature, he might have made the whole question a great deal more difficult for the then defendant Chama Mandar. However, it does not seem to me that under those circumstances it is possible for the present defendant to be allowed to agitate the point in this suit. I certainly think that this point might and ought to have been made a ground of attack by the present defendant's predecessor in the suit in 1878. It was without doubt a very material feature bearing closely upon the present plaintiffs' method of obtaining the water from the northern face of the present defendant's southern embankment. After very careful consideration of this appeal I have come to the conclusion, for the reasons which I have given above, that the appeal should be allowed. I do not, however, think that the form in which the suit was decreed by the Munsif, with its apparently somewhat arbitrary empirical restrictions as to the limit of the space of north of the southern embankment from which the plaintiff is entitled to obtain water, should be maintained. It would seem to me that the defendant's real legal safety valve is the channel at the south eastern corner of her southern embankment. It would also appear that if the defendant finds that her land north of her southern embankment is in danger of being really inundated in the future, it would be her best course to try and come to some arrangement with the adjoining land owners by which, after the plaintiffs' right has been properly satisfied and is being properly maintained, some reasonable outlet may be, by mutual agreement, fixed upon so as to avoid serious flooding of her (the defendant's) land: this ought to be easily arranged by the good offices of a Civil Engineer, who could fix the levels of the embankment so as to ensure a proper supply to the plaintiffs' tank and the prevention of a dangerous inundation of the defendant's land: and I trust that the parties to these proceedings will realise that some simple neighbourly agreement is far more beneficial and far less expensive than protracted litigation.

In my view, therefore, the plaintiffs are entitled to succeed in terms of paragraphs (1) and (2) of their plaint.

I understand that the question of damages does not now arise, but I think that the plaintiffs should be awarded their costs both here and in both Courts below.

P. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 88 OF 1921.

January 3, 1921.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD MUBARAK HUSAIN AND ANOTHER—OBJECTORS—APPELLANTS

versus

SAHU BIMAL PRASAD—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57—Execution—Attachment—Default by decree-holder—Application dismissed but attachment maintained—Order, whether proper.

A Court executing a decree found itself, on a particular date, unable to proceed with the execution of the decree by reason of the default of the decree-holder, but instead of dismissing the application or adjourning it to a further date as provided by Order XXI, rule 57 of the Civil Procedure Code, passed an order that the execution case should, for the time being, be dismissed, but that the attachment should remain in force. On a subsequent date the decree-holder applied to the Court to proceed with the sale of the property without any fresh attachment:

Held, that although the order passed by the Court was not a proper order for the Court to have passed, it could not be treated as a nullity and as having no effect upon the parties between whom it was passed and that the property could be sold without a fresh attachment. [p. 92, col. 1.]

Namuna Bibi v. *Roshun Meah*, 9 Ind. Cas. 558; 38 C. 482; 15 C. W. N. 428; 13 C. L. J. 621, not followed.

Dildar Husain v *Sheo Narain*, 49 Ind. Cas. 113; 41 A. 157; 17 A. L. J. 52, distinguished.

Execution first appeal from a decree of the Subordinate Judge, Moradabad, dated the 15th January 1921,

Mr. *S. A. Haidar*, for the Appellant,

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—The essential point raised by this appeal admits of being briefly stated:—The Court below had before it an application for execution of a decree with which, on a particular date, it found itself unable to proceed further by reason of the default of the decree-holder. Under Order XXI, rule 57, the duty of the Court was, either to dismiss the application, or to adjourn

the proceedings to a future date. On a dismissal of the application it is provided by the said rule that the attachment shall cease. The Court did not follow, as it ought to have done, the provisions of the said rule. The order which it passed was to the effect that the execution case should, for the time being, be dismissed, but that the attachment should remain in force. That is not an order which the Court ought to have passed; but the question before us is as to the effect of the said order when passed. The decree-holder on a subsequent date applied to the Court to take up the proceedings at the stage at which they stood on the date of the order above mentioned; that is to say, he asked the Court to proceed with the sale of the property in question without any fresh attachment. The judgment-debtor objected that a fresh attachment was necessary, and that objection has been overruled by the Court below; hence this appeal.

There is authority in support of the appellants' contention in the case of *Namuna Bibi* v. *Roshun Meah* (1). We can only say that we do not agree with the decision in that case and that the reasoning on which it is based does not commend itself to us. Moreover, that case is to a certain extent distinguishable from the present, for the execution Court in the case now before us went out of its way to mark the nature of the order which it purported to pass by using the words "*filhal*," which we must render "for the present" or "for the time being." There can be no doubt as to the order which the Court intended to pass and that order was submitted to by the parties. It was, in substance and effect, an order that the execution proceedings do stand adjourned *sine die*. It has, however, been contended before us that the principle laid down by the learned Judges of the Calcutta High Court in the case above referred to has been adopted and enforced by a Bench of this Court. The reference is to the case of *Dildar Husain* v. *Sheo Narain* (2). We are of opinion that that case is distinguishable on the facts. To begin with, the question before the Court in that case concerned the rights of a *bona fide* transferee for value. Secondly, there had been no qualifying expression used in the order of dismissal such as we find in the order laid before us in the present case. While, therefore, we desire to lay stress on the fact already pointed out by us, that the order directing the execution case to be dismissed for the time being and the attachment maintained was not a proper order for the Court to have passed, we are not prepared to treat it as a nullity and as having no effect upon the parties between whom it was passed. We think there is no force in this appeal and we dismiss it accordingly with costs.

J. P. *Appeal dismissed.*

(1) 9 Ind. Cas. 558; 38 C. 482; 15 C. W. N. 428; 13 C. L. J. 621.

(2) 49 Ind. Cas. 113; 41 A. 157; 17 A. L. J. 52.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 81 OF 1921.

August 17, 1921.

Present:—Mr. Justice Krishnan and Mr. Justice Odgers.

PEDDAPALAYAM BODACHARI *alias* VENKATRAYACHARI—DEFENDANT—COUNTER PETITIONER—PETITIONER

versus

PEDDAPPALAYAM MUNIYACHARI—PLAINTIFF—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 89, O. XXIII, r. 3, Sch. II, r. 1 (1)—"Any matter in difference between the parties," meaning of—Reference to arbitration—Jurisdiction of Court to refer matters not in dispute—Award on such reference, validity of.

The expression "any matter in difference between them" in paragraph 1, Schedule II, Civil Procedure Code, should not be given an extended meaning so as to include matters in dispute between the parties not included in the suit. [p. 93, col. 1.]

A reference to arbitration on such matters is not a valid reference and the award on such a reference can neither be treated as a valid award, nor a lawful compromise of the suit claim under Order XXIII, rule 3, Civil Procedure Code [p. 93, col. 1.]

Polita Pavana Panda v *Narasinga Panda*, 51 Ind. Cas. 155; 42 M. 632; 36 M. L. J. 538 and *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub*, 37 Ind. Cas. 140; 40 B. 38; 18 Bom. L. R. 559, followed.

An award under an invalid reference, being self invalid, gives no right either as an award or as a compromise [p. 94, col. 1.]

Semble.—Section 83 of the Civil Procedure Code is a bar to such an award being accepted as a

lawful agreement or compromise of the suit under Order XXIII, rule 3, Civil Procedure Code. [p. 93, col. 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif, Tirupati, dated the 15th December 1920, in Civil Miscellaneous Petition No. 392 of 1920, in Small Cause Suit No. 445 of 1920.

Mr. *N. Chandrasekhara Aiyar*, for the Petitioner.

Mr. *V. Ramadoss*, for the Respondent.

JUDGMENT.—On the first point taken we agree with the lower Court that the Court's jurisdiction to refer to arbitration is confined to matters in difference in the suit itself and does not extend to all matters in dispute between the parties. Though the wording of paragraph 1, clause (1) of the Second Schedule, Civil Procedure Code, is not free from ambiguity when taken by itself, the matter is made clear by a reference to forms Nos. 1 and 2 of the Schedule, particularly the latter. Under the old Code the corresponding section 506 clearly referred to matters in difference in the suit. We think no change in the law was intended by the change in the wording of the rule in the new Code; but it was only a verbal change. Furthermore, on principle, it is difficult to hold that the Legislature intended that a Court which has no jurisdiction over the subject-matter in dispute should have power to refer it to arbitration. Such a result would follow if we give to the words "any matter in difference between them" in paragraph 1 (1), Schedule II, Civil Procedure Code, an extended meaning to include all matters in dispute between the parties and not included in the suit. We consider, therefore, the reference in this case was not a valid reference and the award on such a reference cannot be treated as a valid award and it was rightly rejected by the lower Court. cf. *Polita Pavana Panda* v. *Narasinga Panda* (1).

It is next urged that the award should have been accepted as a lawful agreement or compromise of the suit claim under Order XXIII, rule 3, Civil Procedure Code, and a decree passed in accordance with it so far as it related to the suit. Now it does not appear from the records that such an application was made to the lower Court and it is doubtful if the point should be allowed to be taken before us. However, as the petitioner's Vakil says the point was taken, we have not refused to hear it.

We are, however, inclined to think that an award under an invalid reference, being itself invalid, gives no rights either as an award or as a compromise.

We are further inclined to follow the view taken by Macleod, J., (now Chief Justice) in *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub* (2) that section 89, Civil Procedure Code, is a bar to the present contention, but it is not necessary to express a final opinion on the point.

The civil revision petition fails and is dismissed with costs.

M. C. P.

J. P. *Petition dismissed.*

(1) 51 Ind. Cas. 155; 42 M. 632; 36 M. L. J. 539.

(2) 37 Ind. Cas. 140; 40 B. 386; 18 Bom. L. R. 559.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 123 OF 1920.

May 16, 1921.

Present :—Mr. Justice Walsh and Mr. Justice Wallach.

FIRM KIRPA RAM SITA RAM—DEFENDANTS—APPELLANTS

versus

FIRM MANGAL SEN BISHAN MAL—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20—Jurisdiction—Firm carrying on business in different places—Identity, determination of—Procedure—"Carrying on business," explanation and meaning of—Winding up and carrying on business—Stage of insolvency—Offence against insolvency law.

In the case of firms carrying on business in different parts of the country or of the Province, sometimes constituted of the same people, sometimes constituted with the omission of one person who has no interest in a branch business in one of the towns, or with the addition of a new person

who has an interest confined only to that branch business, a Court should analyse the facts as thoroughly as it can, in order to determine whether the firms or persons so carrying on business are really the same legal entity or person in each place p. 94, col. 2: p. 95, col. 1.]

A firm, without being a branch in the sense that it is subordinate to and under the control of a firm in a different town and compelled to render an account to the latter, might still be in substance the same business so as to make it carry on business in its own place, if it is transacting the business of the other firm in its own place as agent for that firm, purchasing and selling goods and obtaining orders, forwarding or receiving orders to and from that firm and merely remunerating itself by being allowed to make a definite profit out of certain transactions or a limited profit out of all transactions. [p. 95, col. 2]

"Carrying on business" is used in section 20, Civil Procedure Code, as distinct from personally working; of course a man personally working in a particular place is carrying on business, but a man may carry on business, and thousands of people do, in a place where he does no personal work of any kind, and a firm may be carrying on business at a particular place either through an agency or through a manager or by its servants without ever having left its own town. It means, in the section, having an interest in the business transactions at the particular place: a voice in what is done; a share in the gain or loss, as the case may be, and some control, if not over the actual method of working, at any rate, upon the existence of the business. It necessarily means making provision for the future. [p. 96, col. 1.]

Winding up or disposing of goods with a view to winding up is just as much carrying on business while it lasts, as purchasing goods or investing capital in carrying on bussiness. [p. 96, col. 2.]

When a man reaches the stage of insolvency, he commits an offence against the insolvency laws unless he winds up his affairs, that is to say, he goes on incurring liabilities and incurring losses when he is unable to pay his debts. He still carries on business if with a view to winding up his business and preventing any further losses and committing a breach of the insolvency laws, he proceeds to dispose of his stock. [p. 96, cols. 1 & 2.]

First appeal from an order of the District Judge, Cawnpore.

FACTS.—This appeal first came up for hearing before Mr. Justice Walsh and Mr. Justice Ryves on the 24th of February 1921, who remitted issues. The case finally came up for hearing on receipt of finding before Mr. Justice Walsh and Mr. Justice Wallach on the 16th of May 1921.

Messrs. *B. E. O'Conor*, *Saila Nath Mukerji* and *Peary Lal Banerji*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

ORDER.—This suit was brought in Cawnpore against three persons who were alleged to be carrying on business in Cawnpore. They were sued as defendants upon the record by the following description: Lala Mangal Sen, Bishan Mal *alias* Bishambhar Nath and Banarsi Das, proprietors of the firm of Banarsi Das and Co., Delhi, and of Mangal Sen Bishambhar Nath of Cawnpore at present residing at Delhi. The question was raised at once, and the learned Judge decided in favour of the defendants, that the Cawnpore Court had no jurisdiction. The plaintiff contended that the contract was both made and to be performed in Cawnpore. The learned Judge decided that question against him We think there is nothing in this point. We have seen the contract. It was clearly made in Delhi with the firm Banarsi Das of Delhi. That, however, does not dispose of the question of jurisdiction. Section 20, Civil Procedure Code, provides that a suit may be instituted in a Court within the local limits of whose jurisdiction each of the defendants, where there are more than one at the time of the commencement of the suit, actually carries on business, secondly, and in the alternative, within the limits of whose jurisdiction any of the defendants at the time of the commencement of the suit carries on business, provided that in such case either the leave of the Court is given or a defendant who does not carry on business acquiesces in the suit being brought. The learned Judge, therefore, had to decide whether these three people, sued not in a firm's name but as individuals and proprietors of the contracting firm in Delhi and also proprietors of the other firm in Cawnpore, carried on business in Cawnpore, or whether if one of them did, there was any reason why he should not give leave for the suit to be brought in Cawnpore. We recognise that in the case of firms carrying on business in different parts of the country or of the Province, sometimes constituted of the same people, sometimes constituted with the omission of one person who has no interest in a branch business in one of the towns, or with the addition of a new person who has an interest confined only to that branch business, it is often extremely difficult to make up one's mind whether the firms or persons so carrying on business are really the same legal entity or person in each place, but, however difficult it may be, it is a duty imposed upon a Court to analyse the facts

as thoroughly as it can and to arrive at a determination, and it is a duty important in the public interest, because, without expressing any opinion as to the individual merits in this case, it cannot be denied that creditors are constantly kept at arm's length, just rights are defeated and the machinery of the Courts is abused by persons who disguise themselves under the mask of a pseudonym for the purpose of concealing their identity and imposing upon the credibility of those who believe in them. It is not possible to lay down any clear rules for guidance on what is really a question of fact in each case. The best guidance that a Judge can follow is his own common sense and experience of business matters. Take for example the case of the Dunlop Co., who sell tyres all over the world. Probably in the great majority of, if not in all cases, they sell to their sub-agents who dispose of the Dunlop goods to the public, for example in India, and it would be very difficult to show that the Dunlop people carried on business within the meaning of the section in any town in which their sub agents for that purpose were selling Dunlop tyres. On the other hand, to take a very familiar illustration given during the argument, the well-known refreshment contractors, Messrs. Kellner and Co, would have considerable difficulty, we should say, in persuading a Court that they did not carry on business in Allahabad where they have a refreshment room and sell goods, even although it might happen that their manager in Allahabad was made a partner in respect of the Allahabad business and took a share in the profits.

We have made these general observations with a view, if possible, of assisting the Court which has to determine the issues which we are going to send down, which we hope will dispose of this knotty point.

According to the view of the learned Judge, up to the date of the first order the defendants, although members of both the Delhi firm and the Cawnpore firm, were members of a separate and distinct business in Cawnpore by reason of the fact that an additional partner was a member of the firm in Cawnpore, namely, one Jugal Kishore, and at one time, he distinctly held that the firm of Mangal Sen Bishambhar Nath was not a branch of the firm Banarsi Das & Co., Delhi. But without being a branch in the sense that they were subordinate to and under the control of the Delhi firm and compelled to render an account to the Delhi firm, they might still be in substance the same business so as to make the present defendants carry on business in Cawnpore, if they were transacting the business of the Delhi firm in Cawnpore as agents for the Delhi firm, purchasing goods and selling goods and obtaining orders, forwarding or receiving orders to and from Delhi and merely remunerating themselves by being allowed to make a definite profit out of certain transactions or a limited profit out of all transactions. One sentence alone with regard to this matter in the learned Judge's judgment has entirely shaken our confidence in what he intended to find. He said as follows: "The business of Jugal Kishore Bhagwati Prasad is practically carried on in the same premises" ("practically" is always a dangerous word to use when you are finding facts, because it suggests a modification or doubt as to the real finding which you are intended to arrive at), "in which the business of Mangal Sen Bishambhar Nath is carried on." It is quite possible that Jugal Kishore might have been carrying on the business of the firm of Jugal Kishore Bhagwati Prasad and might also have been disposing of the goods of Mangal Sen Bishambhar Nath. No doubt that is a possibility if Jugal Kishore was really engaged in a business totally distinct from Mangal Sen Bishambhar Nath, selling a different class of goods altogether which could not in any way compete with Mangal Sen Bishambhar Nath, but there is nothing in the judgment of the learned Judge to suggest that the business was of a different kind of goods and the presumption is that a man, expert in a particular trade, does not waste his energies upon enterprises of a totally different character and if Jugal Kishore carried on business in the same kind of goods, it seems inconceivable that he should be at the same time carrying on a business of his own on behalf of himself and one Bhagwati Prasad in the same place in direct competition with Mangal Sen Bishambhar Nath, if he was also a member of that firm. The suggestion that one man could be possibly allowed, even if he was able to do it, to

carry on two businesses of the same kind and on the same premises in competition with one another, is so extravagant that it seems there must be some defect in the language which the learned Judge has used.

Similarly the learned Judge has used language which makes us doubt whether he has really appreciated what "carrying on business" means. "Carrying on business" is used in the section as distinct from personally working; of course a man personally working in a particular place is carrying on business, but a man may carry on business, and thousands of people do, in a place where he does no personal work of any kind, and these defendants may be carrying on business at Cawnpore either through an agency or through a manager or by their servants, without ever having left the town of Delhi. The learned Judge seems to think that carrying on business in this section involves some personal presence or personal effort in Cawnpore. That is not the law and he ought to disregard the question altogether. "Carrying on business" means, in this section, having an interest in the business transactions at the particular place; a voice in what is done; a share in the gain or loss, as the case may be; and some control, if not over the actual method of working, at any rate, upon the existence of the business.

Secondly, the learned Judge has, in the plainest way, intimated that, in his opinion, the mere fact that Mangal Sen Bishambhar Nath have been selling their goods in the bazar, is not "carrying on business." We really do not quite know what the learned Judge had in his mind. Selling is the most important part of a business, if you want to make any profit at all. Carrying on business necessarily means making provision for the future. Indeed, for example, when a man reaches the stage of insolvency, he commits an offence against the insolvency laws unless he winds up his affairs, that is to say, if he goes on incurring liabilities and incurring losses when he is unable to pay his debts. But nobody can say that, if with a view to winding up his business and preventing any further losses and committing a breach of the insolvency laws, he proceeds to dispose of his stock, he would not still be carrying on business. Winding up or disposing of your goods with a view to winding up, is just as much carrying on business while it lasts, as purchasing your goods or investing your capital in carrying on business. The learned Judge has persuaded himself that there is not the slightest evidence on the record to show that the defendants or any of them had been carrying on the business of that shop, because the most they were doing was selling of goods. This is a clear misdirection.

With these observations which we have made with a view, if possible, of clearing the ground and assisting the learned Judge to arrive at the conclusion necessary for the disposal of this case, we refer the following issues:—

(1) Was the firm in Cawnpore at the date of the contract owned by the members of the firm of Banarsi Das & Co., Delhi, together with or without the addition of Jugal Kishore?

(2) Was the firm in Cawnpore started by the members of the Delhi firm for the development of their Delhi business?

(3) If Jugal Kishore was a partner in the Cawnpore business, did he become so by way of payment for his management of it in Cawnpore or how otherwise?

(4) Did the Cawnpore firm deal in the identical articles imported by the Delhi firm for their business? If so, how were they accounted for by Cawnpore to Delhi?

Either side may adduce any additional and material evidence. The usual ten days will be allowed for filing objections.

JUDGMENT.

WALSH, J.—On the findings to the issues this appeal must be dismissed and the order of the Court below confirmed with costs.

J. P. *Appeal dismissed.*

ZULFAN KHAN v. SANT BAKHSH SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

(SECOND CIVIL APPEAL No. 173 OF 1921.

August 2, 1921.

Present:—Mr. Daniels, J. C.

ZULFAN KHAN—DEFENDANT—APPELLANT

versus

SANT BAKHSH SINGH—PLAINTIFF AND ANRUD SINGH—DEFENDANT—RESPONDENT.

Pre-emption—Perpetual lease—Sale.

A perpetual lease granted by a superior proprietor conferring under-proprietary rights on the lessee, where the annual rent reserved is substantially equal to the Government revenue assessed on the land and no right of re-entry is reserved, amounts, for purposes of pre-emption, to a sale. [p. 98, col 1.]

Ram Faqir v. *Sheo Ratan*, 8 O. C. 121, *Babu Baldeo Prasad* v. *Shaikh Ali Husain*, 10 O. C. 348, *Ram Autar* v. *Drigpal*, 8 Ind. Cas 7.5; 14 O. C. 41; *Data Ram Tewari* v *Deokali Tewari*, 15 Ind. Cas. 855; 17 O. C. 299; 1 O. L. J. 463, referred to.

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 10th May 1921, confirming that of the Munsif, Sultanpur, dated the 1st February 1921.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellant.

Mr. *Bisheshwar Nath Srivastava*, for Respondent No. 1.

JUDGMENT.—The question in this case is a very short one, though its solution has afforded some difficulty to the Courts in the past, It is this. Is a perpetual lease granted by a superior proprietor conferring under proprietary rights on the lessee, where the annual rent reserved is substantially equivalent to the Government revenue assessed on the land and no right of re entry is reserved, to be treated as a sale for purposes of pre emption? The document to be construed in this case is in form a lease. A premium of Rs. 1,000 was paid and Rs. 15 annual rent was reserved to the lessor in perpetuity. Apart from this no other right was reserved to the lessor. I attach very little importance to other conditions of the lease, namely, that the lessee was empowered to redeem a mortgage on the leased share and that he was at liberty to make use of the land in any manner he wished, because such terms are natural in the case of a perpetual lease where the lessor has no expectation of ever getting back possession of the land. The appellant's argument is that the transaction is what on the face of it it purports to be and should be treated as such. The view contended for by the respondents and accepted by the Courts below is that, if the substance of the transaction is looked to, it is impossible to distinguish it from a sale of under-proprietary right. That a superior proprietor can carve out and sell an under-proprietary right, although by the deed of sale he reserves to himself in perpetuity a rent equivalent to the Government revenue, is concluded by the decision in *Ram Faqir* v. *Sheo Ratan* (1). In this case both Courts have found that the rent reserved is substantially equivalent to the Government revenue payable on the leased share.

There is another way of looking at the matter. The transaction in question is in form a lease and it conforms exactly to the definition of a lease given in section 105 of the Transfer of Property Act. This being so, the mere fact that the interest of the lessee is heritable and transferable and that he comes within the description of under-proprietor is no reason for treating the document as something different from what in fact it is. This however, is not the view which has found favour with this Court. In *Ram Faqir* v. *Sheo Ratan* (1) the superior proprietor sold a *birt* under-proprietary right for a sum of Rs. 100, reserving in perpetuity rent of eight annas a year on account of revenue. It was held that the document was a sale and the fact that only a subordinate tenure was carved out did not affect the matter.

In *Babu Baldeo Prasad* v. *Shaikh Ali Husain* (2) the lease was a perpetual lease by an under-proprietor of his under-proprietary right. Here the under-proprietor still remained liable for the rent to the superior proprietor and the document was treated as a lease.

In *Ram Autar* v. *Drigpal* (3) the lease was a lease by the superior proprietor creating under-proprietary right with a reservation that the lessee was to pay the *lagan sarkari*, *i. e.*, the Government revenue, Rs. 4 6 a year. No right of re entry was reserved. The document was held to be a sale of under-proprietary right and not a lease.

(1) 8 O. C. 121.
(2) 10 O. C. 348.
(3) 8 Ind. Cas. 725; 14 O. C. 41

CHANAN *v.* NUR DIN.

The case of *Data Ram Tewari* v. *Deokali Tewari* (4), on which the appellant relies, does not purport to overrule any of the earlier decisions. The true ground of distinction in that case is not that the deed was granted to a Brahman from religious motives—the motive of the grant has nothing to do with the nature of a transaction—but that the rent reserved was a real rent, reserved, as the learned Judges say, ostensibly to provide the holder with a means of subsistence—*vide* page 300* of the report. (The word "not" in this sentence appears to be either a misprint or a clerical error.) This is the ground on which that case was distinguished in *Ram Suchit* v. *Sheo Sewak Singh* (5). In the latter case the deed was described as a *shankalapnama* and the amount of the consideration as a premium (*zar-i peshgi*), but the document reserved no right to the grantor except the right to receive this sum as the Government revenue appertaining to the land. The transaction was treated as a sale of under-proprietary right and pre-emption was allowed.

According to all these cases, where the grantor reserves no right of re-entry, whether the document is described as a lease or a sale, the test applied to determine its real nature has been whether any rent was reserved to the grantor over and above the Government revenue, which he himself had to pay on the land. This applies only to deeds executed by the superior proprietor whereby an under-proprietary right is created in the grantee. It does not apply to perpetual leases by an under-proprietor which are governed by the ruling in *Babu Baldeo Prasad* v. *Sheikh Ali Husain* (2). I could not depart from this consistent current of authority without referring the case to a Bench, and this I am not disposed to do. I may say in passing that a perpetual lease is not a form of conveyance which the Courts should go out of their way to encourage. It is a fruitful source of litigation and it has the inconvenient effect of permanently divorcing title and possession. Applying the test laid down in these rulings, the decision of the Courts below is correct. There is a concurrent finding that the rent nominally reserved is substantially equivalent to the Government revenue assessed on the share. The appeal, therefore, fails and I accordingly dismiss it with costs.

N. H. *Appeal dismissed.*

(4) 25 Ind. Cas. 855; 17 O. C. 299; 1 O. L. J. 463.
(5) 56 Ind. Cas. 629; 23 O. C. 50.

*Page of 17 O. C.—[*Ed.*].

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1401 OF 1920.

November 2, 1921.

Present :—Mr. Justice LeRossignol.

CHANAN AND OTHERS—DEFENDANTS —APPELLANTS

versus

NUR DIN AND OTHERS—PLAINTIFFS —RESPONDENTS.

Custom—Gift to khanadamad—*Musalman Gujars of Kharar Tahsil, Ambala District.*

Among Musalman Gujars of Kharar Tahsil in the Ambala District, a proprietor is not empowered by custom to make a gift of ancestral land in favour of a *khanadamad* in the presence of collaterals. [p 99, col. 1.]

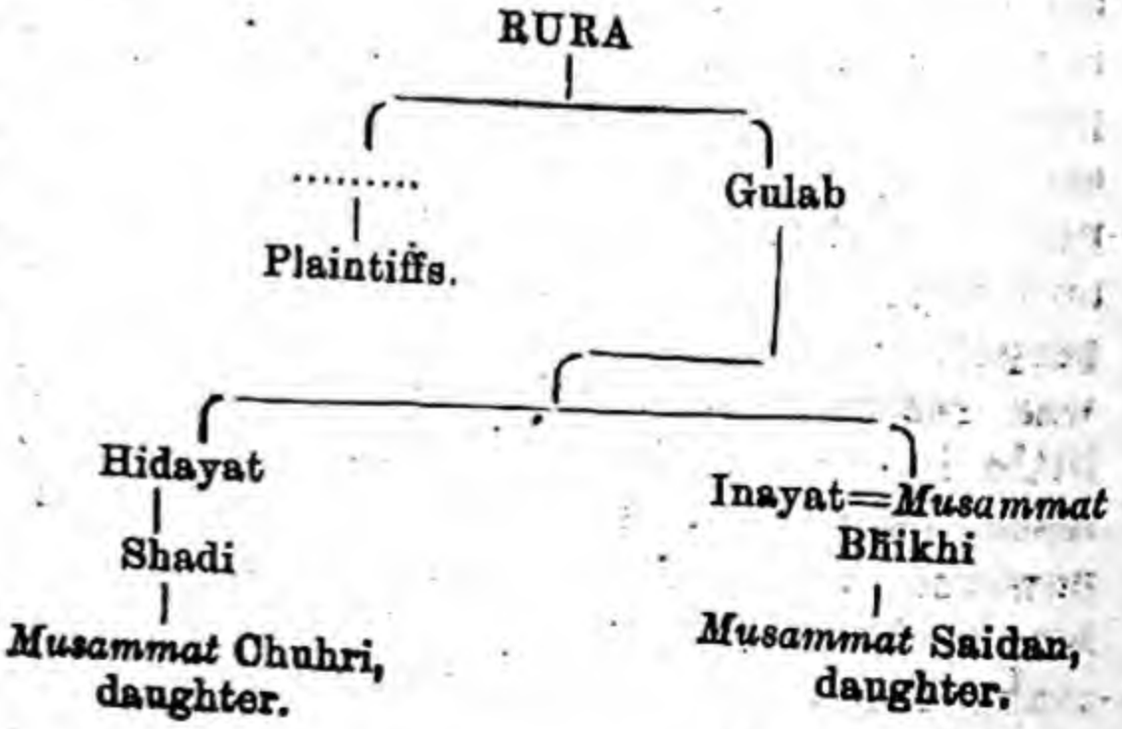
Second appeal from a decree of the District Judge, Ambala, dated the 29th March 1920, affirming that of the Munsif, First Class, Rupar, District Ambala, dated the 29th August 1919.

Mr. *N. C. Pandit*, for the Appellants.

Mr. *Ghulam Rasul*, for the Respondents.

JUDGMENT.—The parties are Musalman Gujars of Kharar Tahsil in Ambala.

The following table illustrates the dispute :—



The suit was brought by plaintiffs to recover from the descendants of *Musammat* Saidan the estate of Hidayat and Inayat,

They obtained a decree regarding the whole of their claim and the defendants prefer a second appeal to this Court.

It has been ascertained by a remand that all the land in suit is ancestral land, and it is now admitted by Counsel that the defendants have no right to retain Hidayat's share, but the appeal is pressed with regard to Inayat's portion on the grounds that the donee, Muhammad Bakhsh, was a *khana-damad* and that in any case the plaintiffs are estopped.

The history of the estate is that in 1887 Inayat gifted his share to his daughter's husband, that Hidayat was succeeded in respect of his share by his son Shadi, that Shadi died without male issue in 1910 or 1911 and his estate was taken as to one-half by his daughter, and as to the other half by his uncle's widow, *Musammat* Bhikhi. On the marriage of the daughter *Musammat* Bhikhi took the whole.

On the death of Shadi the plaintiffs claimed his succession and contended that *Musammat* Bhikhi had no right to succeed because her deceased husband, Inayat, had gifted away the whole of his property to his son-in law.

It is now urged by defendants that in that case the plaintiffs relied upon the gift, accepted it and are now estopped from challenging it.

The *riwaj-i-am* is very express in its prohibition of a gift to a *khanadamad* in the presence of collaterals, and on that point the defendants cannot succeed.

The plaintiffs' plea in the 1911 case did not succeed and of course could not, and *Musammat* Bhikhi took her nephew's estate by collateral succession, and all that the plea then employed by the plaintiffs establishes is their knowledge of the gift. But is that adequate proof of estoppel? The hour for a declaratory suit had long passed. During Bhikhi's lifetime a suit for possession of Inayat's share was barred and during Shadi's lifetime it was doubly barred. *Labhu* v. *Musammat Nihali* (1), *Muhammad Nias-ud din Khan* v. *Muhammad Umar Khan* (2), *Amir* v. *Musammat Zebo* (3) have been referred to, but there is no definite act of Shadi's on record which could bind the plaintiffs to acquiescence.

The succession opened to the plaintiffs only on the death of *Musammat* Bhikhi and they launched their suit without delay.

For these reasons the appeal must fail and it is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 7 P. R. 1905; 66 P. L. R. 1905; 251 P. W. R. 1905.
(2) 1 P. R. 1907; 31 P. W. R. 1907.
(3) 42 P. R. 1902.

MADRAS HIGH COURT.

REFERRED CASE NO. 10 OF 1921.

September 27, 1921.

Present:—Mr. Justice Spencer and Mr. Justice Ramesam.

THE GREAT INDIAN PENINSULA RAILWAY CO., LTD.—DEFENDANT—APPELLANT

versus

CHELLARAM GIANCHAND—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), s. 75, *Sch. II, cls.* (m), (s)—*Applicability of s.* 75—"*Shawls*," *meaning of*—"*Special value*," *meaning of.*

The use of the words "special value" in the marginal note to section 75 of Act IX of 1890 and in clause (*s*) of the Second Schedule must not be taken to imply that only articles falling within the description of the Schedule which are of exceptional value, must be declared. In respect of loss of a consignment of "Shawls" it is a consideration of no consequence that the particular Shawls were not Kashmir Shawls nor made of wool, nor articles of comparatively high value provided that the value of the articles in the parcel exceeded Rs. 100 in all. [p. 100, col. 1.]

Shudarshan Maharaj Nand Ram v. *East Indian Railway Company*, 52 Ind. Cas. 644; 42 A. 76; 17 A. L. J. 1031, referred to.

The term "Shawls" in clause (*m*) of Schedule II of the Railways Act should not be interpreted with reference to the use of the phrase "article of special value" in the marginal note to section 75 and in clause (*s*) of Schedule II. [p. 100, col. 2.]

Sarat Chandra Bose v. *Secretary of State for India*, 14 Ind. Cas. 726; 39 C. 1029, not approved.

Case referred by the Court of Small Causes, Madras, under section 69 of the Presidency Small Cause Courts Act, 1882, in Full Bench Application No. 185 of 1920 (Small Cause Suit No. 9171 of 1920) on the file of the Court of Small Causes, Madras for the opinion of the High Court as to the proper construction of the term "Shawls" as defined in the Railways Act (IX of 1890).

Mr. *D. Chamier*, for the Appellant.

OPINION.

SPENCER, J.—I agree with the majority of the Judges of the Small Cause Court and with the decision in *Shudarshan Maharaj Nand Kam* v. *East Indian Railway Company* (1).

The plaintiff described the articles in respect of which he made his claim as "Shawls" and, in my opinion, it is a consideration of no consequence that the particular Shawls which were lost were not Kashmir Shawls, nor made of wool, nor articles of comparatively high value, provided that the value of the articles in the parcel exceeded Rs. 100 in all.

The use of the words "special value" in marginal note to section 75 of Act IX of 1890 and in clause (*s*) of the Second Schedule, in my opinion, must not be taken to imply that only articles falling within the description of the Schedule which are of exceptional value, must be declared.

As pointed out by Mr. Justice Stuart in *Shudarshan Maharaj Nand Ram* v. *East Indian Railway Company* (1), the words "lace" "watches" and "Government stamps" may include articles of comparatively small intrinsic value.

Generally speaking, all the articles in the list are articles which *may* have a special value, and it is for that reason that it was found necessary to secure Railway Companies from exaggerated claims being made after the loss or destruction of parcels, by enacting that all articles of these classes should be declared, so that the Railway Company may know, before they undertake the conveyance of them, to what extent they will be liable in the event of the articles being lost or destroyed, and to enable the Railway Company to recoup themselves for the special care and risk that attends the carriage of articles that may in many cases be valuable articles, by levying a higher rate for such parcels.

RAMESAM, J.—I agree. The only question to be decided in this reference is whether the goods consigned are 'Shawls.' If they are 'Shawls,' section 75 of the Indian Railways Act applies and the plaintiff is not entitled to recover. If we are to interpret the term "Shawls" with reference to the restricted sense (No. 1 given by Murray), it will be confined to Kashmir Shawls and I do not see how it can cover Shawls of high value but made of material other than the hair of the Kashmir goat, as Dr. Pandalai seems to think.

Again I do not think that we are at liberty to interpret the term 'Shawl' with reference to the use of the phrase 'article of special value' in the marginal note to section 75 and in clause (*s*) of the Second Schedule. With great deference to the learned Judges who decided the case of *Sarat Chandra Bose* v. *Secretary of State for India* (2), I am unable to agree with their reasoning. It may be that that case is correctly decided, if *alwans* are not 'Shawls.' Dr. Pandalai seems to think that, if the extended sense of the term as given in the Dictionaries (Murray and Webster) is allowed to control the meaning of the term as used in the Act, there will be "a revolution in the conditions of carriage of textiles in India." I do not think there is any ground for this apprehension. The second or extended sense as given in the dictionaries is not a definition (in the sense that one can substitute it for the term as its equivalent) but only an attempt to give a description so as to show that the restricted sense has been latterly departed from. If the second sense as given by Murray or Webster is taken as a definition, every piece of upper cloth used by the middle classes in Southern India (almost always made of cotton) will be a 'Shawl,' but I do not think they will ever be held to be 'Shawls' within the meaning of the Act. In each case it must be found whether the goods are known as 'Shawls.' In this case there is no doubt that the goods lost are 'Shawls.' It is at this stage that the description of the goods in the plaint is of help. I am not to be understood as saying that the plaintiff is estopped by his own language in the plaint from contending that they are not Shawls. If, as a matter of fact, the plaint description is erroneous, he may be at liberty to show it. But, in this case, it is clear that it is not erroneous and that his description is in perfect consonance with the extended use of the term as given in the Dictionaries. In this case, therefore, there is no doubt that

(1) 52 Ind. Cas. 644; 42 A. 76; 17 A. L. J. 1031.

(2) 14 Ind. Cas. 726; 39 C. 1029.

the goods lost are 'Shawls' and the plaintiff is not entitled to recover.

M. C. P.

Answer accordingly.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 65 OF 1919.

March 3, 1921.

Present:—Mr. Justice Walsh.

RAM DHARI UPADHIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

BABU LAL UPADHIA—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 167—Two rival Zemindars—One fraudulently entering other's name as sub-tenant, obtaining ex parte *decree for rent and suing for ejectment - Revenue Court, if has jurisdiction —Civil Court, if bound by decree.*

One of two rival Zemindars fraudulently entered the other Zemindar's name as sub-tenant, obtained an *ex parte* decree for arrears of rent from the Revenue Court and then sued for ejectment The other Zemindar raised the defence of proprietary possession, and was thereupon directed to bring his suit within three months in a Civil Court. In the Civil Court, he asked for a declaration of his proprietary title. It was alleged that the suit was barred by *res judicata* and also by limitation as it was brought more than six years after the entry of the plaintiff's name as sub-tenant:

Held, that the suit was not barred by *res judicata* as the Revenue Court was not competent to decide this case, that a fresh cause of action arose when the decree for rent was obtained and that that decree was not binding on the Civil Court and could not operate as estoppel against the plaintiff. [p. 101, col. 2: p. 102, col 1.]

Allah Jilai v. *Umrao Hussain*, 24 Ind Cas. 535; 36 A. 492; 12 A. L. J. 810, followed.

Kishore Singh v. *Bahadur Singh*, 48 Ind. Cas. 470; 16 A. L. J 933; 41 A 97, *Mollo* v. *Ramlal*, 58 Ind. Cas. 772; 18 A. L. J. 1030; 43 A. 191, referred to.

A claim for a declaration of title by an alleged owner cannot be brought within section 167 of Agra Tenancy Act. [p. 101, col 2.]

A Civil Court, in such a case, is not bound by any findings arrived at in the Revenue Court. It is entitled to take an independent view of its own, having regard to all the circumstances of the case. [p. 102, col 1.]

Second appeal from a decision of the District Judge, Ghazipur, dated the 26th of October 1918.

Mr. *U. S. Rajput*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—In this case it is found, (1) that the parties are rival Zemindars, (2) that with regard to No. 803/3, the plot in dispute, the plaintiff has always been in proprietary possession since Fasli 1287, (3) that in 1310 Fasli the defendants fraudulently entered the plaintiff's name as sub-tenant in the revenue records (whether with the collusion of the Patwari, as the Court below thinks, is immaterial), (4) that in 1916 the defendants obtained in the Revenue Court an *ex parte* decree for rent of the property for a certain period against the plaintiff as sub-tenant and that that decree has not been set aside, (5) that the present plaintiff did not come to know of that decree until his property was attached, that he had no opportunity of setting up his proprietary title in that suit and that the decree was obtained by the defendants' fraud and clever device against the well established right of the plaintiff, (6) and that this property about Fasli 1289 was entered in the defendants' *patti*.

On these findings, the plaintiff is clearly entitled to what he claims, namely, a declaration of title, unless there is some legal bar to the same. He does not claim possession because he has always been in possession. It appears that the defendants attacked him with another suit under section 58 of the Tenancy Act for ejectment after the previous decree and then the plaintiff raised his defence of proprietary possession and was directed to bring this suit within three months in a Civil Court (see paragraph 3 of the plaint admitted by the written statement). Much reference is made in the judgments below and in the pleadings to section 11, Civil Procedure Code. That section is clearly irrelevant. The Revenue Court was not competent to decide this case and the only bar that I can see is either a kind of estoppel or the bar raised by sections 166 and 167 of the Tenancy Act. The authorities relied upon in this Court are *Kishore Singh* v. *Bahadur Singh* (1) and *Mollo* v. *Ramlal* (2). In my opinion, these two cases have nothing to do with this case. The former case was decided under section 157 of the Tenancy Act and the case of *Mollo* v. *Ramlal* (2) followed it. This suit being a claim for a declaration of title by an alleged owner, could not be brought under section 167 and these decisions have, therefore, nothing to do with this case. It is said further

(1) 48 Ind. Cas. 470: 16 A. L. J. 933; 41 A. 97.
(2) 58 Ind. Cas. 772; 18 A. L. J. 1030; 43 A. 191.

that the suit is Statute barred. Article 120 prescribes six years and the defendants have had an entry in their favour in 1883 (Fasli 1289) the cause of action is alleged to be the enforced payment by the plaintiff of the arrears of rent under the decree of 1916. Following the decision in the case of *Allah Jilai* v. *Umrao Hussain* (3) with which I entirely agree, I think in any event a fresh cause of action arose when that decree of 1916 was obtained. The Statute of Limitation was not pleaded in the written statement nor raised until it came to this Court. Mr. Bajpai argued that the finding of fraud against the defendants was not justified and that there was really no evidence to support it. I feel doubtful whether this point, *viz.*, as to there being no evidence, is open to the appellants. It was not raised in the memorandum of appeal and the respondent was not called upon to go through the record to see whether there was any direct evidence upon the point. But I do not think that I ought to dismiss that consideration from the appeal, because after all the question of whether the judgment was rightly obtained is involved in the plea of estoppel. The Civil Court is, in a case of this kind, not bound by any findings arrived at in the Revenue Court, nor is there any statement in the record of the Revenue Court conclusively in favour of either party. The Civil Court is entitled to take an independent view of its own, having regard to all the circumstances of the case and if necessary, I am prepared to hold, as a matter of law, that there was sufficient evidence on the record in this case to justify the Court drawing the inference which it has done, that the decree was improperly obtained, which would be a fatal answer to the defence in any event. I think even if it were properly obtained, it would not be binding on the Civil Court or operate as an estoppel against the plaintiff. The appeal must be dismissed with costs.

Appeal dismissed.

J. P.

(3) 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 453 OF 1919.

November 16, 1921.

Present:—Mr. Justice LeRossignol and Mr. Justice Campbell.

MUHAMMAD HUSSAIN—PLAINTIFF APPELLANT

versus

ABDUL GHAFUR KHAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage—Lease—Suit for rent—Suit on mortgage, whether barred.

The defendant mortgaged his house to plaintiff for Rs. 606; possession was to be with the plaintiff, who was entitled to charge interest at 1 per cent. per mensem and was to set off against the interest any sums received by way of rent. It was open to him to induct any tenant he chose, but he gave the house to defendant on a year's lease at Rs. 6 per mensem. In 911 the plaintiff sued the defendant for Rs. 90, being rent for 15 months, and obtained a decree. Subsequently he brought another suit to recover the mortgage-debt and interest:

Held, that the causes of action in the two suits were different and that, therefore, the subsequent suit was not barred by the provisions of Order II, rule 2 of the Civil Procedure Code. [p. 103, col. 1.]

Natha Singh v. *Chuni Lal*, 47 Ind. Cas. 364; 69 P. R. 1918; 112 P. W. R. 1918; 117 P. L. R. 1918, *Altaf Ali Khan* v. *Lalta Prasad*, 19 A. 496; A. W. N. (1897) 128; 9 Ind. Dec. (N. S.) 320, *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu*, 26 M. 662, referred to.

Second appeal from a decree of the District Judge, Ludhiana, dated the 22nd January 1919, reversing that of the Senior Sub Judge, Ludhiana, dated the 19th November 1918.

Lala *Mehr Chand Mahajan*, for Bakhshi *Tek Chand*, for the Appellant.

Messrs. *Kanwar Narain* and *Badr ud Din Kureshi*, for the Respondent.

JUDGMENT.—The only question in this appeal is whether the present suit is barred under Order II, rule 2 of the Code.

The defendant mortgaged his house to plaintiff for Rs. 606; possession was to be with the plaintiff, who was entitled to charge interest at 1 per cent. per mensem and was to set off against the interest any sums received by way of rent.

It was open to him to induct any tenant he chose, but he gave the house to defendant on a year's lease at Rs. 6 per mensem. In 1911 the plaintiff sued the defendant for Rs. 90, being rent for 15, months and obtained a decree.

He has now sued him for recovery of the mortgage debt *plus* interest, and the District Judge has dismissed his suit on the ground that this case is parallel with *Natha Singh* v. *Chuni Lal* (1) and the rent suit of 1911 was really a case between mortgagee and mortgagor as the plaintiff could then have sued to recover the whole mortgage debt.

It is not necessary for us to discuss the correctness of *Natha Singh* v. *Chuni Lal* (1), but it is obvious that this case presents many points of variance from that.

In this case the mortgage was not for one year only, but specially provided for continuance of the contract for more than one year nor was the lease mentioned in the mortgage, which on the contrary stipulated for free choice to the mortgagee in the matter of tenants. Each case, however, has to be decided on its own facts, and the question here for decision is whether the cause of action in the 1911 case was the same as in this case. We hold very distinctly that it was not; the mere fact that a lease was executed indicates that the parties did not stand upon the mortgage alone, but entered into a fresh contract. The suit of 1911 was based upon a breach of the lease contract, not upon the mortgage. In *Altaf Ali Khan* v. *Lalta Prasad* (2), and *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (3) there are some dicta which *prima facie* favour the respondent, but those are by no means parallel cases with this and as said above, each case stands on its own facts.

In this case the plaintiff secured by the lease remedies which he did not enjoy under the mortgage and the causes of action in the two suits were quite different. We accept the appeal and restore the First Court's decree with costs throughout.

Z. K.

Appeal accepted.

(1) 47 Ind. Cas. 364; 69 P. R. 1918; 112 P. W. R. 1918; 117 P. L. R. 1918.

(2) 19 A. 496; A. W. N. (1897) 128; 9 Ind. Dec. (N.S.) 820.

(3) 26 M. 662.

ALLAHABAD HIGH COURT.

MISCELLANEOUS (CIVIL) REFERENCE No. 356 OF 1921.

December 13, 1921.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

RAM SUKH—PETITIONER

versus

MRS. L. E. O'NEAL—OPPOSITE PARTY.

Ajmere-Merwara Regulation (III of 1877), Ch. II, ss. 6, 9—Pre-emption—Sale—Muhammadan Law—Transfer of Property Act (IV of 1882), s. 54, applicability of.

In deciding whether a right to sue for pre-emption has arisen in Ajmere-Merwara, the definition of sale contemplated in Muhammadan Law in accordance with the ruling in *Begam* v. *Muhammad Yakub* (1) where there has been no registered sale-deed, should be followed, inasmuch as section 9 of the Ajmere-Merwara Regulation provides that a right of pre-emption arises in certain cases in respect of property to be sold, not necessarily property which has been sold already. [p. 104, col. 2.]

Miscellaneous reference made by the Secretary to the Hon'ble the Chief Commissioner, Ajmere Merwara, dated the 30th August 1921.

FACTS appear from the following reference:—

"I am directed to make this reference under section 21 of the Ajmere Courts Regulation (I of 1877) in respect of the marginally noted case, in the Court of the Hon'ble the Chief Commissioner, Ajmere-Merwara. The facts are as follows:—

SECOND CIVIL APPEAL No. 2 OF 1921.
RAM SUKH
versus
MRS. L. E. O'NEAL AND OTHERS.

A resident of Ajmere named Birdha mortgaged his land usufructuarily to one Ram Sukh and subsequently sold it to him for Rs. 400. In order, however, to defeat a possible claim for pre emption on the part of one Mrs. O'Neal, who owned the adjoining plot, no formal sale deed was executed. This at any rate is the explanation given in the statement of the vendor P. W. No. 3, and he further states that Ram Sukh paid the full price agreed upon and that his possession then changed from that of mortgagee to that of owner, Mrs. O'Neal, becoming aware of the transfer, filed a suit for pre-emption in respect of the plot of land. The claim was contested by Ram Sukh, who pleaded *inter alia* that as there was no regular sale-deed as required by section 54,

(1) 16 A. 344; A. W. N. (1894) 101; 8 Ind. Dec. (N. S.) 394 (F. B.).

Transfer of Property Act, there was no legal sale and, therefore, no suit for pre-emption lay. The Court of first instance accepted the defendant's plea and dismissed the suit, but the Additional District Judge in appeal, following the ruling in *Begam* v. *Muhammad Yakub* (1), held that the plaintiff had obtained a right of pre-emption inasmuch as the defendant, Ram Sukh, had in fact purchased the plot and had paid the consideration and obtained possession and that the statement of the vendor Birdha showed that no sale-deed had been written for the very reason that Ram Sukh apprehended that the plaintiff might bring a suit for pre-emption. He, therefore, decreed the suit.

In Ajmere Merwara, the law governing pre-emption is given in Chapter II of the Ajmere Laws Regulation (III of 1877), though no definition of sale is given. The law of pre-emption obtaining in Ajmere-Merwara appears to be the same as that in force in Oudh. In the above circumstances the question of law which the Hon'ble the Chief Commissioner wishes to refer for the opinion of their Lordships of the Allahabad High Court is as follows:—

'As a law of pre-emption is provided by Statute, in Ajmere-Merwara, should the Courts in this Province, in deciding whether a right to sue for pre-emption has arisen, accept the definition of sale contemplated in Muhammadan Law in accordance with the ruling in *Begam* v. *Muhammad Yakub* (1) or decide the question of sale with reference to the provisions of the Transfer of Property Act?'

The Hon'ble the Chief Commissioner is inclined to concur in the view taken by the Court of first instance, but as he understands that the ruling given in *Begam* v. *Muhammad Yakub* (1) is followed in Oudh and as there is no precedent dealing with the question so far as Ajmere-Merwara is concerned, he would be grateful for a ruling from their Lordships of the Allahabad High Court."

Mr. *Ram Nama Prasad*, for the Petitioner.

JUDGMENT.—This is a reference from the Chief Commissioner of Ajmere-Merwara. We have heard it to-day in the presence of Counsel representing one of the parties concerned, but in the absence of the other party, Mrs. L. E. O'Neal. A communication has been received from the latter, to the effect that she is not in a position to employ Counsel to argue her case but would have wished to be present in person at the hearing. As she was prevented from being present in person by the state of her health, she asks us to postpone the hearing. In view of the purely legal and technical nature of the question submitted to us, we find it a little difficult to understand what purpose would be served by Mrs. O'Neal being present in person. We decided in any case to hear Counsel for the opposite party in the first instance, reserving the question whether we should fix a further date to permit of Mrs. O'Neal's presence after we have heard and considered his arguments. As we are prepared to return an answer to the reference which is in substance the answer Mrs. O'Neal would desire, we do not think it necessary to postpone the matter further. The question referred is this: "As a law of pre emption is provided by Statute, in Ajmere-Merwara, should the Courts in this Province, in deciding whether a right to sue for pre-emption has arisen, accept the definition of sale contemplated in Muhammadan Law in accordance with the ruling in *Begam* v. *Muhammad Yakub* (1) or decide the question of sale with reference to the provisions of the Transfer of Property Act?"

It seems clear to us that the question must be answered with reference both to the principles underlying the Allahabad decision (1) and to the wording of the Ajmere Regulation (No. III of 1877) where it deals with the question of pre-emption. We note particularly the definition in section 6, Chapter II of the said Regulation, where a right of pre-emption is stated to be a right to acquire immoveable property in preference to other persons in certain specified cases. Then in section 9 we find that a right of pre emption arises in certain cases in respect of property to be sold, not necessarily property which has been sold already. Under the circumstances we are clearly of opinion that the principles laid down in the Allahabad ruling mentioned in the reference should be followed in cases where a right of pre-emption is claimed under the Statute Law of Ajmere Merwara. A further question may arise as to whether or not, after a pre-emption suit has been decreed under

(1) 16 A. 344 (F. B.); A. W. N. (1894) 101; 8 Ind. Dec. (N. S.) 224.

circumstances similar to those of the case now before us, the pre-emptor may not lawfully require, and claim as one of the reliefs in the suit, the execution of a formal document completing the transfer in his favour, so as to fulfil the requirements of the Registration Law and of section 54 of the Transfer of Property Act (IV of 1882). This question, however, does not directly arise out of the reference made to us which, we think, we have sufficiently answered. As this reference has been heard *ex parte*, we do not make any order as to the costs of the hearing in this Court.

J. P. *Reference answered.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 587 OF 1920.

February 7, 1921.

Present :—Mr. Justice Richardson.

PANCHANAN CHATTERJEE—PLAINTIFF—PETITIONER

versus

Babu SANTOSH KUMAR BOSE, CHAIRMAN, BURDWAN MUNICIPALITY, BURDWAN—DEFENDANT—OPPOSITE PARTY.

Bengal Municipal Act (III of 1884), s. 363, applicability of—Suit against Chairman for breach of contract—Limitation.

Section 363 of the Bengal Municipal Act is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise or honestly supposed exercise of their statutory powers. It has no application to a suit against the Chairman of a Municipality by an inspecting Pundit of Pathshalas or primary schools under the Municipality to recover his pay. Such a suit is for breach of contract, and not for anything done under the Act. [p. 106, cols 1 & 2.]

Chunder Sikhur Bundopadhya v. *Obhoy Churn Bagchi*, 6 C. 8 (F. B.; 3 Ind Dec. (N. S.) 6, followed.

Shudhangshu Bhusan Roy Chowdhury v. *Bejoy Kali Roy Chowdhury*, 3 C. L. J. 376, *Mayandi* v. *McQuhae*, 2 M. 124; 3 Ind. Jur. 309; 1 Ind. Dec. (N. S.) 358, referred to.

Rule against an order of the Court of the Sub-Judge, Burdwan, in Small Cause Suit No. 224 of 1919.

FACTS appear from the judgment.

Babu *Mohesh Chandra Banerjee*, for the Petitioner.—The Rule was obtained against the Chairman of the Burdwan Municipality to show cause why the decree should not be set aside.

The petitioner is a Pundit of Pathshalas under the Burdwan Municipality. He filed a suit to recover his pay of Rs. 315 for twenty-one months. He also claimed Rs. 84 5 annas on account of his deposit in the Provident Fund. The defense was that he had not worked for the period for which the pay was claimed. The suit was tried by a Subordinate Judge exercising Small Cause Court jurisdiction. He dismissed the suit.

See *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (1). In this it has been said that the section is applicable to cases where the damage has been caused by the Commissioners. The Bengal Municipal Act authorises the Chairman as well as the Commissioners to do certain acts. The section can apply only to cases of omission by the Commissioners. The rate-payers come under section 363 of the Bengal Municipal Act. If the Municipality levy a rate higher than that for which they have been authorised, then the rate-payers can come under section 363 of the Bengal Municipal Act. If they do not come within three months, then they are debarred from coming under that section. See *Mayandi* v. *McQuhae* (2).

Babu *Nirmal Chandra Chatterjee* for Babu *Promotho Nath Banerjee*, for the Opposite Party.—Section 363 of the Bengal Municipal Act does apply to a suit of this nature. There is nothing in the Full Bench case [*Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (1)] which warrants the interpretation put upon the section by my learned friend. The Full Bench case is applicable to a suit of a different nature. The only test is whether the acts exercised by the Municipality are in excess of the statutory power. See section 69, clause (6) of the Bengal Municipal Act. Refers to section 46 of the Bengal Municipal Act. The act was done by virtue of the authority vested in the Chairman. Notice is essential in the case. No notice was given in the case. The

(1) 6 C. 8 (F. B.); 3 Ind Dec. (N. S.) 6.

(2) 2 M 124; 3 Ind. Jur. 309; 1 Ind. Dec. (N. S.) 358.

learned Subordinate Judge has held that the whole claim is barred by limitation.

JUDGMENT.—The petitioner was an inspecting Pundit of Pathshalas or primary schools under the Burdwan Municipality. He brought the suit to recover his pay for twenty-one months at Rs. 15 a month for the period from September 1916 to May 1918, the pay for the whole period amounting to Rs. 315. He also claimed a sum of Rs. 84-5 0 which, he alleged, was in deposit on his account in the Provident Fund. The defense set up by the defendant was that the petitioner's pay had been stopped because he had not worked for the period for which the pay was claimed. I am informed that no separate defense was made in respect of the sum in the Provident Fund, but the written statement has not been placed before me. The suit was tried by a Subordinate Judge exercising Small Cause Court powers. The learned Subordinate Judge, dealing somewhat briefly with the merits on which he found that the plaintiff had done no work for the period to which the claim related, dismissed the suit. This Rule was issued on the defendant—the Chairman of the Municipality—to show cause why the decree should not be set aside.

Now, the principal ground on which the learned Subordinate Judge proceeded was the ground of limitation. He held that the suit was barred by limitation under the provisions of section 363 of the Bengal Municipal Act (III of 1884). That section lays down, in reference to the present purpose, that no suit shall be brought against the Commissioners of any Municipality or any of their officers "for anything done under this Act" until the expiration of one month next after notice in writing has been delivered or left at the office of such Commissioners. It further lays down that every such action—meaning every suit brought against the Commissioners for anything done under the Act—shall be commenced within three months next after the accrual of the cause of action and not afterwards. In the case of *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (1) it was held by a Full Bench of this Court that section 87 of Bengal Act III of 1864—the provisions of which were similar to those of the Act of 1884—was applicable only in those cases where the plaintiff claimed damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise or honestly supposed exercise of their statutory powers. In that case, the suit was a suit for the recovery of land; but the principle laid down is applicable to the present case. Then there is the case of *Shudhangshu Bhusan Roy Chowdhury* v. *Beioy Kali Roy Chowdhury* (3). That was a case under the present Act, in which the plaintiff sued for a declaration that a tax imposed upon him had been improperly assessed. The learned Judges followed—though apparently with some reluctance—the construction put upon the section by the Full Bench. A similar view of a similar provision was taken by the Madras High Court in the case of *Mayandi* v. *Mc Quhae* (2), where it was held that a suit for breach of contract was not a suit 'for a thing done under the Act.' [See also *Municipality of Parola* v. *Lakshmandas Supadhubhai* (4).

In England the Public Authorities Protection Act of 1893 applies to any action, prosecution or other proceeding against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority and provides that the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of. It has been held that that provision does not apply to such actions as an action for wrongful dismissal founded on breach of contract of service (Lightwood's Time Limit on Actions, page 389).

In my opinion it is clear that the present is not a case to which section 363 of the Bengal Municipal Act has any application. The suit is for breach of contract and not for anything done under the Act. The learned Subordinate Judge was, therefore, in error in holding that the suit was barred by limitation. As to the merits the learned Subordinate Judge, in view, no doubt, of the opinion which he held on the question of limitation, did not deal with them as completely as he might have done. That being

(3) 3 C. L. J. 376.
(4) 25 B. 142, 2 Bom. L. R. 857.

so, the decree complained of must be set aside and the suit must be remanded to the Court below to be re-tried with reference to the observations made in this judgment. Costs of this Rule—the hearing fee being assessed at four gold *mohurs*—will abide the result.

B. N. *Case remanded.*

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 91 OF 1921.
December 20, 1921.
Present :—Mr. Justice Piggott and
Mr. Justice Walsh.
HIRA LAL AND ANOTHER—PLAINTIFFS—APPLICANTS
versus
ALLAH BAKSH—DEFENDANT—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Wrong decision on question of limitation—High Court, power of, to interfere—Limitation Act (IX of 1908), Sch. I, Art. 75.

A High Court has power to interfere with a decision by a Court of Small Causes where it has wrongly decided a question of limitation.

Civil revision from an order of the Judge of the Court of Small Causes at Roorki, dated the 30th March 1921.

Dr. *K. N. Katju*, for the Applicants.

JUDGMENT.—The learned Judge of the Small Cause Court at Roorki has dismissed a suit on an instalment bond on a finding that the whole is barred by limitation. Of course he had jurisdiction to try the issue of limitation, but he has determined it without referring to the Article of the Indian Limitation Act (IX of 1908) which would be applicable. It is quite clear that under Article 75 of the said Schedule the plaintiff was in time in respect of those instalments to which his suit referred, where there had been no waiver on his part. We cannot allow the plaintiff to suffer injustice on account of a mere failure on the part of the Trial Court to consult the Statute under which it had acted. Our power of supervision in respect of decisions by Courts of Small Causes are certainly adequate to warrant

our interference in a matter of this sort. We set aside the decree dismissing the suit and direct the Court below to re-admit the suit on to its file of pending cases and to try it on the merits. This appeal has been heard *ex parte* but we think the costs of it must at least be costs in the cause.

J. P. *Decree set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.
SECOND CIVIL APPEAL No. 17 OF 1921.
August 1, 1921.
Present:—Mr. Dalal, A. J. C., and
Mr. Wazir Hasan, A. J. C.
RAGHUBAR PANDE—DEFENDANT—APPELLANT
versus
Pandit GOKUL PRASAD PATAK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Sale by some members—Transferee from all members, right of, to recover possession—Sale price.

A transferee from all the members of a joint Hindu family can set up the invalidity of a sale by some of the members of the family and can recover possession of the joint property without payment of the sale price to the vendee from some members of the family. [p. 109, col. 1.]

Muhammad Muzamil-Ullah Khan v. *Mithulal*, 11 Ind. Cas. 220; 33 A. 783; 8 A. L. J. 901, followed.

Lachhman Prasad v. *Sarnam Singh*, 40 Ind. Cas. 284; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990, 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334, 44 I. A. 163 (P. C.), *Madho Parshad* v. *Mehrban Singh*, 18 C. 157; 17 I. A. 194; 5 Sar. P. C. J. 586; Rafique and Jackson's P. C. No. 121; 9 Ind. Dec. (N. S.) 105 (P. C.), *Mahabeer Pershad* v. *Ramyad Singh*, 20 W. R. 192; 12 B. L. R. 90, *Balgobind Das* v. *Narain Lal*, 15 A. 339; 20 I. A. 116; 6 Sar. P. C. J. 313; 17 Ind. Jur. 425; 7 Ind. Dec. (N. S.) 934, referred to

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 6th December 1920, modifying a decree of the Munsif, Musafirkhana, dated the 22nd March 1920.

Mr. *St. C. Thompson*, for the Appellant.

Mr. *M. Wasim* holding brief of Mr. *A. P. Sen*, for the Respondents.

RAGHUBAR PANDE v. GOKUL PRASAD.

JUDGMENT.—One of us in his referring order has stated the brief facts of this case. Two out of four cousins, who formed a joint Hindu family, sold a certain area of revenue paying land belonging to the joint family to the defendant for Rs. 800. Subsequently after the death of one of the four cousins the three remaining cousins, who formed the joint family at the time, made a gift of the entire property in Mahal Dirgaj Singh to Pandit Gokul Prasad, plaintiff No. 1. The plaintiff Gokul Prasad thereupon along with the other co-sharers of the village sued Raghubar Pande for the possession of the plots of land transferred to him by the two cousins Mahadeo Singh and Nimar Singh. The basis of the suit was the invalidity of a transfer of joint Hindu family property made by only some members thereof. Both the Subordinate Courts have found, as they were bound to do, that such a transfer was invalid. The First Court, however, made a condition to the decree for possession that the plaintiffs should pay to the defendant Rs. 800 before the decree can be executed. On appeal by the plaintiffs the lower Appellate Court cancelled this condition. The defendant Raghubar Pande has come here in second appeal in consequence.

The legal point for decision here is very short. In *Lachhman Prasad* v. *Sarnam Singh* (1) the Privy Council re-affirmed the general law, which was quite plainly laid down by Lord Watson in the judgment of the Board in the case of *Madho Parshad* v. *Mehrban Singh* (2), that "so long as the interest of one of several members of a joint family is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes." On behalf of the appellant reference was made to the case of *Mahabeer Pershad* v. *Ramyad Singh* (3) and subsequent rulings of the Calcutta High Court reported as *Jamuna Parshad* v. *Ganga Pershad Singh* (4) and *Banwari Lal* v. *Sheo Sankar Misser* (5). The ruling reported in the Weekly Reporter (3) was explained and distinguished by their Lordships in the case mentioned above and reported in 39 Allahabad [*Lachhman Prasid* v. *Sarnam Singh* (1).] Their Lordships did not consider it necessary to decide whether that particular case was rightly decided or not, but were of opinion that the decision of that case was based upon an implied representation or undertaking given by the transferors that they had power to charge the joint family property and would make good the representation by partition or otherwise. No such plea of representation was advanced in the written statement by the defendant here.

It is quite true that the transferors themselves would not be able to get the sale cancelled. In *Balgobind Das* v. *Narain Lal* (6) the Privy Council pointed this out at page 351 of the reports, but they proceeded to hold that an auction purchaser in execution of a decree against the joint family property could urge the invalidity of the transfer by one member of the joint Hindu family. The case which appears to be most applicable here is that of *Muhammad Muzamil Ullah Khan* v. *Mithulal* (7), where the defendant, who had acquired title to the property by adverse possession as against all the members of a joint Hindu family, was held to be entitled to set up as a defence the invalidity of a prior mortgage by one member of the family, though the defendant's own title was originally acquired from the mortgagor alone. Banerji, J., observed: "We have now to consider whether a transferee from the mortgagor himself can do so (*i. e.*, question the validity of a mortgage). Ordinarily he cannot. A mortgagor cannot be allowed to question the validity of his own mortgage and thereby derogate from his own grant. A transferee from him who stands in his shoes has no higher right. In the present case, however, the appellant must be deemed to be a transferee not only from Padam Singh, but from the whole of the joint family.....As such, he can set up the invalidity of the plaintiff's mortgage and

(1) 40 Ind. Cas. 284; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 44 I. A. 163 (P. C.).

(2) 18 C. 157; 17 I. A. 194; 5 Sar. P. C. J. 586; Rafique and Jackson's P. C. No. 121; 9 Ind. Dec. (N. S.) 105 (P. C.).

(3) 20 W. R. 192; 12 B. L. R. 90.

(4) 19 C. 401; 9 Ind. Dec. (N. S.) 712.

(5) 1 Ind. Cas. 670; 13 C. W. N. 81 .

(6) 15 A. 339; 20 I. A. 16; 6 Sar. P. C. J. 313; 17 Ind. Jur. 425; 7 Ind. Dec. (N. S.) 984.

(7) 11 Ind. Cas. 220; 33 A. 783; 8 A. L. J. 901.

is not estopped from doing so". We think that in the present case plaintiff No. 1, who is a transferee from all the members of the joint Hindu family, can set up the invalidity of the sale in favour of the defendant, though both the vendors of the defendant were two of the three donors of the plaintiff. No condition can be imposed on the plaintiff to repay the sale price to the defendant before obtaining possession.

We dismiss this appeal with costs.

J. P. *Appeal dismissed.*

ALLAHABAD HIGH COURT.
FULL BENCH.

CIVIL REVISION No. 43 OF 1920.

November 30, 1921.

Present :—Mr. Justice Piggott,
Mr. Justice Walsh and
Mr. Justice Gokul Prasad.

FIRM SOHANPAL-MUNNALAL—PLAINTIFF—PETITIONER

versus

THE EAST INDIAN RAILWAY—DEFENDANT—OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 47, (1) (f), 54, 72—Rules framed under s. 47 (1) (f), validity of—Consignment of goods—Grant of receipt, necessity of—Railway Company, responsibility of.

It is not open to a Railway Company to enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the Railway, nevertheless the Court shall not deem them to be so delivered unless and until the Railway servant in question has performed a particular act, *e. g.*, giving a receipt [p. 111, col. 1.]

Ramachandra Natha v. *G. I. P. Railway*, 29 Ind. Cas. 545; 39 B. 485; 17 Bom. L. R. 496, followed.

A consignor of goods by Railway, after his package had been taken over by the goods clerk and duly marked, was told to go away and come back for a Railway receipt in a couple of days' time. No receipt was taken by him. The package was despatched, but was mis-sent to another destination and lost in consequence of having been so mis-sent. The consignor sued for damages for the loss of the consignment. The Railway Company relied upon a rule made under section 47 (1) (*f*) of the Railways Act, to the effect that "goods will in all cases be at the owner's risk until taken over by the Railway Administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised Railway servant:"

Held, that if the rule put forward limited the statutory liability imposed upon the Railway Company by section 72 of the Railways Act, it was inconsistent with the Act and was of no effect and that as the goods were lost owing to negligence on the part of the company's servant, the company was liable notwithstanding no receipt was given. [p. 111, col. 1.]

Banna Mal v. *Secretary of State for India in Council*, 23 A. 367; A. W. N. (1901) 107, *Jalim Singh Kotary* v. *Secretary of State for India in Council*, 31 C. 951; 8 C. W. N 725, *Narasinggirji Manufacturing Co.* v. *G. I. P. Railway*, 51 Ind. Cas. 309; 21 Bom. L. R. 406, referred to.

Per *Walsh, J.*—No rule which any company can make, can cut down, control or limit its liability which is the creature of Statute under section 72 of the Railways Act and, if a rule is relied upon by the company which is inconsistent with that liability, it has clearly gone beyond the authority created for making rules. [p. 112, col. 1.]

A Railway Company is by law a common carrier. It cannot lawfully refuse to carry goods properly tendered to it. It is given statutory existence and wide statutory powers in exchange for public duties and it is bound to carry goods. [p. 112, col. 2.]

Rule 2 framed under section 47 (1) (*f*) of the Railways Act is not inconsistent with anything contained in the Act, inasmuch as the rule is made for regulating the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on behalf of the consignee or owner and it is placed under a heading "wharfage," and has nothing whatever to do with the liability of a Railway in respect of goods which have been actually accepted by a Railway servant for despatch and have been either despatched or lost. [p. 113, col. 1.]

Banna Mal v. *Secretary of State for India in Council*, 23 A. 367; A. W. N. (1901) 107, doubted.

Civil revision from an order of the Judge of the Court of Small Causes, Agra.

Dr. *K. N. Katju*, for the Petitioner.

Mr. *Ladli Prasad Zutshi*, for the Opposite Party.

JUDGMENT.

PIGGOTT, J.—This is an application in revision against a decision of the Judge of the Court of Small Causes at Agra. The plaintiff sues the East Indian Railway Company, through its agent, for damages for the loss of a consignment, namely, a package of gunny bags, alleged by him to have been delivered to an authorised agent of the company at Agra for carriage to Amroha, which certainly never reached its destination. There was some conflict of evidence as to the facts. The Railway Company in the first instance denied that the plaintiff had ever even brought to

their office at Agra any such package as that referred to in the plaint. Their main defence, however, was of a technical nature. They called attention to a notification published in the Gazette of India of July 5th, 1902, *vide* page 504 of Part I, Notification No. 231, dated the 3rd of July 1902, in which certain rules were notified and the sanction of the Governor-General in Council to the same published for general information. These rules purport to have been made under the power conferred by section 47, sub-section (1), clause (*f*) of the Indian Railways Act (IX of 1890). One of them is in the following words:—"Goods will in all cases be at the owner's risk until taken over by the Railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised railway servant." The Small Cause Court, after investigating the facts, found them generally in favour of the plaintiff. The learned Judge, however, felt himself constrained to hold, with reference to a reported decision of this Court, *Banna Mal* v. *Secretary of State for India in Council* (1), that the process of delivery by the plaintiff to the Railway Company's agent had not been completed, because no receipt had been granted by the latter to the former. He dismissed the suit accordingly and the plaintiff applied in revision to this Court. The application was entertained by a learned Judge of this Court who, for reasons given in his order, remitted an issue to the Trial Court for determination. The issue is in these terms:—"Was the bale of gunny bags in question actually handed over by the plaintiff's servant to the Railway Officials and accepted by the latter or not?" In remitting this issue the learned Judge added the following observations:—"The lower Court will note that the decision of this issue depends considerably upon the ordinary course of business at the booking station in the course of which goods are offered and accepted for transport. The parties may give further evidence on this point." Neither party offered further evidence upon the remitted issue and the finding of the lower Court has been recorded upon the evidence tendered at the original trial. The finding is in favour of the plaintiff on both points; *i. e.*, the bale in question was actually handed over by the plaintiff's servant to the Railway Officials and was accepted by the latter. Upon this the case has been referred to a Bench of three Judges in order that the principles laid down in *Banna Mal* v. *Secretary of State for India in Council* (1) may, if necessary, be further considered. Our attention has been drawn to the fact that this decision has been commented upon by two other High Courts. The cases in question are those of *Jalim Singh Kotary* v. *Secretary of State for India in Council* (2) and *Ramchandra Natha* v. *G. I. P. Railway* (3). We find also that, in a subsequent case which has not been printed in any of the authorised reports, but which is to be found in the 21st Volume of the Bombay Law Reporter at page 406 [*Narsinggirji Manufacturing Co.* v. *G. I. P. Railway* (4)], a Bench of that Court has re-affirmed the principles laid down in *Ramchandra Natha's case* (3) mentioned above.

I am inclined to doubt whether the principle of law about which this Court is supposed to have differed from the High Courts at Bombay and at Calcutta really arises in the present case. The rule to which we have been referred occurs in a notification dealing with wharfage, and section 47 (1) (*f*) of the Indian Railways Act empowers the Railway Companies to make general rules consistent with the Act for regulating the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on behalf of a consignee. In the present case the Court has believed the story told by the plaintiff, where there is a conflict between his evidence and that of the booking clerk and of another servant of the company who were called for the defendant. According to the plaintiff's story no question of wharfage arose. His package was taken over for despatch and it never reached its destination. The Court below, without recording a positive finding on the point, has given very good reasons for believing, on the evidence, that the package in question was actually put upon

(1) 28 A. 367; A. W. N. (1901) 107.

(2) 31 C. 951; 8 C. W. N. 725.

(3) 29 Ind. Cas. 545; 39 B. 495; 17 Bom. L. R. 496.

(4) 51 Ind. Cas. 309; 21 Bom. L. R. 406.

the rail and was mis-sent to another destination and lost in consequense of having been so mis-sent. Further, the expression "shall be at owner's risk" is in itself a technical one. There are several kinds of "owner's risk," and the Railway Company's Manual which has been produced before us shows that responsibility for goods made over to the Railway Company may be differently divided between the owner and the company, according as to whether the former elects to consign his goods on the terms provided by "Risk Note A" or on the terms provided by "Risk Note B." Whatever might be the case if the package in question had been destroyed by fire, for instance, while lying on the company's premises at Agra, it is by no means clear that the expression "owner's risk" in this notification would exempt the Railway Company from liability, if in fact the package has been totally lost and the failure to deliver the same can be traced to negligence on the part of the company's servants in sending it to a wrong destination.

As, however, the case has been referred to a Full Bench for an expression of opinion on the general questions of law involved and those questions have been argued before us, I think it advisable to add a few words. It seems to me that, if a rule like that relied upon by the Railway Company in the present case (a rule supposed to have been made in virtue of the powers conferred by section 47 of Act IX of 1890) is put forward as limiting the statutory liability imposed upon the Railway Company by section 72 of the same Act, then that rule is inconsistent with the provisions of the Act and is of no effect. I do not think it is open to the Railway Company to enact, by means of a rule, that, although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the Railway, nevertheless the Court shall not deem them to have been so delivered unless and until the Railway servant in question has performed a particular act. To this extent I agree with the decision of the Bombay High Court in *Ramchandra Natha's case* (3).

In argument before us an alternative case was put forward on behalf of the Railway Company, differing from that upon which the question was litigated in the Court below. Our attention was called to section 54 of the Indian Railways Act (IX of 1890), which empowers a Railway Administration to impose conditions, not inconsistent with the Act or with any general rule thereunder, with respect to the receiving, forwarding, or delivering of any animals or goods. We were asked to hold, in effect, with reference to certain public notifications said to have been issued by the East Indian Railway Co., and reproduced in a Manual of general rules shown to us, that this company had given general notice to the public that any person desiring to despatch goods for transit by that company should retain the same under his own supervision and consider himself responsible for their safe custody, until he held a receipt properly made out by the Railway servant responsible for taking over delivery of the goods. In reality the line of argument here sought to be taken was anticipated by the learned Judge of this Court who remitted for trial the issue to which reference has already been made. It would have been open to the Railway Company at the trial of that issue to bring forward the facts which have been pressed upon us in argument regarding the public notification of this alleged rule, governing the delivery and receipt of goods at their Railway stations, to prove by evidence the fact of such publication and the existence of a regular course of business founded upon the general knowledge by the public of the existence of such a rule. The Railway Company having failed to produce any fresh evidence on the remitted issue, it seems to me impossible for us to take up the question from the point of view now pressed upon us. The submission that any such public notification was issued by the Railway Administration to the public is not really supported by any evidence before us, nor have we any evidence as to the existence of such a general understanding or such an established course of business. On the contrary, the plaintiff has been believed in his evidence where he says that as a matter of fact, after his package or bale had been taken over by the goods clerk and duly marked, he was told to go away and

some back for a railway receipt in a couple of days' time or so, as nothing further could be done at the moment because the particular line along which he desired his goods to be despatched was blocked. If this is to be treated as a finding of fact, it scarcely leaves room for the alternative argument which has been pressed upon us. For these reasons I would accept the application in revision, set aside the order of the Court below and decree the plaintiff's claim with costs throughout. In view of the circumstances of the case we should allow Counsel for the applicant the full amount of the fee certified by him.

WALSH, J.—I entirely agree. The primary and fundamental responsibility of a Railway Company entrusted with goods under a contract either to despatch or to warehouse them is defined in section 72 of the Railways Act as that of a bailee for reward as defined in sections 151, 152 and 161 of the Indian Contract Act of 1872. Those sections, of course, cannot be construed without first interpreting the contract of bailment as defined in section 148 of the Indian Contract Act, which again involves the definition of "Delivery" as contained in section 149 of the Indian Contract Act, and the two sections 148 and 149 are equally incorporated with the Railways Act and define and control the liability of the Railway Company. Whatever rules the company may make under its statutory authority contained in the same Act, they cannot, and it is provided by the statutory authority enabling them to make such rules that they shall not, make rules inconsistent with the Act. It, therefore, follows that no rule, which any company can make, can cut down, control, or limit its liability which is the creature of Statute under section 72, and, if a rule is relied upon by the company which is inconsistent with that liability, it has clearly gone beyond the authority created for making rules. In these Railway cases half the difficulty is often created by failure on the part of the Railway Authorities themselves, or rather those who represent them in the Courts, and the failure of Moffussil Tribunals, to clear their minds first as to what I have described as the fundamental and primary liability of the Railway Company. When one has done that, it is easier to see whether a suggested expansion or modification of it is really anything of the kind. Instead of that it frequently happens that the Courts are invited to plunge into a discussion of some rule or explanation which the Railway Company puts forward as being sufficient in itself to absolve it from all liability, very often without the Raiway Authorities themselves or those who represent them in Court really understanding what it is that they are relying upon. I think that is what has happened in this case. It is suggested that some general rules of the company made under section 54 are sufficient to absolve the company under the circumstances of this case, which are that a company admittedly received goods for despatch to a particular destination and either sent them to the wrong one or lost them altogether. Apart from the contention that such general rules, if they attempted to cut down the definition of "Delivery," would be inconsistent with the provisions of the Act which are incorporated with the Railways Act, I am of opinion that what is contemplated by section 54 are merely general conditions with regard to receiving, forwarding or delivering. It seems tautologous to say that that is contemplated because those are the actual words used. To my mind that section has nothing to do with the responsibility of a company as bailee. A Railway Company is by law a common carrier. It cannot lawfully refuse to carry goods properly tendered to it. It is given statutory existence and wide statutory powers in exchange for public duties and it is bound to carry goods. Section 54 enables it to make provisions or conditions with regard, for example, to the receiving of goods. It is not bound to receive goods at all unless they are first weighed, or unless they are properly labelled, but those provisions, namely with regard to receiving goods, are antecedent to the act of delivery; in other words, they provide that the company may insist on the consignor doing certain acts before he is able to deliver the goods to the company at all. Similarly with regard to forwarding, for example, live stock and wild animals, they can reasonably insist on their being put under proper control. With regard to the trucks for the conveyance of live stock, they can insist on the consignor approving of the means of transit proposed. All these matters are, I think, antecedent to the performance

of the act which is legally and technically known as "Delivery." To my mind section 54 and rules thereunder have nothing to do with the case in hand. I am of the same opinion with regard to rule 2, which was sanctioned by the Governor-General in 1902 under section 47 (1) (*f*) of the Railways Act and which was relied upon by the company and has frequently been referred to in this controversy and the decided cases that have been cited to us. I hesitate to hold that that rule is inconsistent with anything contained in the Act. In my view it is not. If it were intended to lay down some rule which would have the effect of defining "Delivery," or deciding when delivery, in the sense in which it is used in the Contract Act, took place, then undoubtedly it would be inconsistent or, as stated in one case, *ultra vires*. It purports on the face of it to be a rule made for regulating the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on behalf of the consignee or owner and it is placed under a heading, and finds itself in a collection of rules made under a heading, which runs as follows—

"I—Wharfage

on goods for despatch waiting to be consigned." It seems to me that that has nothing whatever to do with the liability of a Railway in respect of goods which have been actually accepted by a railway servant for despatch and have been either despatched or lost. It is intended to define the boundary line, in cases where it would otherwise be debatable, which divides the owner's loss from the warehouse-man's loss and although the point does not arise in this case, I am inclined to think that, although that boundary line is fixed as being the time when the receipt is given by the Railway Official, it only applies, when in fact a receipt is given, and has no application when a receipt is not given; in other words, if the Railway Official asks the consignor's consent to postpone the handing over of the receipt, nonetheless the case would have to be decided as if the receipt had been given when it would have been given in the ordinary course of business, if the handing over had not been for some special purpose and by common consent waived.

Lastly, I would merely add that really *Banna Mal* v. *Secretary of State for India in Council* (1) does not govern this case, even if it were rightly decided. In my view it was wrongly decided. It was decided under a slightly different set of rules from the rules which are now before us, and on the principle of a decision in England in 1854 which the Court followed without, I think, sufficient reason. When the facts of the English decision are studied, it becomes apparent that there the plaintiff, knowing full well the course of business of the company, had not merely waived some formal performance of an act like the handing over of the receipt, but had departed altogether from the practice at that particular station, and had left six pigs in the possession of one of the railway porters to do what was necessary in order to consign them to London, making him, as the Judges held, for that purpose his servant. The company had made rules for dealing with livestock deliverd to them for despatch and the plaintiff did not attempt to carry out any of them, but merely left it to the railway porter to carry them out, and in the leading text-book in England on "Carriage" I find the case cited for this proposition that "delivery must be in conformity with the known course of the company's business." It has been found in this case on overwhelming evidence that it was, and there is nothing in the company's rules, and, in my opinion, there could not in law be anything, to cut down the company's ordinary liability as a bailee after taking delivery.

GOKUL PRASAD, J.—I agree with the order of the Court and the reasons given by my brother Piggott, to which I think it unnecessary to add anything.

BY THE COURT.—The application in revision is accepted, the order of the Court below is set aside and the plaintiff's claim is decreed with costs throughout, the said costs to include the fee certified by the applicant's Counsel.

J. P. *Application accepted.*

SAHEB ALI *v.* MOHAMMAD ZABID.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 200 OF 1921.

July 20, 1921.

Present:—Mr. Daniels, J. C.

Sheikh SAHEB ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MOHAMMAD ZAHID *alias* BABBOO AND ANOTHER—DEFENDANTS—RESPONDENTS

*Court Fees Act (VII of 1870), s. 7 iv) (c), Sch. II, Art. 17 (iii), (vi)—Portion of property excluded from liability under mortgage—Appeal—*Ad valorem *Court-fee—Suit to make property liable for mortgage or charge, whether declaratory suit or not capable of being valued in money.*

Where a plaintiff objects in appeal to that portion of the decree which excludes certain property from liability under his mortgage and asks to have it made liable, he must pay Court-fees on the value of the property.

Khachera v. *Kharag Singh*, 7 Ind. Cas. 315; 33 A. 20; 7 A. L. J. 842, *Sukhnandan* v. *Lachhman Prasad*, 24 Ind Cas. 286; 17 O. C. 90, relied upon.

A suit to make a certain property liable for the mortgage or charge is not a declaratory suit but a suit involving further relief, nor is such a suit not capable of being valued in money.

Girijanund Datta Jha v. *Sailajanund Datta Jha*, 23 C. 645; 12 Ind. Dec. (N. S.) 429, referred to.

Appeal against a decree of the District Judge, Rae Bareli, dated the 4th April 1921, modifying that of the Subordinate Judge, Rae Bareli, dated the 9th December 1920.

Mr. *Zahur Ahmad*, for the Appellants.

JUDGMENT.—Before this appeal can be admitted, a question of Court fees has to be decided. The suit was one for enforcement of a mortgage or charge against certain property and the decree granted by the Trial Court was in the ordinary form prescribed under Order XXXIV, rule 4. The charge was, however, held to be enforceable only against a portion of the property which the plaintiffs sought to make liable. In appeal they contend that they should also be given a mortgage decree against the property which was excluded by the Courts below. They have valued their appeal for jurisdiction at Rs. 1,117, the amount of the decree of the Court below, but have paid a Court fee of Rs. 10 only. The office has reported that an *ad valorem* fee is payable. The appellants contend either that this should be treated as a declaratoy suit under Artiele 17 (*iii*) of the Second Schedule of the Court Fees Act, or as a suit not capable of being valued in money under Artiele 17 (*vi*) of the same Schedule. Neither of these contentions is tenable. It has been held over and over again that when a plaintiff seeks to make a certain property liable for the mortgage or charge, this is not a declaratory suit but a suit involving further relief. The case on which the appellants rely for their second contention, *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (1), is not on all fours. There a declaration was sought that certain arrears of maintenance could be recovered from surplus offerings to an idol, the amount of such surplus being entirely indefinite. There are twe cases, one of the Allahabad High Court and one of this Court, in which it was held that where a plaintiff objects in appeal to that portion of the decree which excludes certain property from liability under his mortgage and asks to have it made liable, he must pay Court-fees on the value of the property. I refer to the cases of *Khachera* v. *Kharag Singh* (2) and *Sukhnandan* v. *Lachhman Prasad* (3). The appellants wish to distinguish these cases on the ground that the suit had been wholly dismissed against the defendants whose property was sought to make liable, whereas here the property excluded and the property in respect of which the decree has been given belong to the same person This, however, makes no difference in principle. The appellants are seeking a mortgage decree against certain property. So far as that property is concerned, the decree has been refused to them. As was held in the two cases cited above they are, therefore, liable to pay an *ad valorem* fee on the value of the property in dispute. They have themselves valued their appeal for purposes of jurisdiction at Rs. 1,117-8. As reported by the office, there is a deficiency of Rs. 75. I allow the appellants fifteen days within which to make good the deficiency. The appeal may be put up for orders on 5th August.

S. D. *Order accordingly.*

(1) 23 C. 645; 12 Ind. Dec. (N. S.) 429.
(2) 7 Ind. Cas. 315; 33 A. 20; 7 A. L. J. 842.
(3) 24 Ind. Cas. 286; 17 O. C. 90.

NAURANG AHMAD *v.* BASHESHAR NATH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1300 OF 1917.

October 27, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Campbell.

NAURANG AHMAD—DEFENDANT—APPELLANT

versus

BASHESHAR NATH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Lease, construction of—'Durbar,' meaning of.

Plaintiff leased a house in Delhi to defendant. One of the clauses in the lease ran as follows:—

"The tenant will occupy the said house himself or by sub-tenants, but in case the said tenant do sub-let the whole or a large portion of the said house to any Chief for Durbar occasion, the tenant will pay the landlords 25 per cent. of the amount recovered from such Chief and no rent will be payable by the tenant for such portion for such period:"

Held, (1) that the parties intended the clause to apply to occasions on which a number of Ruling Chiefs should congregate at Delhi at one time and create competition for house accommodation, as distinguished from isolated visits of single Chiefs, and that the clause was applicable to the occasion of the Conference of Ruling Chiefs held at Delhi in October 1916; [p. 116, col. 1.]

(2) that under the clause the landlord was entitled to 25 per cent of the sum recovered by the tenant from a Chief on such an occasion without any deduction on account of any commission paid or any expenses incurred by him. [p. 116, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Delhi, dated the 9th April 1917, varying that of the Subordinate Judge, Second Class, Delhi, dated the 21st February 1917.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT:—In October and November 1916 a Conference of Ruling Chiefs was held at Delhi. It was attended by His Highness the Maharaja of Nabha, who rented for the period of his stay at Delhi (22nd October to 5th November) a house known as the Civil and Military Hotel from Naurang Ahmad. Naurang Ahmad held the house on a seven years' lease from two brothers, Basheshar Nath and Jageshar Nath. One of the clauses in the lease (which had been transferred to Naurang Ahmad by the original lessee, Mrs. Smith) was the following:—

"The tenant will occupy the said house herself or by sub-tenants, but in case the said tenants, do sub-let the whole or a large portion of the said house to any Chief for Durbar occasion, the tenant will pay the landlords 25 per cent. of the amount recovered from such Chief and no rent will be payable by the tenant for such portion for such period."

Basheshar Nath and Jageshar Nath sued Naurang Ahmad for Rs. 1,700, being Rs. 200, the ordinary rent due for the month of October 1916, and Rs. 1,500, one fourth of Rs, 6,000, the sum which the plaintiffs alleged had been received by the defendant from the Maharaja.

The defendant resisted the claim on several grounds.

The Trial Court held that the Chiefs' Conference was a Durbar occasion within the meaning of the lease, that the amount paid by the Maharaja to the defendant was Rs. 5,200, that this sum included rent for the defendant's furniture as well as for the building, that the defendant was entitled to retain Rs. 200 as rent for the furniture, that he was also entitled to deduct Rs. 1,154, commission paid to an agent Muhammad Fazal who arranged the sub-lease to the Maharaja, and Rs. 123 4, the cost of certain road repairs and of electric and water charges for the period of the Maharaja's visit, and that Rs. 200, rent for October, had been paid already by the defendant to the plaintiffs. Deducting a further sum of 100, the amount of ordinary rent for the period of the Maharaja's occupation, in accordance with the condition of lease above quoted, the Trial Court gave the plaintiffs a decree for Rs. 830 11.

Both parties appealed to the District Judge. The learned District Judge upheld the first Court's decision (though on slightly different grounds) that the hotel had been sub let for a Durbar occasion, but held that the defendant was not entitled to any deductions for use of furniture, commission, repairs and electric light, and that to the plaintiffs were due one-fourth of the gross amount paid by the Maharaja, minus Rs. 100—15 days' rent already paid. The decree was enhanced to one for Rs. 1,200.

The defendant has appealed to this Court and pleads (*a*) that the Chiefs' Conference was not a Durbar occasion and (*b*) that,

it was, the decree of the first Court should be restored.

On the first point *Bakhshi* Tek Chand for the defendant-appellant has argued that a business meeting of Ruling Chiefs cannot be termed a Durbar, that ceremony is an essential feature of a Durbar, that the speech of His Excellency the Viceroy in opening the Conference (as reported in a copy of the *Statesman* newspaper on the record) alluded to an absence of ceremony, and that the parties to the lease plainly had in their minds a ceremonial occasion of the character of those which have taken place in the past and have been known as Delhi Durbars. We are unable to assent to the proposition that a gathering of over forty Princes and Chiefs convened by the Governor General at the Capital of India cannot be called a Durbar. The word Durbar, according to the Century Dictionary and the Encyclopædia Britannica quoted by the learned District Judge, may mean an audience held by the Governor-General, an official reception, or a Council for administering affairs of State. In the Farhang Asfiya by Said Ahmad Delhwi, Volume II, there are a number of meanings appended to "Durbar," among them "assemblage of men of eminence". Further the words in the lease are "for Durbar occasion." The omission of the article before Durbar may be accidental but as the phrase stands, it is wider than the words "a Durbar" and must be taken to mean for such occasion as a Durbar. The text indicates, in our opinion, that the parties to the lease intended the condition under discussion to apply to occasions on which a number of Ruling Chiefs should congregate at Delhi at one time and create competition for house accommodation, as distinguished from isolated visits of single Chiefs. We hold that the lower Appellate Court was correct in finding that the clause applied to the Ruling Chiefs' Conference of 1916.

We have decided also to uphold the learned District Judge on the second point. *Bakhshi* Tek Chand admits that the Indian Evidence Act requires us to interpret the lease on its own terms and to disregard extrinsic evidence designed to explain the intentions of the parties, of which there is some on the record. The lease empowered the landlords to demand "25 per cent. of the amount recovered from such Chief," and makes no mention of deductions. The omission of all reference to deductions is reasonably explicable by the fact that the landlord's share is a small one. Instead of being one-half, charges on account of commission, etc., to be shared, it is one-fourth clear of such charges. There is nothing obviously inequitable in this.

The final argument of the learned Counsel for the defendant-appellant that the amount "recovered" from the Maharaja was Rs.4,000, and not Rs. 5,200, has no force. A sum of Rs. 1,200 certainly appears to have been paid as commission to Muhammad Fazal, but it was paid by the defendant out of Rs. 5,200 received by him from the Maharaja.

We dismiss the appeal with costs.

Z. K.

Appeal dismissed

BHAGWAN DIN *v.* INDRANI.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 60 OF 1920.

July 26, 1921.

Present :—Mr. Daniels, J. C., and Mr. Dalal, A. J. C.

BHAGWAN DIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat INDRANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Murao *caste*—*Widow*—*Re-marriage*—*Right in deceased husband's property, forfeiture of*—*Reversioners*—*Declaration of reversionary right, when granted*—*Hindu Widows' Re-marriage Act (XV of 1856), s. 2, applicability of.*

A Hindu widow of the *Murao* caste does not forfeit her right to her deceased husband's property by re-marriage, inasmuch as re-marriage is permitted by custom among that caste [p 118, col. 1.]

Section 2 of the Hindu Widows' Re-marriage Act is inapplicable to the case of a widow who is permitted by the custom of her caste to re-marry. [p. 118, col. 1.]

Janaki Ammal v. *Narayanasami Aiyar*, 37 Ind. Cas. 161; 39 M. 634; 20 M. L. T. 168; 31 M. L. J. 225; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 15 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530; 43 I. A 207 (P. C.) and *Gajadhar* v. *Kaunsilla*, 1 Ind. Cas 761; 31 A. 161; 6 A L. J. 107, referred to.

Where a cloud on the entire reversionary interest is thrown by a stranger, the next reversioners are entitled to obtain a declaration that the stranger has no rights to deprive the reversionary body of their rights on the death of the widow. [p. 118, col. 2.]

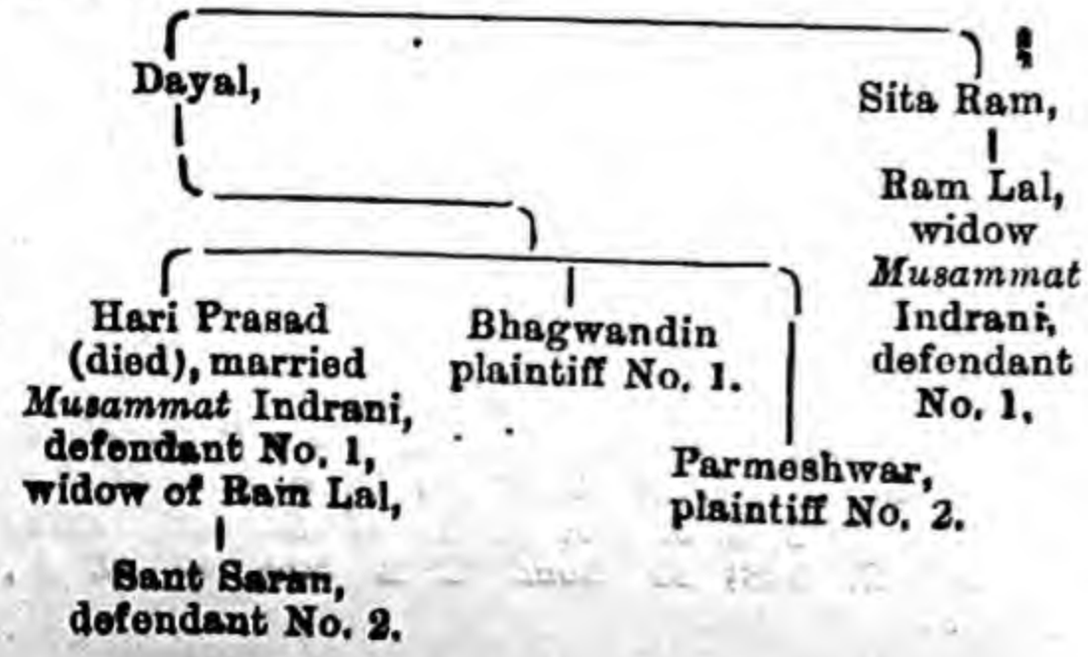
There is no immemorial custom among the *Muraos* entitling a son by a second husband to succeed to the property of the first husband. [p. 119, col. 2.]

Appeal against a decree of the Subordinate Judge, Sitapur, dated the 21st June 1920.

Messrs. *Ali Mohammad* and *Wasi Hasan*, for the Appellants.

Messrs. *Bisheshwar Nath Srivastava* and *Sidh Prasad*, for Respondents Nos 1 and 2.

JUDGMENT —The relationship of the parties will appear from the following pedigree :—



The plaintiffs sued in the Court of the Subordinate Judge of Sitapur for the possession of the property of Ram Lal on the ground that *Musammat* Indrani, who was in possession as a Hindu widow, lost her rights under law, equity and custom on her re marriage with Hari Prasad. In the alternative there was a prayer for a declaration that after the death of *Musammat* Indrani, Sant Saran shall have no right in the property in suit and that the plaintiffs shall be entitled thereto The main defense was stated in paragraph 18 of the joint written statement of defendants Nos. 1 and 2 that Sant Saran, the issue of defendant No. 1 and Hari Prasad, was under law and custom the son of Ram Lal and the owner of the property. In paragraph 19, an alternative defence was stated that under law and custom the defendant No. 1 cannot be deprived of her first husband's property during her life in spite of her second marriage. As an answer to the declaratory relief sought by the plaintiffs, it was urged in paragraph 21 that it was premature simply with a view to get a complicated legal point decided, and the Court should not exercise its discretionary powers in the matter.

The complicated legal point was not specified and it is noticeable that any right of Sant Saran to the property in suit after the death of his mother was not advanced.

The learned Subordinate Judge dismissed the suit for possession on the ground that a Hindu widow did not lose her rights in her deceased husband's property by re-marriage. He recorded no findings on the main defence of the immediate vesting of the property in Sant Saran on his birth, contenting himself with the observation that the declaration sought by the plaintiffs amounted only to a declaration of their rights to succeed to the property in suit as reversioners of Ram Lal and was barred under the principles of the Privy Council ruling in the case of *Janaki Ammal* v. *Narayanasami Aiyar* (1).

The suit of the plaintiffs was wholly dismissed and in consequence the plaintiffs have appealed. Arguments were addressed

(1) 37 Ind. Cas. 161; 39 M. 634; 20 M. L. T. 168; 31 M. L J. 225; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C W N. 1324; 18 Bom. L. R. 853; 24 C. L. J. 309; 4 L. W. 530; 43 I. A. 207 (P. C.).

to us to cover both the reliefs applied for in the plaint.

On the question of possession we agree with the lower Court that a Hindu widow of the *Murao* caste, to which the parties belong, does not forfeit her right to her deceased husband's property by re marriage. The re-marriage is permitted by custom among *Muraos*, as is admitted by the plaintiffs' own witnesses. Sahebdin (P. W. No. 2) stated that when a widow re-married, the marriage became valid on a dinner being given to the brotherhood. Jeorakhan (P. W. No. 3) deposed to the effect that the re-marriage of a widow was recognised by the brotherhood so long as *bhanwars* were not performed; it was only at the end in cross-examination that he went back on this statement and stated among *Muraos* there was no widow re-marriage. None of the four witnesses of the plaintiffs examined at the commencement of the proceedings asserted that a widow forfeited her deceased husband's property by re-marriage. The defence witnesses were all taken up with establishing the son's immediate rights to the property; they, however, deposed that a widow's marriage was valid by the custom of the brotherhood and that the widow remained in possession till a son was born to her. In this connection we may point out that if the learned Subordinate Judge, who heard most of the evidence but was transferred before judgment was pronounced, had recorded the statements of parties as he was required to do under Order X, rule 1, we should have received great assistance in deciding this appeal.

The provisions of Act No. XV of 1856 do not govern this case. The re-marriage among *Muraos* is recognised by the custom of the brotherhood and is not validated by Statute. The defendant No. 1, therefore, does not suffer from the incapacity enjoined by section 2 of the Act. In *Gajadhar* v. *Kaunsilla* (2) Banerji, J., laid down, after an examination of the case-law on the subject, that the Act was inapplicable to the case of a widow who was permitted by the custom of her caste to re-marry and that she does not forfeit the property inherited by her from her former husband. The same view was expressed by a learned Judge of this Court in *Narpat* v. *Janaka* (3), where the case-law on the subject is collected and discussed.

The provisions of the Act of 1859 can be the only bar to a Hindu widow continuing in possession after re-marriage because even if her re marriage be not valid, her unchastity will not deprive her of the estate which has vested in her for life (Mayne, paragraph 555). It is admitted that the defendant No. 1 re married a year after she had been in possession of her first husband's property. The plaintiffs' claim for possession must, therefore, fail.

We think that under the circumstances of the present case, the question of declaration must be inquired into. The Privy Council ruling quoted by the lower Court applies to a case where a reversioner claims for himself a declaration that he is the next reversioner and no more. At the time of the widow's death he may be dead and his heirs may not have that status. A declaration in such a case will be of no value and will not be granted. In this case the lower Court has overlooked the fact that the plaintiffs sought a declaration as regards defendant No. 2 in addition to the one for themselves. Defendant No. 2, by asserting his present possession as a son (by fiction) of Ram Lal, threw a cloud on the entire reversionary interest, so the next reversioners are entitled to obtain a declaration of want of a title of defendant No. 2, if they can prove it. *Saudagar Singh* v. *Perdip Narayan Singh* (4) is a Privy Council ruling which covers the facts of the present case. It is true that in the Privy Council case there was a deed of grant in favour of the person who claimed to succeed, but the principles are the same. There the stranger claimed under a deed while here he claims in virtue of his birth. The next reversioners are entitled to a declaration, if borne out by evidence, that the stranger had no rights to deprive the reversionary body of their rights on the death of the widow.

(2) 1 Ind. Cas. 761; 31 A. 161; 6 A. L. J. 107.

(3) 61 Ind. Cas. 303; 24 O. C. 11.

(4) 43 Ind. Cas. 484; 45 I. A. 21; 4 P. L. W. 52; 34 M. L. J. 67; 23 M. L. T. 31; 16 A. L. J. 61; 7 L. W. 146; 27 C. L. J. 186; 22 C. W N. 436; (1918) M. W. N. 323; 20 Bom. L. R. 509; 45 C. 51, (P. C.),

We propose to decide here the issue whether the defendant No. 2 has any rights in the property, instead of remitting it to the lower Court for decision. If the case is sent back, it would not come before the Judge, who heard the bulk of the evidence, and even the one or two witnesses, who were examined by the Judge, who pronounced judgment, were examined more than a year ago, so he would not be likely to retain any personal recollection of them.

The custom set up by the defence in favour of Sant Saran is akin to *Niyoga*, "The begetting of offspring upon the widow of a man who had left no issue," as described by Mayne in paragraph 71 of his Commentary, but without any of the restrictions noted by him. The learned Pleader for the defence argued that Sant Saran claimed ownership after the death of *Musammat* Indrani and that, therefore, the matter in issue may be left for decision to the time when the widow died. This presentation of the case for the defence is not correct. The Pleader for the defendants made a statement in the lower Court on 4th June 1920 to the effect that the issue born of the re-marriage inherited the property of the former husband as his own son. This meant that the son succeeded on birth to the exclusion of the widow. The oral testimony also is to the same effect. We have examined the statements of the defence witnesses and are not satisfied that they prove an immemorial custom among the *Muraos* entitling a son by the second husband to succeed to the property of the first husband. Ten instances were quoted by the different witnesses and they are all of a recent date within the memory of the witnesses. No instance was quoted with reference to their fathers or grandfathers. Some of the witnesses themselves, such as Jagannath, D. W. No. 2, Mohan Dass, D. W. No. 4, and Mathura, D. W. No. 5, were interested in establishing the claims of their own sons by widows. Another significant fact is that the property of the former husband was given to the son by the second husband under the orders of a Panchayat. In six out of the ten instances the evidence is to the effect that the Panchayat in settlement of a dispute made over the property of the first husband to the son by the second husband. If the son had succeeded to the property by immemorial custom, as is alleged on behalf of the defence, the necessity for convening a Panchayat would not have arisen. Wherever the matter of succession is probed in cross-examination, the result is far from definite. To take the instance of Asharfi Lal, son of Ganga Din's widow by Jagannath (D. W. No. 2), it appears from the statement of Gaya Dutt (D. W. No. 14) that his name alone appears in the deed of lease of cultivated land and in the village record and that the name of Asharfi Lal does not appear there. In fact the oral testimony regarding the succession in the ten instances given by the defence witnesses was not supported by copies of any village records. It was submitted by the respondents' learned Pleader that *Muraos* are tenants and not proprietors; but the rights of tenants are recorded in the village *khasra* and copies of that document could have been produced. Obviously there is only an understanding among the relations that Asharfi Lal shall be given Ganga Din's share of the cultivation, and it is possible that this arrangement may never take place. It will also be observed that witnesses differed as to the exact terms of the custom. In the written statement the custom is described in paragraph 17 as applicable to a childless widow who takes as a second husband a member of the brotherhood. The witness Gaya Datt (D. W. No. 14) deposed that a widow with children can also re-marry and that her children by the second husband will share in the property of the first husband. The witness Baldo (D. W. No. 15) actually gave an instance of Jai Ram's widow who remarried Chandi and the children of both Jai Ram and Chandi were given Jai Ram's property by the Panchayat. It appears that every case is decided on its merits by a meeting of the brotherhood and that there is no immemorial custom to govern succession without the orders of the Panchayat. We hold that Sant Saran did not acquire any right on his birth to the property of Ram Lal. There was no allegation on behalf of the defence in the lower Court that Sant Saran would succeed to Ram Lal's property on the death of his mother.

We decree the appeal so as to grant to the plaintiffs the relief of a declaration and dismiss the rest of the appeal. The declara-

tion shall be to the effect that the defendant Sant Saran has no rights in the property in suit as a son of Ram Lal either at present or after the death of his mother, *Musammat* Indrani. This declaration shall not affect whatever rights Sant Saran may happen to have as a reversioner of Ram Lal at the time of the death of his mother, *Musammat* Indrani. The parties shall receive and pay costs of both Courts according to their success and failure.

J. P. *Appeal partly decreed.*

PATNA HIGH COURT.
APPEAL FROM ORIGINAL ORDER No. 220 OF 1921,
December 20, 1921.
Present:—Mr. Justice Adami.
Maharaja GURU MAHADEVA ASHRAM PROSAD SAHI BAHADUR—APPELLANT
versus
MAHABIR SUKUL AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution—Step-in-aid of execution—Application, defective, whether saves limitation—Civil Procedure Code (Act V of 1908), O. XXI, r. 17 (2).

An application for execution which does not show the amount of the decree and the amount of costs is not in accordance with law within the meaning of Order XXI, rule 17 (2), Civil Procedure Code, and is not a step-in-aid of execution so as to save limitation within the meaning of Article 182 of the Limitation Act.

Salimullah Bahadur v. *Sainaddi Sarkar*, 22 Ind. Cas. 337; 18 C. L. J. 538 and *Gopal Sah* v. *Janki Koer*, 23 C. 217; 12 Ind. Dec. (N. S.) 145, followed.

Appeal from an order of the Subordinate Judge, Saran.

Mr. *Harnarayan Prasad*, for the Appellant.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Saran rejecting an objection put forward by the appellant in execution proceedings. A decree was obtained on the 29th January 1914 and the decree-holder made his first application for execution of the decree on the 29th January 1917. The application failed to show certain particulars, for instance column 8, showing the amount of the decree, and column 9, showing the amount of costs, were not filled up and certain copies of decrees were not filed. The Court gave time till the 5th February 1917 to supply the deficiencies, but no action was taken to remedy the defects and the application was rejected on the 6th February 1917. A second application was made on the 27th January 1920, but was struck off on the application of the decree-holder on the 6th April 1920, and the judgment-debtor on that date objected that the application was times barred since the orders passed with regard to the first application had not been carried out. A third application was made on the 9th April 1920, and the present appellant then objected that it was time barred inasmuch as there had been no proper step-in aid of execution on the 29th January 1917, the decree-holder having failed to remedy the defects in the application, and, therefore, the application was not in accordance with law within the meaning of sub-rule (2) of rule 17 of Order XXI, and Article 182, clause 5 (*a*) of the Limitation Act.

The learned Vakil for the appellant relies on the cases of *Salimullah Bahadur* v. *Sainaddi Sarkar* (1) and *Gopal Sah* v. *Janki Koer* (2). It is clear from these decisions that the application made on the 29th January 1917 cannot be taken to have been a step-in-aid of execution, for the application was not in accordance with law as required by Article 182 of the Limitation Act. The present application was, therefore, time barred and the appeal must succeed. No one appears on behalf of the respondent. The appeal is allowed with costs and the order of the Subordinate Judge is set aside. The proceedings in execution are now time-barred.

J. P. & S. D. *Appeal allowed.*

(1) 22 Ind. Cas. 337; 18 C. L. J. 538.
(2) 23 C. 217; 12 Ind. Dec. (N. S.) 145.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3264 OF 1917.

November 5, 1921.

Present:—Mr. Justice Chevis and Mr. Justice Harrison.

SHAH MUHAMMAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Khan Bahadur Chaudhri KARAM ILAHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Limitation Act (IX of 1908), s. 5—Abatement of appeal—Death of respondent—Extension of time.

The provisions of section 5 of the Limitation Act do not apply to applications to bring on to the record the legal representatives of a deceased respondent.

Where in a suit by certain proprietors against the remainder of the proprietary body of the village for a declaration relating to the *shamilat deh* one of the defendants dies and his legal representatives are not brought on the record, a declaration cannot be given against the remaining defendants and the whole suit abates.

Second appeal from a decree of the District Judge, Gujranwala, dated the 31st August 1917, affirming that of the Junior Subordinate Judge, First Class, Gujranwala, dated the 19th of February 1917.

Messrs. *Nanak Chand* and *Devi Dayal*, for the Appellants.

Mr. *Zafarulla Khan*, for the Respondents.

JUDGMENT.—A preliminary objection to the hearing of this appeal has been raised by Mr. Zafarulla Khan, who points out that Rallia Ram, one of the respondents, died long ago. No application for bringing his representatives on to the record was made until December 1919 and that application itself states that Rallia Ram died about one and a half years before. In the application it is stated that the appellants only recently came to know of the death of the said Rallia Ram. This, however, is a matter into which we are not prepared to enter. It is sufficient to say that the provisions of section 5 of the Limitation Act do not apply to applications to bring on to the record the legal representatives of a deceased respondent. No application for bringing on the record the legal representatives of the deceased having been made within the time limited by law, the provisions of Order XXII, rule 4 (3), apply and the suit has abated. No appli-

cation for setting aside the abatement has been presented to us and consequently there is nothing further for us to do except to declare that the appeal has abated. The suit is one brought by certain proprietors against the remainder of the proprietary body of the village for a declaration relating to the *shamilat deh*, and it is obvious that a declaration cannot be passed against a portion only of those proprietors who are the defendants in the case. We declare that the appeal has abated and we allow Rs. 32 as costs of the hearing to the respondents' Counsel.

Z. K.

Appeal rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 213 OF 1921.

September 2, 1921.

Present:— Mr. Daniels, J. C.

BHUP SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAZIM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Special covenant entitling mortgagee to additional amount—Deed, ambiguous—Burden of proof.

Where in a suit for redemption the defendants set up a special covenant entitling them to an additional amount and there is nothing to show that it refers to the mortgage in suit, there is no presumption and the burden is upon the defendants to show that it refers to the deed in suit. [p. 122, col. 1.]

Appeal against a decree of the Subordinate Judge, Unao, dated 15th April 1921, modifying that of the Munsif, North Unao, dated the 8th January 1921.

Mr. *S. M. Ahmad*, for the Appellants.

Mr. *Kanhaiya Lal*, for the Respondents.

JUDGMENT.—The point for decision in this case is a very short one. The suit was one for redemption of two mortgage deeds of 1867 and 1869 executed by one Lau Singh, predecessor-in-interests of the plaintiffs. The defence was that the plaintiffs were bound before redemption to pay up also the amount due on a deed of further

charge, executed by Mathura Singh, son of Lau Singh, in favour of the same mortgagees. The defendants are the heirs of the original mortgagees. It is now conceded that this deed was not a deed of further charge at all, but a simple bond. It contains a covenant in the following terms:—"There are two bonds by which the plots are mortgaged. So long as I do not redeem these two bonds (the covenant is very ungrammatically expressed), then first I will pay the money due on this bond and then I shall be allowed to redeem the fields."

("*Aur do tamassuk khet gahne hain to jab donon tamassuk nahin nikaren tab pahle yeh tamassuk ke rupaya den tab khet chutai pawen bich na pawen.*")

The learned Munsif held that this covenant was enforceable against the heirs of the original mortgagees, but that there was nothing to show what were the mortgage bonds to which it referred or that it referred to the mortgages in suit. Clearly there is nothing to show this. The entire covenant has been quoted above and it gives no reference either to the plots, the amount of the mortgage, its date, or the parties between whom it was executed. No oral evidence was called by the parties at all.

The learned Subordinate Judge held that it can be presumed that it referred to the deeds in suit and that it was for the plaintiffs to show the contrary. This appears to me to be contrary to the accepted legal principles. The defendants were setting up a special covenant entitling them to an additional amount and the burden of proof clearly lay on them. The learned Subordinate Judge bases his decision on a judgment printed on page 451 of Volume VII of the Oudh Law Journal [*Jageshar Singh* v. *Bir Ram* (1)]. I do not doubt that that case was rightly decided on its own facts, but I do not understand it as laying down any general principles. Because in the circumstances of that particular case, the learned Judge felt justified in presuming that an acknowledgment of debt referred to a particular debt which was shown to exist at the time, it does not follow that a similar presumption should be made on the absolutely vague language of the document now before me.

I take this opportunity of pointing out that though this Court may and frequently does refer to and follow decisions reported in the Oudh Law Journal, such cases cannot be treated as of equal authority with cases reported in the Oudh Cases. The latter reports are published under authority of the Court, to which they are previously submitted, and they are the only authorised reports of the decisions of this Court. Decisions printed elsewhere are on the same footing as unreported cases. It is open to the Oudh Law Journal or to any publication not controlled by the Court to re-print decisions which the Court has deliberately refused to publish under its authority, either because this was not considered to lay down any general principle, or because the Court on consideration felt doubts as to the soundness of the principles laid down or considered that the language used was open to misconstruction. While, therefore, the Oudh Law Journal is a useful publication which the Court has no desire to discourage, it is to be borne in mind that its reports have not the same authority as precedents as those published under the authority of the Court.

For reasons already given I allow the appeal and setting aside the decree of the lower Court, restore the decree of the Munsif with costs in all Courts.

J. P. *Appeal allowed.*

(1) 60 Ind. Cas. 189; 7 O. L. J. 451; 23 O. C. 176; 2 U. P. L. R. (J. C.) 152.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 69 OF 1920.

December 16, 1921.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Ross.

Chowdhury RAM PRASAD RAI AND OTHERS—APPELLANTS

versus

MAHESH KANT CHOWDHURY—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XXI, r. 1, O. XXIII, r. 1—Execution petition, withdrawal of—Sale of property notwithstanding withdrawal—Jurisdiction—Appeal—Inherent power of Court.

A decree-holder applied for execution of his decree by sale of the judgment-debtor's property, but on the date fixed for the sale applied to the Court to dismiss the execution case. The Court rejected the second application and proceeded to sell the properties. Against the order rejecting the appli-

cation an appeal was made to the District Judge who set aside the order of rejection. On an appeal to the High Court a single Judge set aside the order of the District Judge as being without jurisdiction. On a Letters Patent Appeal:

Held, that no appeal lay to the District Judge against the order of the Munsif rejecting the application of the decree-holder and ordering the sale of the property in question. [p. 123, col. 2.]

Held, also, that the Munsif had no jurisdiction to reject the prayer of the decree-holder to dismiss his petition for execution, inasmuch as there was nothing to prevent a decree-holder from withdrawing his execution and getting it dismissed, if he did not want to claim any relief in respect of the execution. [p 123, col. 2.]

Held, further, that under such circumstances the High Court had power under section 115 of the Civil Procedure Code to set aside the order of the Munsif, which was without jurisdiction. [p. 123, col. 2.]

Andrew Anthony v. *Rev. J. M Dupont*, 4 M. 217; 1 Ind. Dec. (N. S.) 986, *Zamiran* v. *Fateh Ali*, 32 C. 146, *Debi Das* v. *Ejaz Husain*, 28 A. 72; 2 A. L. J. 749; A. W. N. (1905) 191, followed.

Letters Patent Appeal against a judgment of Mr. Justice Das, reported as 57 Ind. Cas. 369, setting aside a decision of the District Judge, Darbhanga

Mr. *Lachmi Kant Jha*, for the Appellants.

Mr. *Saroshi Charan Mitter*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This is a Letters Patent Appeal against a decision of a Single Judge of this Court. By his order the learned Judge decreed the appeal presented to this Court.

The respondent obtained a decree against certain persons and in execution of that decree he caused the property of the appellant judgment-debtor to be advertised for sale. On the 17th of April 1919, the date fixed for sale, he applied to the Court to dismiss this execution case. This application was rejected by the Munsif, with the result that the property was put up for sale and was purchased by the appellant. The decree-holder, being dissatisfied with the decision of the Munsif, preferred an appeal to the Court of the District Judge of Darbhanga. The District Judge, being of the opinion that the Court had no power to sell the property on its own account in disregard of the application of the decree-holder, set aside the order of the Munsif and also the sale held in pursuance thereof. The purchaser, therefore, appealed to this Court. The appeal was heard by Mr. Justice Das. He held that the District Judge had no jurisdiction to deal with the matter in appeal and to set aside the order of the Munsif. He accordingly set aside the order of the District Judge and restored that of the Munsif.

The learned Judge of this Court was perfectly right in holding that no appeal lay from the order of the Munsif rejecting the application of the decree-holder and ordering the sale of the property in question. I, however, think that the learned Judge should have gone further and should have set aside the order of the Munsif in exercise of the powers vested in this Court under section 115 of the Code of Civil Procedure. The Munsif's order was certainly without jurisdiction and not sanctioned by any provisions of the Civil Procedure Code. Execution was taken by the decree-holder and the powers of the Court with respect to that execution were invoked by the decree-holder. The application was made under Order XXI, rule 1; and the nature of the relief and the mode for the enforcement of that relief were expressly stated by the decree-holder—*vide* rules 10 and 11 of Order XXI, Civil Procedure Code. The decree-holder expressly prayed for the execution of the decree and for the sale of the property of the judgment-debtor. He had the right to withdraw the execution petition at any moment he liked. No doubt Order XXIII, which relates to the withdrawal and abandonment of a claim, does not apply to execution proceedings; but there is nothing to prevent a decree-holder from withdrawing his execution and getting it dismissed, if he does not want to claim any relief in respect of the execution. The party which sets the Law Court in motion has a right to withdraw the proceedings from the Court. Therefore, the order of the Munsif was wrong and he acted certainly without jurisdiction in persisting in selling the property in spite of the wishes of the decree-holder to the contrary.

Now two broad orders were passed in this case—first by the Munsif and second by the lower Appellate Court. None of these Courts had any jurisdiction to pass their respective orders. This, therefore, was a fit case to set right the wrong order of the Munsif. Section 115 of the Code of Civil Procedure empowers the Court to act *suo motu*, on an application of the aggrieved person,

Nor is there any limit of time prescribed for it. In fact the decree-holder need not have come to this Court if he had obtained an order of the District Judge, however wrong and without jurisdiction. Therefore, this Court, having been apprised of an order without jurisdiction passed by the Munsif, should have set aside that order under section 115 of the Code. Authorities are not wanting where in such cases the High Court exercised their revisional jurisdiction under section 115 of the Code: *Andrew Anthony* v. *Rev. J. M. Dupont* (1), *Zamiran* v. *Fateh Ali* (2) and *Debi Das* v. *Faz Husain* (3).

I, therefore, decree this appeal and set aside the order of the learned Judge as well as that of the Munsif, and consequently the sale in execution is set aside. In the circumstances I make no order as to costs.

Ross, J.—I agree.

P. D. *Appeal decreed.*

(1) 4 M. 217; 1 Ind. Dec. (N. S.) 986.
(2) 32 C. 146.
(3) 28 A. 72; 2 A. L. J. 749; A. W. N. (1905) 191.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 490 OF 1921.
October 27, 1921.
Present:—Mr. Justice Scott-Smith.
LORIND CHAND AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ALLAH BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Declaratory suit—Cause of action—Limitation.

Plaintiffs claimed *adna malkiyat* rights in certain land which formed part of the *shamilat deh*, on the ground that they had broken it up. They applied to the Assistant Collector that the *adna malkiyat* should be mutated in their names, but mutation was refused by him on the 26th November 1912. They appealed to the Collector, who reversed the order of the Assistant Collector and ordered mutation to be effected on the 3rd February 1913. This order was, however, reversed by the Commissioner on the 3rd May 1913. The plaintiffs remained in possession and brought the present suit for a declaration of their title as *adna maliks* on the 2nd April 1919:

Held, that, though the denial by the defendants of plaintiffs' title in 1912 gave them a cause of action, the order passed by the Commissioner on the 3rd May 1913 gave them a fresh cause of action and that, therefore, the present suit, which was brought within six years of that date, was within time. [p. 125, col. 1.]

Sheopher Singh v. *Sheo Narain Singh*, 17 Ind. Cas. Ind. Cas. 675; 10 A. L. J. 413, followed.

Allah Jilai Umrao Husain, 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810, referred to.

Second appeal from a decree of the District Judge, Mianwali, dated the 17th November 1920, affirming that of the Munsif, First Class, Bhakkar, District Mianwali, dated the 29th June 1920.

Lala *Hargopal*, for the Appellants.

Mr. *B. D. Qureshi*, for the Respondents.

JUDGMENT.—The plaintiffs' suit for a declaration that they and defendant No. 27 are *adna* proprietors of certain land, of which they are in possession, has been dismissed by the lower Courts as barred by limitation. They have filed a second appeal in this Court.

The plaintiffs' claim was that they were entitled to *adna malkiyat* in the land which is part of the *shamilat deh*, on the ground that they had broken it up. They applied to the Assistant Collector that the *adna malkiyat* should be mutated in their names, but mutation was refused by him on the 26th November 1912. They appealed to the Collector who reversed the order of the Assistant Collector and ordered mutation to be effected on the 3rd February 1913. This order was, however, reversed by the Commissioner on the 3rd May 1913. The plaintiffs remained in possession and brought the present suit for a declaration of their title as *adna maliks* on the 2nd April 1919.

The contention urged by their Counsel is that the suit is within time, as it was brought within six years of the date of the Commissioner's order, which amounted to a fresh invasion of the plaintiffs' rights. He relies upon a case reported as *Sheopher Singh* v. *Sheo Narain Singh* (1), which was referred to with approval in *Allah Jilai Umrao Husain* (2). His argument is that though no doubt the defendants' denial of

(1) 17 Ind. Cas. 675; 10 A. L. J. 413.
(2) 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J 810.

plaintiffs' rights before the Assistant Collector in 1912 gave them a cause of action, their title was cleared by the order of the Collector in their favour on the 3rd February 1913 and that whatever cause of action they may have had before, the Commissioner's order of the 3rd May 1913, which reversed the previous order in their favour, was a fresh invasion of their rights and gave them a fresh cause of action. It is argued, and in my opinion correctly so, that after the Collector's order of the 3rd February 1913 there was no necessity for the plaintiffs to file a suit unless and until that order was set aside by the Commissioner. The case reported as *Allah Jilai* v. *Umrao Husain* (2) is, in my opinion, in point. There the owners of certain Zamindari property sold their interest in it with the exception of 26 *bighas*. In 1888 the vendors were recorded as exproprietary tenants of these 26 *bighas*. In 1903 the representatives of the vendors applied to have the village papers corrected, but their application was dismissed and they were told to go to the Civil Court. In 1910 the representatives of the purchasers applied to have rent assessed on the 26 *bighas* and obtained an order in their favour. The representatives of the vendors thereupon brought the present suit in the Civil Court for a declaration that they were proprietors. It was held that whatever cause of action the plaintiffs might have had before the proceedings of 1910, the order passed in those proceedings gave them a fresh cause of action. Similarly, in the present case though the denial by the defendants of plaintiffs' title in 1912 gave them a cause of action, the order passed by the Commissioner on the 3rd May 1913 gave them a fresh cause of action. The present suit, which was brought within six years of that date, is within time.

I, therefore, accept the appeal and, setting aside the order of both the lower Courts, remand the case to the Court of first instance for decision in accordance with law. Stamps in this and in the lower Appellate Court will be refunded and other costs will be costs in the cause.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.
CIVIL REVIEW No. 13 OF 1921.
December 14, 1921.
Present:—Mr. Justice Das and
Mr. Justice Ross.
SHAM LALL SAHU AND OTHERS—
DEFENDANTS—APPELLANTS—PETITIONERS
versus
Musammat NAG KOER *alias* SITA KOER
—PLAINTIFF—RESPONDENT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review, maintainability of, pending appeal—Ground for review.

A Court has power and in fact is bound to proceed with an application for review of judgment notwithstanding the fact that an appeal has been subsequently filed.

Chenna Reddi v. *Pedda Obi Reddi*, 2 Ind. Cas. 802; 32 M. 416; 19 M. L. J. 388; 6 M. L. T. 135 and *Pyari Mohan Kundu* v. *Kalu Khan*, 41 Ind. Cas. 497; 44 C. 1011, followed.

Civil review from a decision of Mr. Justice Das and Mr. Justice Ross.

Messrs. *Kulwant Sahay* and *Kailash Pati*, for the Petitioners.

Mr. *Lakshmi Narain Singh*, for the Opposite Party.

JUDGMENT.

ROSS, J.—A preliminary objection is taken to this application on the ground that an appeal has been made to the Privy Council and, therefore, the application for review cannot be entertained. This question was considered in *Chenna Reddi* v. *Pedda Obi Reddi* (1) and *Pyari Mohan Kundu* v. *Kalu Khan* (2), and it was held that the Court has power and in fact is bound to proceed with the application for review of judgment notwithstanding the fact that an appeal has been subsequently filed. The petitioner asks for a modification of the judgment on two points. It was directed that the plaintiff should pay to the defendants towards the amount due to them as capital Rs. 24,345 in cash, if there was cash in hand to that amount and, if not, in cash and house property. It is stated that there is not cash available to that amount and the petitioner desires a direction that instead of house property being made over to the

(1) 2 Ind. Cas. 802; 32 M. 416; 19 M. L. J. 388; 6 M. L. T. 135.
(2) 41 Ind. Cas. 497; 44 C. 1011.

opposite party to make up the balance due, cash according to the valuation of the house property referred to in the earlier part of the judgment should be paid.

The second point is that in the subsequent direction for the distribution of the remaining assets in the proportion of 10 to 6, there should be a further direction that instead of house property being delivered as against the share of the opposite party, the equivalent according to the above-mentioned valuation should be delivered in cash. All this was a matter for argument at the time of hearing of the appeal, and as it was not acceded to then, I see no reason now to vary the order that was passed.

We, therefore, dismiss the application for review and we do so with the less anxiety because an appeal to the Privy Council is pending and if there has been any error here, the matter can be set right.

The opposite party will get costs of this application, two gold *mohurs*.

DAS, J.—I agree.

J. P. *Application dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 446 OF 1921.

October 27, 1921.

Present:—Mr. Justice Scott-Smith.

ALI MUHAMMAD AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

JAHAN KHAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Execution of decree—Executing Court, power of—Decree-holder cannot go beyond decree.

An Executing Court cannot go behind the decree of which execution is sought. [p. 127, col. 1.]

An Execution Court has no power to direct something to be done in execution of a decree which is not directed to be done by the decree itself, on the ground that literal compliance with the decree has become impossible. [p. 126, col. 2.]

A decree directed the closing of an outlet made by the defendants in a certain hill stream and the building of a *bund* at a certain point. A *bund* was built in accordance with the decree, but was subsequently washed away by a flood. Another *bund* was subsequently made by the decree-holders at another point:

Held, that the decree-holder had no right to build a *bund* at any point other than that specified in the decree. [p. 127, col. 1.]

Miscellaneous second appeal from an order of the District Judge, Shahpur at Sargodha, dated the 29th December 1920, reversing that of the Munsif, First Class, Shahpur, dated 16th February 1920.

Mr. *Nanak Chand*, for the Appellants.

JUDGMENT.—The dispute before the Court in this appeal relates to the execution of a decree obtained by the respondents against the appellants. The decree directed the closing of an outlet made by the defendants in a certain hill stream and the building of a *bund* at a certain point *Alif*. It appears that a *bund* was built in accordance with the decree, but was subsequently washed away by a flood. It also appears from the order of the lower Appellate Court that another *bund* was subsequently made by the decree-holders to the west of the point *Alif*. This point is now in the bed of the stream. The Executing Court ordered that the existing *bund*, which had been made not in accordance with the decree, should be removed. The lower Appellate Court caused an enquiry to be made as to whether it was possible to erect a *bund* at point *Alif* or not. The report upon this enquiry was to the effect that such a *bund* could be constructed at a cost of a little over Rs. 300. The Judge of the lower Appellate Court, however, says in his order that "the forces of Nature have rendered a literal compliance with the decree impossible for all practical purposes. But compliance with the spirit of the decree is both possible and I think permissible. This has been done by the erection of a *bund* at another point further in and the whole object of the decree is thus secured." Now, in an earlier part of his judgment the learned District Judge notes that literal compliance with the decree is not impossible; but whether it is impossible or not, it is not permissible for the Executing Court to go beyond the actual decree. In *Mehr Nishan* v. *Nawabzada Muhammad Kasim Ali Khan* (1) the learned Judges pointed out, see page 133, that it is settled law that the

(1) 35 P. R. 1900 P. L. R. 1900 p. 357.

Executing Court cannot go behind the decree of which execution is sought. It is, therefore, clear that the decree-holders had no right under their decree to construct a *bund* at any other point than *Alif* and the Executing Court was, therefore, right in ordering that the existing *bund* should be removed.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court, restore that of the Executing Court; but I make no order as to costs.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 236 OF 1920.
August 1, 1921.
Present :—Mr. Hallifax, A. J. C.

JAGANNATH—PLAINTIFF—APPELLANT
versus
SAHEBRAO—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 95—Co-sharers—Re-distribution—Suit between tenant and former landlord—Jurisdiction of Civil and Revenue Courts.

The division of *khudkasht* or *sir* among co-sharers of a village to be held in severalty is a partial private partition of the village lands and each co-sharer's separately held parcel of land is a separate *patti* of the village, of which he is the sole landlord, and if he leases that land to a tenant, he is still the sole landlord. But there is nothing to prevent the co-sharers having a re-distribution of the lands held in separate ownership at any time, and either *khudkasht* or tenancy land can always be transferred to another *patti* or to what may be called the *shamilat patti*. Of tenancy land so returned to the body of co-sharers they are the landlords and are ordinarily represented by the *lambardar*, and the co-sharer who held the land previously in separate ownership is no longer the landlord. A suit between him and the tenant in respect of that land is, therefore, not a suit between landlord and tenant as such and is cognisable by a Civil Court. [p. 127, col. 2.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 26th April 1920, in Civil Appeal No. 33 of 1920.

Mr. *K. P. Vaidya*, for the Appellant.
Mr. *M. B. Bobde*, for the Respondent.

JUDGMENT.—The allegations in the plaint were these. In 1912 the defendant's father, who was then a co-sharer in the village in which the land in suit lies and also the Lambardar, conferred on the plaintiff occupancy rights in that and certain other land, all of which was at the time his *khudkasht* held in severalty. He ceased to be Lambardar in 1916, but remained a co-sharer, and in 1917 he took forcible possession of the field in suit, alleging that it was not really included in the lease of 1912 but was still his *khudkasht*. From 1912 onwards the plaintiff had been paying rent for all the land to the Lambardar for the time being. Along with the plaint were filed certain receipts purporting to show that the plaintiff paid rent for the land to the defendant's father in 1912 and 1913 and to Damru Patel, his successor in the office of Lambardar, in 1916 and 1917.

The division of *khudkasht* or *sir* among co-sharers of a village to be held in severalty is undoubtedly a partial private partition of the village lands and each co-sharer's separately held parcel of land is a separate *patti* of the village, of which he is the sole landlord, and if he leases that land to a tenant, he is still the sole landlord. But there is nothing to prevent the co-sharers having a re-distribution of the lands held in separate ownership at any time, and either *khudkasht* or tenancy land can always be transferred to another *patti* or to what may be called the *shamilat patti*. Of tenancy land so returned to the body of co-sharers they are the landlords and are ordinarily represented by the Lambardar, and the co-sharer who held the land previously in separate ownership is no longer the landlord. His suit between him and the tenant in respect of that land is, therefore, not a suit between landlord and tenant as such. That is the state of things alleged in the plaint in this case, and the decision of the lower Appellate Court that the suit is not triable by a Judge who is not also a Revenue Officer, is, therefore, wrong.

As it happens, the result would not be very different if the decision of the learned Additional District Judge had been correct. That decision was given on the 26th of April 1920. Only four days later Act I of 1920 came into force, and under section

106 of that Act the Court which actually tried the case would then have jurisdiction. If the order of the lower Appellate Court had been accepted or if it were confirmed in this appeal, the case would go back to the Court in which it was originally tried, though it would have to be tried over again from the beginning. The question of limitation would, almost certainly, be obviated by section 14 of the Limitation Act, if it arose at all. I am, however, satisfied that the Court in which the case was tried had jurisdiction even under the old Tenancy Act. The order of the lower Appellate Court is, therefore, set aside. The plaint, which has been filed in this Court with the appeal, will be sent to the lower Appellate Court with instructions to re-admit the appeal under its original number in the register and to dispose of it on its merits. The costs of the plaintiff in this Court will be paid by the defendant respondent, but all costs heretofore incurred in the lower Appellate Court will abide the result.

Z. K. *Appeal allowed;*
Case remanded.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1025 OF 1919.

October 19, 1921.

Present:—Mr. Justice Scott-Smith.

SHAH MUHAMMAD, HEIR AND REPRESENTATIVE OF PIR MUHAMMAD (DECEASED)—PLAINTIFF—APPELLANT

versus

MUHAMMAD ROSHAN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 43—Joint judgment-debtors—Decree discharged by one—Contribution.

The principle contained in section 43 of the Contract Act is founded upon equity and is applicable to the case of joint judgment-debtors. [p. 129, col. 1.]

Where one of several joint judgment-debtors satisfies the judgment, he can compel every other joint judgment-debtor to contribute his equal share towards the satisfaction of the judgment-debt, and if any of the latter makes default in such contribution, the remaining joint judgment-debtors must bear the loss arising from such default in equal shares. [p. 129, col. 1.]

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 31st January 1919, varying that of the Munsif, First Class, Sargodha, dated the 13th December 1917.

Mr. *M. L. Puri*, for the Appellant.

Mr. *M. Obedulla*, for the Respondents.

JUDGMENT.—On the 25th June 1915, one Diwan Chand got a decree for Rs. 986-15-0 against Pir Muhammad, Ala-ud-Din and Roshan Khan. The decree was executed against Pir Muhammad and he paid up the whole amount. He brought the suit, out of which the present appeal arises, in order to recover two-thirds of the sum paid by him from Roshan Khan and the heirs of Ala-ud-Din. He got a decree against them for the amount claimed, which made them jointly and severally liable for the whole amount. Upon an appeal by Roshan Khan, the lower Appellate Court directed that the plaintiff should have a decree against Roshan Khan for Rs. 328 15-8½ and half costs and against the representatives of Ala-ud-Din jointly for a similar amount recoverable from the estate of Ala-ud-Din deceased. From this order the plaintiff has filed a second appeal to this Court. He asked for two alternative reliefs, either that there should be a decree for the whole amount claimed against all the defendants jointly and severally, or in any case Roshan Khan should be held responsible for half of the amount of the decree if nothing could be realised from the estate of Ala-ud-Din. It is only the second of these reliefs which appellant's Counsel presses before me.

No direct authority has been cited on either side, but appellant's Counsel relies upon section 43 of the Indian Contract Act. That section deals with a case of joint promisors and lays down that each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, and that if any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares. Now, though this section is not directly applicable to the present case, it is obviously founded upon equity and its principles should, I think, be applied to the case of joint judgment debtors. Diwan Chand's decree was passed jointly against three persons, and, in the absence of any direction to the contrary, it is obvious that each of them should contribute equally towards the satisfaction of the decree. Pir Muhammad alone having paid the whole

amount decreed, is entitled to one-third of that amount from each of the joint judgment-debtors, and if nothing can be realised from either of them, he is obviously entitled to get half the total amount from the other. His prayer merely is that if he is unable to recover anything from the representatives of Ala ud-Din, he may recover half the total amount from Roshan Khan. This prayer is in accordance with equity, and, in my opinion, the appeal must succeed to this extent.

I accept the appeal, and, in modification of the lower Appellate Court's decree, direct that if Pir Muhammad is unable to realise the whole or any part of the amount decreed from the estate of Ala ud-Din, then half the amount of any deficiency which he has been unable so to realise shall be made good to him by Roshan Khan. As the appellant has only partially succeeded in this Court, I direct the parties to bear their own costs.

Z. K. *Appeal partly accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 189 OF 1921.

August 31, 1921.

Present :—Mr. Daniels, J. C.

ABUL KASIM BEG—PLAINTIFF—APPELLANT

versus

Sheikh EHSANUL GHANI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 16 (3)—Contract, rescission of—Champertous bargains—Unconscionability—Undue influence.

Champertous bargains having been held in India not to be contrary to public policy stand, as regards rescission, on the same footing as any other contract. Under section 16 (3) of the Contract Act, the fact that a champertous agreement is unconscionable is not in itself a sufficient ground for setting it aside, but simply one of two elements which, when combined, throw the burden of rebutting undue influence on the person who derives profit under the agreement. [p. 130, col. 2.]

Dhanipal Das v. *Maneshar Bakhsh Singh*, 28 A. 570; 4 C. L. J. 1; 1 M. L. T. 203; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. D. J. 293; 33 I. A. 118 (P. C.), *Chhannu Lal* v. *Raj Kuar*, 42 Ind. Cas. 295; 20 O. C. 318, *Poosathurai* v. *Kannappa Chettiar*, 55 Ind. Cas. 447; 47 I. A. 1; 38 M. L. J. 349; 11 L. W. 455; 18 A. L. J. 344; (1920) M. W. N. 317; 2 U. P. L. R. (P. C.) 62; 22 Bom. L. R. 538; 13 Bur. L. T. 28; 43 M. 546; 27 M. L. T. 316 (P. C.), applied.

Raja Mohkam Singh v. *Raja Rup Singh*, 15 A. 352; 20 I. A. 127; 6 Sar. P. C. J. 327; 17 Ind. Jur. 376; 7 Ind. Dec. (N. S.) 943, *Raghunath* v. *Nil Kanth*, 20 C. 843; 20 I. A. 112; 6 Sar. P. C. J. 302; 17 Ind. Jur. 374; Rafique and Jackson's P. C. No. 129; 10 Ind. Dec. (N. S.) 567, *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*, 35 C. 420; 10 Bom. L. R. 230; 12 C. W. N. 393; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49; 35 I. A. 48 (P. C.), referred to.

Appeal against a decree of the District Judge, Rae Bareli, dated the 29th March 1921, reversing that of the Munsif, Dalmau, dated the 8th September 1920.

Mr. *Ali Mohammad*, for the Appellant.

Messrs. *Niamat-ul-lah* and *Mohammad Husain*, for the Respondents.

JUDGMENT.—This is a suit for possession of immoveable property. The facts are as follows :—

The plaintiff's father, Mirza Qalandar Beg, claimed certain property which was in the possession of one Ikram-ul-la. In order to establish his claim legal proceedings would be necessary. He accordingly executed on 22nd September 1900 a sale deed for three-fourths of the property in favour of the defendants respondents for a sum of Rs. 1,500, retaining one-fourth share for himself. Of the sale consideration he admitted having received Rs. 30. The balance Rs. 1,470 was left with the vendees for expenses of the litigation. Various conditions, which it is not necessary to discuss, were entered in the sale-deed, debarring the vendor from compromising the case which should be filed without the consent of the vendees, providing what should happen in case the full claim was not decreed, and so on. After the execution of the sale deed a joint application for mutation was presented by the vendor and the vendees. In the course of the mutation proceedings they effected a compromise with the person in possession, Ikram-ul-la, by which the latter retained half the property and gave up the other half to the applicants. As a result of this compromise a half share was given to the vendor and the vendees in the proportions provided in the sale-deed, namely, one-fourth and three fourths. The plaintiff brought the present suit to recover three-fourths of the share from the vendees

on the ground that the sale deed was procured by fraud and undue influence and was null and void, and that its terms were harsh and unconscionable. The learned Munsif gave him a decree, but the learned District Judge dismissed the suit. There were originally two plaintiffs, but Abul Kasim Beg alone appeals.

The appellant's learned Pleader accepts the finding of the Court below that the sale-deed was not procured either by fraud or by undue influence and that Qalandar Beg executed it as a free agent and of his own free will. He contends that he is nevertheless entitled to have it set aside if its terms are found to be harsh and unconscionable. In other words, he claims that though he entered into the contract voluntarily, nevertheless if it proves to be a bad bargain for him the Court will relieve him of it. He relies mainly on two decisions of the Privy Council, *Raja Mohkam Singh* v. *Raja Rup Singh* (1) and *Raghunath* v. *Nil Kanth* (2). In the former case their Lordships merely said that they were not prepared to set aside the decision of the High Court, which had relieved the plaintiff of his bargain, unless it clearly appeared to be wrong. In the latter case the appellants rely on an observation towards the close of the judgment to the effect that though the English Law of Champerty is not in force in India, yet documents of such a nature should be jealously scanned and when found to be extortionate and unconscionable as against the party against whom relief is sought, effect should not be given to them. In both these cases it was the money-lender who was plaintiff, and in the second case he was seeking to compel the execution of a sale deed so that the relief asked for was by way of specific performance, which is always discretionary. In the present case the plaintiff is the vendor and is seeking to set aside a transaction which has already been given effect to, and to oust the defendants from property of which they are already in possession. Whatever difficulty may be felt in interperting these *dicta* of the Privy Council, the law has now been very clearly laid down in subsequent cases. In *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (3) their Lordships say on page 426 :

"For the respondents, it was boldly argued that, although the English Law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds what is substantially the same law is there in force. Their Lordships are of opinion that that proposition cannot be supported."

Their Lordships then refer to three cases which have laid down to the contrary and one of them is the very case of *Raghunath* v. *Nil Kanth* (2), on which the appellant most relies. In *Dhanipal Das* v. *Maneshar Bakhsh Singh* (4), a case which has been followed by this Court in *Ohhannu Lal* v. *Raj Kuar* (5), their Lordships make it very clear that English equitable doctrines are not applicable and that such cases have to be decided with reference to the provisions of section 16 of the Contract Act. In sub-section (3) of that section unconscionable bargains are specifically referred to and the fact of a bargain being unconscionable is treated, not as in itself a sufficient ground for setting it aside, but as one of two elements which, when combined, will throw the burden of rebutting undue influence on the person who seeks to profit by the contract. In *Poosathurai* v. *Kannappa Chettiar* (6) their Lordships have drawn attention to this provision. Champertous bargains having been held in this country not to be contrary to public policy, stand on the same footing as any other contract in this respect.

As the appellant has rested his case on

(1) 15 A. 352; 20 I. A. 127; 6 Sar. P. C. J. 327; 17 Ind. Jur. 376; 7 Ind. Dec. (N. S.) 943.

(2) 20 C. 848; 20 I. A. 112; 6 Sar. P. C. J. 302; 17 Ind. Jur. 374; Rafique and Jackson's P. C. No. 129; 10 Ind. Dec. (N. S.) 567.

(3) 35 C. 420; 10 Bom. L. R. 230; 12 C. W. N. 393; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49; 35 I. A. 48 (P. C.).

(4) 28 A. 570; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 C. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292; 33 I. A. 118 (P. C.).

(5) 43 Ind. Cas. 295; 20 C. C. 318.

(6) 55 Ind. Cas. 447; 47 I. A. 1; 38 M. L. J. 349; 11 L. W. 455; 18 A. L. J. 344; (1920) M. W. N. 317; 2 U. P. L. R. (P. C.) 62; 22 Bom. L. R. 588; 13 Bur. L. T. 28; 43 M. 546; 27 M. L. T. 316 (P. C.).

principles of law which I find to be erroneous, I have so far dealt with it on this basis. On the facts, however, I should not be prepared to hold that the bargain was unconscionable. As things have turned out, no doubt the respondents have obtained, by an expenditure of Rs. 175, property which is valued in the plaint at Rs. 750. We have to look, however, not merely to what subsequently happened, but at the circumstances as they stood at the time when the bargain was entered into. The plaintiff was evidently very doubtful of the success of his claim, and the sale-deed itself shows that the parties contemplated a probability of litigation which might go up to this Court in second appeal. If things had taken this course, a considerable sum of money might have had to be expended. Rs. 750 is the valuation put by the plaintiff on a three fourths share of one-half of the property, *i. e.*, three eighths of the entire property. The purchasers were, therefore, agreeing to spend up to the value of the three-fourths share which they acquired under the deed. Such a bargain was in no way unconscionable. The appeal fails on both grounds and it is hereby dismissed with costs.

N. H. *Appeal dismissed.*

PATNA HIGH COURT.

In the matter of SECOND CIVIL APPEAL No. 281 OF 1920.

December 21, 1921.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

Musammat CHANDMANI—APPELLANT

versus

KARTICK SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 5—"Court," meaning of—Question as to legal representatives of deceased party—Determination—Jurisdiction.

The word "Court" in Order XXII, rule 5, Civil Procedure Code, means 'the Court before which the question arises,' that is to say, the Trial Court if the question arises at the trial stage and the Appellate Court if the question arises when the Appellate Court is in seisin of the case.

Therefore, where there is any dispute as to the legal representative of a deceased party to an appeal the Appellate Court should determine the question itself and should not ask the Trial Court to report upon and determine the question but may direct the Trial Court to take evidence upon the question as to who is the proper legal representative of the deceased party and return the evidence to the Appellate Court.

Application to bring on record the legal representatives of a deceased party.

Mr. *A. B. Mukherji*, for the Appellant.

Mr. *Rai G. S. Prosad*, for the Respondent.

ORDER.—We think that the question for determination in this application is one which ought to be decided by the Court itself. That can only be determined after taking evidence. We may either hear evidence ourselves by affidavit or orally, to both of which courses there is obvious objection, or we may direct that evidence be taken before the Trial Court. It is clearly the most convenient course to direct that the evidence be taken before the Trial Court. The parties reside in that neighbourhood and the oral evidence, which is always more satisfactory than evidence by affidavit, can then be taken. Whether or not the Trial Court before whom the evidence is taken should submit a report and come to findings upon the questions concerning which the evidence is taken, is a matter which has been brought to our consideration. It appears from Order XXII, rule 5, that where the question arises as to whether any person is or is not the legal representative of a deceased party, such question shall be determined by the Court. The Court there means the Court before whom the question arises, that is to say, the Trial Court if the question arises at the trial stage and the Appellate Court if the question arises when the Appellate Court is seized of the case. There is no provision in the Code for delegating our powers conferred under this rule and, therefore, we do not think it would be proper to ask the Trial Court to report upon and determine the question, which is a question for the determination of this Court alone. In the circumstances we think the order should be that the Trial Court be directed to take evidence upon the question as to who is the proper legal representative of the deceased plaintiff Babu Kartick Singh and to return the evidence to this Court at as early a date as possible.

P. D. *Order accordingly.*

SIRAJ HUSAIN *v.* MUSHAF HUSAIN.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 2 OF 1921.

September 5, 1921.

Present:—Mr. Wazir Hasan, A. J. C.

SIRAJ HUSAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUSHAF HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Shia School—Gift of vested remainder—Donee not born—Gift, essentials of—Deed, construction of—Gift under Shia Law is contract between two parties.

The elements of 'proposal' and 'acceptance' are the essential elements of a contract of gift under Muhammadan Law and the absence of either is fatal to the validity of the gift. [p. 134, col. 2.]

Among Shias the creation of a life-interest and a deferred estate, which would amount to a vested remainder under English Law, are permissible, but stand on the same footing as ordinary gifts. So that a gift of the deferred estate cannot be made in favour of a person who is not born at the time of the making of such gift. [p. 133, col. 2; p. 134, col. 2.]

A deed of gift provided: "I fix the annual maintenance of my daughter, Zakia Begum, and create a charge for this maintenance on 89 *bighas* of land. The maintenance shall subsist for her lifetime without right of transfer, and after her death shall be transferred automatically to her male issue without right of transfer. In case of necessity, the said lady or her male issue shall be entitled to transfer it for proper price to my sons or their issue:"

Held, that there was a gift of a life-interest to the daughter and a further gift *in præsenti* of the deferred estate in favour of her male issue and that the provision about the right of transfer for necessity did not in any way enlarge the life-estate in favour of the daughter. [p. 133, col. 1.]

Appeal against a decree of the Subordinate Judge, Rae Bareli, dated 11th December 1920.

Mr. *J. P. O. Bhattacharji*, for the Appellants.

Messrs. *Haidar Husain* and *Kalbi Abbas*, for the Respondents.

JUDGMENT.—On the 30th of March 1906 Saiyid Mushaf Husain executed a document which is given the name of *tamliknama*. By its provisions Mushaf Husain transferred *in præsenti* the whole of his immoveable property to his three sons, Murtaza Husain, Razi-ud-din, and Abbas Husain. The deed also provided for an annuity of Rs. 360 by way of maintenance in favour of Mushaf Husain's daughter, *Musammat* Zakia Begam. On the date of the execution of this document the three sons of Mushaf Husain were minors. Mutation of names in the revenue papers was effected in favour of them under the guardianship of Mushaf Husain, their father. Murtaza Husain, the eldest of the three sons, died soon after. *Musammat* Zakia Begam died on the 23rd August 1914.

The suit out of which this appeal arises was brought by Saiyid Siraj Husain, Saiyid Zainulibad and Saiyid Mohammad Amjad, minor sons of *Musammat* Zakia Begam, under the guardianship of their father, Saiyid Mohammad Jawad, for recovery of the arrears of the annuity since the death of *Musammat* Zakia Begam and also for possession over 8-9 *bighas* 81/5th *biswas* of land, situate in Mauza Katra Bahadurganj, in lieu of the cash annuity for the future. Mushaf Husain and his two sons, Razi-ud-din and Abbas Husain, are the defendants to the suit. The Court of first instance rejected the relief in respect of possession of the land, but granted a decree for a small portion of the arrears of the annuity claimed by the plaintiffs.

The title of the plaintiffs to the annuity or any portion of it exclusively rests upon the provision relating thereto in the deed of settlement of the 30th of March 1906. The only questions, therefore, which arise for decision are:—

(1) The construction of the provision relating to the annuity, and

(2) The validity of that provision.

The learned Subordinate Judge in his judgment under appeal has given a translation of that portion of the deed of the settlement which deals with the question under consideration, and I reproduce it here:—"I fix annual maintenance of my married daughter, *Musammat* Zakia Begam, at Rs. 360 cash, and create a charge for this maintenance on 89 *bighas* $8\frac{1}{4}$ *biswas* of land. The maintenance shall subsist for the lifetime of her without right of transfer, and after her death this maintenance of Rs. 360 shall be transferred automatically to her male issue without right of transfer. In case of necessity of transfer the said lady or her male issue shall be entitled to transfer it for proper price to my sons or their issue."

On the first question the learned Subordinate Judge held as follows:—"I think the effect of this deed is to give *Musammat*

akia Begam an absolute estate." Following this view he subjected the annuity to division amongst the heirs of *Musammat* Zakia Begam under the Muhammadan Law. According to this division the three sons of *Musammat* Zakia Begam, who are the plaintiffs in this suit, were held entitled to 5-12ths of the annuity, the remaining 7-12ths being divisible amongst her mother, father and husband.

On the second question the learned Subordinate Judge overruled the objection taken before him by the defendants as to the validity of the settlement relating to the annuity.

On the question of interpretation of the provision relating to the annuity I am of opinion that the construction of that provision as conferring an absolute estate on *Musammat* Zakia Begam is perfectly clear, and there is no ambiguity whatsoever with regard to the intention as disclosed by the words used: "This maintenance shall subsist for the lifetime of her without right of transfer, and after her death this maintenance of Rs. 360 shall be transferred automatically to her male issue without right of transfer." If these words had stood alone, there could be no question that they would clearly amount to a grant of life-estate in favour of the daughter and on her death a further gift in favour of her male issue. But what follows seems to have given a good deal of trouble to the learned Subordinate Judge in coming to a conclusion on the question under consideration: "In the case of necessity of transfer the said lady or her male issue shall be entitled to transfer for proper price to my sons or their issue." In my opinion this language has not, in any manner, the effect of enlarging the gift for life made by the clause already quoted. The power of transfer intended to be conferred on the donee or her male issue under certain contingencies relates to that interest only which is created in their favour in most unequivocal language by the preceding clause. Besides, the donor by restricting the transfer in favour of his sons or their issue clearly intended that the transfer shall be with the consent of the representatives-in-title of the grantor of the annuity. The power of transfer with these limitations, therefore, cannot be construed to enlarge the life estate created in favour of the daughter. In my judgment, therefore, *Musammat* Zakia Begam had only a life interest in the annuity which came to an end on her death and was consequently not heritable by any of her heirs, under the Muhammadan Law. The donor, however, made a further gift *in praesenti* of the sum of Rs. 360 per year in favour of the male issue of his daughter, *Musammat* Zakia Begam, which gift was to come into effect on the determination of the prior estate in favour of the said lady. This brings me to the consideration of the second question set out in an earlier part of this judgment.

The interest of the nature created in favour of the sons of *Musammat* Zakia Begam would be called in English Law 'vested remainder.' The parties being Shias, the creation of a life-interest and a gift of the deferred estate which would amount to a vested remainder in English Law, are clearly permissible. Original texts are quoted in the judgment of Sir Lawrence Jenkins, Chief Justice, in the case of *Banoo Begum* v. *Mir Abel Ali* (1). It will serve no useful purpose to recapitulate them in this judgment. I propose, however, to quote a short extract from Sharya-ul-Islam a book of undoubted authority on the Shia Law:—

"والعبارة عن العقدان يقول اسكنتك او عمرتك اورقبتك او ماجري مجري ذالك هذه الدار و هذه الارض او هذا المسكن عمرك اوعمرے اومدة معينة"

(Sharya-ul-Islam—Book on Sukna and Hoobs).

A paraphrase of the quotation given above is made by Mr. Baillie in his Digest of Muhammadan Law, Imamees, page 226, in the following words:—"The words of constitution are, 'I have bestowed on thee this mansion, or this land or this dwelling, for thy life or my life, or for a fixed period.'" This conveys the meaning of the Arabic quotation fairly accurately. Most of the passages given in Sir Lawrence Jenkins' judgment relate to limited interests in house property, but the extract given above distinctly shows that the power of a Shia in

(1) 32 B. 172; 9 Bom. L. R. 1152.

creating a limited interest is not restricted to any particular kind of property but extends to lands as well.

The next question to be considered is whether the gift of the interests in favour of the male issue of *Musammat* Zakia Begam is valid or not in law. I have already pointed out that the gift in favour of the male children must be treated as a gift *in præsenti* and direct, though it is of an interest only. If this gift is not otherwise valid, it cannot be validated by the creation of the prior and a particular estate in favour of *Musammat* Zakia Begam. It is a well-settled principle of law "that a man cannot be allowed to do by indirect means what is forbidden to be done directly." *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2). In the case of *Sadiq Husain Khan* v. *Hashim Ali Khan* (3) Lord Atkinson in interpreting the word 'gift' in section 3 of the Oudh Laws Act (XVIII of 1876) observed as follows:— "The Court of the Judicial Commissioner has held that the term 'gifts' as here used does not include 'gifts' in trust. Their Lordships cannot adopt such a narrow construction of the term 'gift' as would exclude any gift where the donor's bounty passes to his intended beneficiary through the medium of a trust, so that while a 'gift' by *A* to *C* direct would be governed by the Muhammadan law, a 'gift' by *A* to *B* in trust for *C* would be governed by some other law. So to hold would, they think, defeat the plain purpose and object of this section of the Statute." It follows that the gift in favour of the plaintiffs in this case must be tested with reference to rules of the Muhammadan Law relating to gift in its direct form.

In Sharya ul-Islam gift is defined as follows:—

"والحكمة الهبة و هو العقد المقتضى تمليك العين من غير عوض تمليكا منجزاً مجرداً عن القربته.... وهى تفتقد الى الا يجاب والقبول والقبض"

For a paraphrase in English of this quotation see Mr. Baillie's Digest of Muhammadan Law, Imamees, page 203. Gift, therefore, as understood in the Shia Muhammadan Law, is a contract between two parties (Aqd). Consensus of the two minds with reference to a transaction is a necessary element of the law of contract in the Muhammadan Law as it is in every other system of jurisprudnce. The elements of disposition are 'proposal' (*ejab*) and 'acceptance' (*qabul*). The elements of 'proposal' and 'acceptance' are the essential constituents of a contract of gift, so that if either of them be wanting there can be no valid contract. It may be mentioned here that "seizin" is not an essential element of gift, that is to say, of the formation of the contract, but it is necessary for the purpose of giving effect to that contract. The word '*munizan*' in the quotation given above clearly excludes the idea of any possibility, contingency, condition or futurity entering into the formation of the contract of gift. It follows that the absence of 'acceptance' and the presence of contingency or futurity must be found in a case where a gift is made in favour of a person who has not come into existence. Now, therefore, if none of these three plaintiffs had been born on the date of the deed of the settlement, the gift upon which they rely in support of their claim must fail.

By my previous order dated the 11th of May 1921 I remitted the following issue for finding to the lower Court:—

"What are the respective ages of the plaintiffs?"

The learned Subordinate Judge has answered that issue as follows:—"I hold that the plaintiff No. 1 was born in December 1906, plaintiff No. 2 in February 1909, and plaintiff No. 3 in January 1912."

This finding has been assailed by the plaintiffs, but in my opinion it is based on clear and cogent evidence which the learned Subordinate Judge has accepted as true and reliable. I accept the finding. On the 30th March 1906, the date of the deed of the settlement, none of the plaintiffs was, therefore, in existence. The gift consequently fails.

(2) 18 W. R. 359; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

(3) 36 Ind. Cas. 104; 43 I. A. 212; 31 M. L. J. 607; 14 A. L. J. 1248; 19 O. C. 192; 18 Bom. L. R. 1037. 21 C. W. N. 180; (1916) 2 M. W. N. 577; 21 M. L. T. 40; 38 A. 627; 1 P. L. W. 157; 4 O. L. J. 22; 25 C. L. J. 368; 6 L. W. 878; 10 Bur. L. T. 140 (P. C.).

The result is that I dismiss the appeal, allow the cross-objections, and dismiss the plaintiffs' suit with costs throughout.

N. H.

Appeal dismissed.

PATNA HIGH COURT.
CIVIL REVISION No. 140 OF 1921.
December 12, 1921.
Present :—Mr. Justice Das and Mr. Justice Bucknill.
Syed ALI ZAMIN—PETITIONER
versus
Nawab Syed MUHAMMAD AKBAR ALI—OPPOSITE PARTY.

Land Registration Act (VII B. C. of 1876), ss. 42, 52, 55, 63—Jurisdiction—Land Revenue Deputy Collector, when to make reference to Civil Court—Registration of name in Land Registration Record—Revision—Discretion.

Where an applicant for registration of his name in the Land Registration Record claims to have succeeded to any proprietary right, whether by purchase, inheritance, gift or otherwise, it is necessary for him to establish not only that the succession or transfer has taken place but that he has acquired possession in accordance with such succession or transfer. But where he claims to have assumed charge of the estate or property either as joint proprietor or as manager, it is sufficient for him to establish that his possession exists. [p. 136, col 2.]

Hence where each of the two applicants claims to have assumed charge of an endowment, the Collector has simply to see with whom possession exists. If he finds, as a matter of fact, that possession exists with one of the applicants, he has no jurisdiction to refer the matter to the Civil Court, but should order the name of the person in possession to be recorded in the Land Registration Record. [p. 136, col. 2.]

The jurisdiction either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute. [p. 136, col. 2.]

The exercise of revisional powers is always discretionary, and where an aggrieved party has other remedy available a High Court is unwilling to interfere. [p. 137, col. 1.]

Per *Bucknill, J.*—When a right thing has been done in a wrong way, for example, when a Civil Court has entertained a reference made by a Land Registration Deputy Collector, which the latter had no jurisdiction to make and the former no jurisdiction to entertain, but the conclusion arrived at by the Civil Court is correct, the High Court would not quash the order in revision. [p. 137, cols. 1 & 2.]

Appeal from an order of the Subordinate Judge, Gaya,

Messrs. *S. M. Mullick* and *Panchanan Banerji*, for the Petitioner.

Mr. *Sultan Ahmed*, for the Opposite Party.

JUDGMENT.

DAS, J.—This application is directed against the order of the Subordinate Judge of Gaya in a reference made by the Land Registration Deputy Collector under section 55 of the Land Registration Act. Mr. Hassan Imam on behalf of the applicant contended before us that the learned Subordinate Judge had no jurisdiction to deal with the matter inasmuch as the reference was invalid under the law. He also contended that, assuming the reference was a valid reference, the order must still be set aside inasmuch as the learned Subordinate Judge acted in the matter illegally or with material irregularity.

The contest is between the petitioner, Syed Ali Zamin, and Nawab Syed Akbar Ali commonly known as Chotey Nawab. Each of these persons claims to be the Mutwalli of the endowment of Nawab Lutf-ali Khan. The learned Deputy Collector who tried the question between the parties in the first instance came to the conclusion that Ali Zamin had title but had no possession and that Nawab Akbar Ali had possession but no title. He accordingly referred the matter to the Civil Court under section 55 of the Act. The learned Subordinate Judge agreed with the learned Deputy Collector that Akbar Ali Khan was in possession of the properties in dispute. He, however, differed from the Deputy Collector on the question of title. He came to the conclusion that Akbar Ali had a good title to the properties. He accordingly certified to the Collector his determination as to the right of possession under section 63 of the Act.

In my opinion the reference was not a valid one. In order to determine this point it is necessary to refer to the relevant sections of the Land Registration Act. Section 42 of the Act provides that "every person succeeding, after the commencement of this Act, to any proprietary right in any of the estate or revenue free property, whether by purchase, inheritance, gift or otherwise, and every joint proprietor of an estate or revenue free property assuming charge after such commencement of such estate or property, or of any interest therein,

respectively, on behalf of the other proprietors thereof, and every person assuming charge after such commencement of any estate or revenue free property, or of any interest thereof, respectively, as manager, shall, within six months from the date of such succession or assumption of charge, make application to the Collector for registration of his name and of the character and extent of his interest as such proprietor or manager." It will be noticed that this section makes a clear distinction between the case of "succession," whether by purchase, inheritance, gift or otherwise, and the case of "assumption of charge," whether as joint proprietor or as manager. The distinction is an important one, as we shall presently see in connection with section 52.

That section provides for the enquiry to be held by the Collector, and runs as follows:—"On the day fixed in the notice issued under section 48, or as soon thereafter as possible, the Collector shall consider any objections which may be advanced and make such further inquiry as appears necessary to ascertain the truth of the alleged possession of, succession to, or transfer of, the estate, revenue free property, or interest therein, in respect of which registration is applied for; and if it appears to the Collector that the possession exists, or that the succession or transfer has taken place, and that the applicant has acquired possession in accordance with such succession or transfer, but not otherwise, the Collector shall order the name of the applicant to be registered in the proper registers as proprietor or manager of the said estate, revenue free property or interest therein; provided that any person to whom any proprietary right in an estate has been mortgaged may be registered as mortgagee, whether he be in actual possession or otherwise." It seems to me that reading section 52 with section 42, the Collector has the power to order the name of the applicant to be registered where, in the case of assumption of the charge, he is satisfied that the possession exists: but that in the case of succession or transfer he has no right to direct the name of the applicant to be registered unless he is satisfied, first, that the succession or transfer has taken place and, secondly, that the applicant has acquired possession in accordance with such succession or transfer. In other words, where the applicant claims to have assumed charge of the estate or property either as joint proprietor or as manager, it is sufficient for him to establish that his possession exists: but where he claims to have succeeded to any proprietary right, whether by purchase, inheritance, gift or otherwise, it is necessary for him to establish not only that the succession or transfer has taken place but that he has acquired possession in accordance with such succession or transfer. In the present case there were two applicants in the land registration department, each claiming to have assumed charge of the estate or property as manager of the endowment. There was no question of succession, whether by purchase, inheritance, gift or otherwise, to be tried by the land registration department. It seems to me, therefore, that the only question which the Land Registration Deputy Collector had to determine was—did possession exist in favour of either of the applicants? He came to the conclusion that it did exist in favour of the opposite party. In my opinion he ought to have ordered the name of the opposite party to be registered as manager of the endowment.

The learned Deputy Collector, however, referred the matter to the Civil Court under section 55 of the Land Registration Act. That section gives the right to the Collector to determine summarily the right to possession of the property, or, if he be of opinion that the dispute can more properly be determined by a Civil Court, to refer the matter in dispute to the Civil Court, provided it is not proved to his satisfaction that any person is in possession of the interest in dispute. In other words, the jurisdiction either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute. In the present case the learned Deputy Collector was satisfied that the opposite party was in possession of the interest in dispute. In my opinion, therefore, there was no jurisdiction in the Land Registration Deputy Collector to refer the matter

to the Civil Court under section 55 of the Act.

I have now to consider whether we ought to set aside the order of the learned Subordinate Judge in view of the decision that the reference was not a valid one. I have come to the conclusion that we ought not to interefere with the order passed by the learned Subordinate Judge. We are asked to exercise our revisional powers and as is well settled, the exercise of revisional powers is always discretionary. The ordinary rule is that where an aggrieved party has other remedy available this Court is unwilling to interefere, and in this case we are all the more loth to interfere since the learned Subordinate Judge has passed an order which the learned Deputy Collector should have passed in the first instance. In these circumstances we think that no useful purpose will be served by revising the order passed by the learned Subordinate Judge. I would refuse this application, but in the circumstances, would make no order as to costs.

BUCKNILL, J.—I have no doubt that the Land Registration Deputy Collector ought not to have referred this matter to the Civil Court. He had really no jurisdiction so to do, for he had come to a clear decision as to the possession by one of the parties. Under such circumstances the reference to the Subordinate Judge merely because the Deputy Collector thought that the possession and the title were not identical, was outside his proper jurisdiction. The Subordinate Judge should, and, if it had been clearly pointed out to him, no doubt, would, have seen this *impasse*: but he accepted instead of refusing the reference: and his order, based as it is on an invalid reference, is obviously incapable of theoretical support. The Subordinate Judge, however, although he accepted, wrongly, the incubus of the reference, came, by a quite irregular mode of dealing with the matter, to the conclusion that, whilst the Land Registration Deputy Collector was right so far as possession was concerned, he was wrong in his view as to the title: and, so, on quite improper premises and on a reference which he ought to have rejected as outside his jurisdiction, he has made an order the effect of which is no doubt correct. The upshot is that the right thing has been done in quite a wrong way.

The question then arises what this Court ought to do under such circumstances. If this Court decided to quash the order and send the matter back for reconsideration, the only result would be to cause further and possibly considerable expenses: whereas, if the order is allowed to stand, the position will remain the same as would be effected by a reconsideration. I think, therefore, that although I do not quite like to allow an order which I feel is without jurisdiction to stand, the sensible course is not to interfere, and I, therefore, agree with my learned brother.

P. D. & J. P. & M. H.

Application refused.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1864 OF 1918.

November 8, 1921.

Present:—Mr. Justice LeRossignol and Mr. Justice Campbell.

KISHAN LAL—PLAINTIFF—APPELLANT

versus

DURGA PARSHAD—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 23—Money deposited with surety to induce him to stand bail, whether can be recovered—Public policy.

The plaintiff being an accused in a Police inquiry, was called upon to find security in Rs. 1,000 for his appearance before the Magistrate. The defendant became his bail on the deposit with him by the plaintiff of Rs. 1,000 cash; at the same time the defendant gave the plaintiff a promissory note for Rs. 1,000. The bail was subsequently discharged and the plaintiff sued the defendant upon the promissory note:

Held, (1) that the contract had been carried out, at least in part, by the defendant standing surety for the plaintiff; [p. 138, col. 2.]

(2) that the contract being opposed to public policy, the plaintiff could not succeed. [p. 138, col. 2.]

PITAMBER CHOWDHRY *v.* RAHMAT ALI.

Second appeal from a decree of the District Judge, Ambala, dated the 3rd April 1918, varying that of the Subordinate Judge, Second Class, Ambala, dated the 5th December 1917.

Dr. *G. C. Narang*, for the Appellant.

Lala *Durga Das*, for the Respondent.

JUDGMENT.—This is a second appeal in an action arising out of the following circumstances.

The plaintiff being an accused in a Police inquiry, was called upon to find security in Rs. 1,000 for his appearance before the Magistrate. The defendant became his bail on the deposit with him by the plaintiff of Rs. 1,000 cash; at the same time the defendant gave the plaintiff a promissory note for Rs. 1,000.

The bail was subsequently discharged and the suit was upon the promissory note.

The learned District Judge has dismissed the suit upholding the Trial Court's finding that the contract was void, being opposed to public policy. He referred to *Sunder Singh* v. *Kishen Chand* (1), which resumes the English authorities on the point.

Before us, it is urged that *Sunder Singh* v. *Kishen Chand* (1) is distinguishable from this case inasmuch as in that case the bail bond had been forfeited, whereas in this case there was no forfeiture, moreover it is contended that the contract never issued from the executory stage and that *Wilson* v. *Strugnell* (2) is an authority in favour of the appeal.

The learned Judge in *Wilson* v. *Strugnell* (2) seems to have held that the contract between the principal and his bail became illegal only when the bail was forfeited, and not before and he referred to *Jones* v. *Orchard* (3) as a direct authority in favour of his view, though the judgment of the Court proceeded on another point.

With very great deference, we are unable to find anything in *Jones* v. *Orchard* (3) to support that view and it seems to us that if the forfeiture had taken place, plaintiff's case would have failed not merely because the consideration was illegal, but because the contract had been carried out and he had no cause of action.

The contract between the plaintiff and the defendant in our view was as follows:—

Plaintiff promised to deposit Rs. 1,000 with defendant in consideration for defendant's tender of bail; defendant tenders the bail.

The contract is carried out, at any rate in part, and the contract does not become executory merely because, on the discharge of the bail, he refuses to restore the deposit to plaintiff.

The crucial question is:—Would the defendant have tendered bail if the plaintiff had not deposited Rs. 1,000 with him? The illegality of the consideration lies in the fact that by the deposit of Rs. 1,000 the surety was placed in a position which encouraged him to be careless, whether or not his principal made an appearance before the Court.

For these reasons we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 1 P. R. 1899.

(2) (1881) 7 Q. B. D. 548 at p. 55; 150 L. J. M. C. 145; 45 L. T. 218; 14 Cox. C. C. 624, 45 J. P. 831.

(3) (1855) 16 C. B. 614; 24 L. J. C. P. 229; 1 Jur. (N. S.) 936; 3 W. R. 554; 139 E. R. 900; 100 R. R. 852.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 54 OF 1920.

December 16, 1921.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Ross.

PITAMBER CHOWDHRY—DEFENDANT No. 1—APPELLANT

versus

Sheikh RAHMAT ALI—PLAINTIFF AND MANGLI KHAN—DEFENDANT No. 2—RESPONDENTS.

Cess Act (IX of 1880), ss. 5, 41, Ch. IV, ss. 52, 54—Public Demands Recovery Act (I of 1895)—Sale of holding for non-payment of cess, effect of—Previous incumbrance on holding — Priority — Rent-free tenure, cess on, liability to pay, when arises—Notice under Cess Act—Evidence Act (I of 1872), s. 114 (e)—Presumption—Onus—Contract to pay cess not illegal—Previous decree for cess—Res judicata.

A purchaser of a holding in execution of a decree for cess purchases only the right, title and interest

of the tenant; but the holding itself does not pass so as to entitle the purchaser to hold it free from encumbrance created upon it by the tenant previous to the sale and, therefore, he cannot have the encumbrance annulled nor recover possession of the holding from a purchaser of it in execution of a decree based on the encumbrance. [p. 143, col. 2]

Malkarjun v. *Narhari*, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.) and *Moti Lal* v. *Karrabuldin*, 25 C. 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec (N. S.) 121, referred to.

The payment of road cess is a liability to the Government, but the liability enforced by section 5 of the Cess Act does not in itself create any charge on any estate or tenure. So far as the liability to the Government is concerned, it is a personal one, which is enforced by the Public Demands Recovey Act and for the realization of which the right, title and interest only of the judgment-debtor passes. [p. 141, col 2.]

Ahsanulla v. *Manjura Banoo*, 30 C. 778; 8 C. W. N. 359 and *Shekaat Hosain* v. *Sasi Kar*, 19 C. 787; 9 Ind. Dec (N. S.) 965, followed.

In order to make cess payable under the provisions of the Cess Act with respect to rent-free lands the requirements of Chapter IV of the Act must be complied with. It is only after the publication of the extracts from the valuation roll that the liability to pay cess to the superior landlord arises in the case of a rent-free tenure. When the provisions of Chapter IV of the Cess Act are fully complied with, then a cess becomes payable under the Act and such a cess a superior landlord is entitled to realise "with the same penalty and in the same manner as if it were an arrear of rent" [p. 140, cols. 1 & 2.]

No presumption of section 114, clause (*e*) of the Evidence Act applies with respect to the notice provided by section 52 of Cess Act and the person who claims that a right or obligation, such as the payment of cess by a tenure-holder, has accrued, must prove that the liabilities had been incurred and the things described in the Act had been actually done. The owners of rent-free lands are not bound to pay road cess before the publication of the valuation rolls under section 52. [p. 142, col. 2; p. 143, col. 1.]

Ashanullah Khan Bahadur v. *Trilochan Bagchi*, 13 C. 197; 6 Ind. Dec. (N. S.) 630, *Bhugwati Kuweri Chowdhurani* v. *Chutterput Singh*, 25 C. 725; 2 C. W. N. 407; 13 Ind. Dec. (N. S.) 474, *Rash Behari Mukerjee* v. *Pitamberi Chowdhrani*, 15 C. 237; 7 Ind. Dec. (N. S.) 743, followed.

A previous decree for cess does not operate as *res judicata*, inasmuch as a cess is a recurring charge. [p. 148, col. 1.]

A contract to pay cess is not at all illegal, nor is it prohibited under the provisions of section 41 or any other provision of the Cess Act. [p. 143, col. 1.]

Ashutosh Dhar v. *Amir Mollah*, 3 C. L. J. 337, followed.

Appeal from a decision of the Judicial Commissioner, Ranchi.

Messrs. *Sultan Ahmad* and *Rai Gurusaran Prasad*, for the Appellant.

Messrs. *Kulwant Sahay* and *Siveswar Dayal*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This is an appeal by defendant No. 1. The property in dispute is 42 *kats* of *don* land known as Gangi Jamuni, Ras and Goshin Nari situate in Mauza Darida. The village belonged to one Ram Narain Singh, Manki of Tarai and the land in question was held by his uncle Bharat Singh as rent-free Khorposh, the rule of succession in the family being that of lineal primogeniture whereby the eldest member succeeds to the estate and the junior members are allowed rent-free grants for maintenance. Such grants are transferable, but the grantor may resume them on the failure of heirs male of the original grantee free from encumbrances. Ram Narain died in 1898 and was succeeded by Bharat Singh's son Ganganarain. Bharat had three sons, Ganganarain, Ramgopal and Harakh. During his occupancy of the rent-free tenure in question Bharat gave sometime before 1896 12 *kats* out of 42 in usufructuary mortgage or *bhugut* to Regree Babu. The term of this *bhugut* expired long ago. In 1895, however, he gave the remaining 30 *kats* to defendant No. 1 in *bhugut* for a consideration of Rs. 1,000 for a term expiring in 1923 (1916). In 1897 Ram Narain, the proprietor of the estate, executed a *bhugut* of the whole *mauza* in favour of two cousins Rajab Ali and Sher Ali, for a term expiring in 1912. In 1899 Ganganarain and Ramgopal, the two elder sons of Bharat, executed a simple mortgage of the lands in suit for a consideration of Rs. 700 in favour of defendant No. 1. In the meantime Rajab Ali and Sher Ali had obtained a decree for cess against Bharat in the year 1897 in the Revenue Court. They executed this decree in 1901 against Ganganarain only, whose right, title and interest in the property in dispute was sold in November 1901 under section 124 of Act I of 1879 and the holding in question was purchased by one Baldeo Sahay. In 1902 Ganganarain executed a *kabala* in favour of Rajab Ali, Sher Ali and three others in lieu of the advance made by them to Ganganarain and Ramgopal for carrying out the litigation against the widow of

Ram Narain as to the right of sucsession to the estate. It may be incidentally mentioned that after the death of Ram Narain his widow and Ganganarain disputed the right of sucsession to the estate, which ultimately terminated in favour of Ganganarain in the year 1905. In February 1902 Ganganarain and Ramgopal had exsouted in favour of the defendant No. 1, Pitamber Choudhry, a *mokarari* deed with respect to the land in suit. Pitamber, however, abandoned his right under the *mokarari* deed and brought a suit in July 1902 to enforce his mortgage of 1899 which was exsouted by Ganganarain and Ramgopal. He obtained a preliminary decree in September 1902 for the sale of the mortgaged properties subject to his own prior mortgage in exsoution whereof he purchased the property in 1911. In 1912 he obtained delivery of possession of the property in suit. In the meantime Rajab Ali and Sher Ali had instituted a suit for recovery of cess against Baldeo Sahay who had purchased the land in 1901 in exsoution of a decree for cess. In April 1904 they obtained a decree for cess, and in August the land in suit was sold in exsoution of the decree and was purchased by the present plaintiff, Rahmat Ali. The sale purported to have taken place under section 123 of Act I of 1879, section 124 of that Act having been repealed by the Amending Act of 1903. Thus the land in suit has been purchased by both the plaintiff and defendant No. 1. The plaintiff's purchase was in exsoution of a decree for cess in the year 1904 and the defendant's purchase was in exsoution of his mortgage-decree in the year 1911, the mortgage being of the year 1899. The land in suit is at present in possession of the defendant No. 1 and the plaintiff seeks in the present suit to oust the defendant No. 1 upon a declaration that he purchased the land free from any encumbrance and that the defendant's lien created by the mortgage of 1899 was consequently annulled. He also prays for recovery of mesne profits.

The Courts below have decreed the plaintiff's suit. The defendant No. 1 has, therefore, come to this Court in second appeal. It is unnecessary to give in any detail the pleas taken by the defendant No. 1 in his written statement. The following issues framed by the Trial Court will show the nature of the different pleas: (1). Is the suit barred by limitation? (2) Has the plaintiff acquired any right to the disputed land? Whether the suit brought by Sher Ali and Rajab Ali is fraudulent? Whether any cess was payable in respect of this land? (3) Whether the decree and sale in exsoution of it is bad in law? (4) Whether the plaintiff can avoid the encumbrance to which the disputed land was subject? (5) To what relief, if any, is the plaintiff entitled in this suit?

The first and the foremost question upon which the decision of the present appeal hinges is as to whether the tenure in question was liable for the payment of cess to the superior landlord and whether such a cess was chargeable upon the tenure. The Trial Court held, upon the construction of the provisions in the Cess Act (Act IX of the 1880) and the admissions contained in paragraphs 6 and 7 of the plaint in the mortgage suit (Exhibit 4) brought by the defendant Pitamber to enforce his mortgage against the sons of Bharat, that the tenure in question was liable to pay cesses. The Subordinate Judge, however, referred to Exhibits R. L. and 13 upon the record and recorded the following finding: "Defendant on the other hand contends that the tenure, which was a rent-free one, was not liable to pay any cesses. In support of his contention defendant has filed copy of a valuation roll (Exhibit R) for the year 1900, which does not show any assessment in respect of this tenure. It is further argued on behalf of the defence that under section 36 of the Cess Act this assessment continued to be in force for a period of five years. So in 1904 when the suit against Baldeo was brought for arrears of cesses, the tenure was, as a matter of fact, not liable for such a charge. Plaintiff has produced a valuation roll (Exhibit 13), which proves that the tenure held by Baldeo was assessed to cesses and valued at Rs. 50-1-3. The cess returns are not now available to prove the state of affairs in existence in 1897, when the first decree for cesses was obtained by Rajab Ali against Bharat Singh, or at the date of the subsequent decree obtained against Baldeo Sahay. Under section 50 of the Cess Act all lands are assessable to cesses unless exempted under sections 2 and 3 of that Act. There is no evidence to prove that the tenure

was exempted from such assessment. Exhibit 13, valuation roll, at least disproves the defendant's contention that the tenure was not liable to pay any cesses." Then he refers to paragraphs 6 and 7 of the plaint which have already been adverted, to and concludes his finding upon this point in the following words: "So I have not the least doubt that the tenure was liable to pay cesses as alleged by the plaintiff." On appeal the learned Judicial Commissioner set aside this finding of the Subordinate Judge and referred in detail to the documents, namely, the cess valuation papers referred to by the Subordinate Judge, and said: "Exhibit R is very strong evidence that Rajab Ali and Sher Ali made such a return in obedience to an order passed when a re valuation of the estate, which includes Mouza Darida, was going on and that they omitted from it any mention of the rent-free tenure in suit. In the absence of any evidence to explain or to rebut the entries in this statement I find such to be the case. It is suggested that the tenure of Baldeo Sahay may have been shown elsewhere, but in the face of the return this suggestion, which is improbable, should not be accepted unless it is proved." And as a consequence of this omission the learned Judicial Commissioner held that Baldeo Sahay, the holder of the tenure, although he may not have known it, was not liable to pay cess. This is a finding of fact which is binding upon this Court in second appeal. It has not been shown to us that in arriving at this finding the Court below anywhere misconstrued the documents referred to by it or in way misguided itself. Therefore the plaintiff failed to prove that the tenure in question was shown in the return submitted by the superior landlord under the Cess Act or that any cess was assessed upon this tenure as payable to the superior landlord. The plaintiff seeks to have a declaration that he purchased the property free from any encumbrance on the ground that cess was the first charge thereon. He must prove it; in other words the onus lay upon him.

The learned Vakil on behalf of the respondents has employed the argument advanced by the Subordinate Judge in support of the contention, that whether any cess was actually assessed upon the tenure or not and whether the tenure in question was shown in the return submitted by the superior landlord to the Collector under the Cess Act or was omitted therefrom, the holder of the tenure is liable to the superior landlord within whose estate the tenure in question geographically situates. He contends that such a liability is enforced by the Cess Act. He has referred to the definition of "tenure" in sections 5, 41 and 47 of the Act in support of his contention. The definition of "tenure" includes both rent-paying and rent-free tenures. Section 5 of the Act makes all immoveable property situate in any district or part of a district liable to the payment of road cess and public works cess. This is a liability to the Government, but the liability enforced by section 5 does not in itself create any charge on any estate or tenure. So far as the liability to the Government is concerned, it is only a personal one, which is enforced by the provisions of the Public Demands Recovery Act and for the realization of which the right, title and interest only of the judgment-debtor passes. This is settled law and hardly needs any authority. Reference may, however, be made to *Ahsanulla* v. *Manjura Banoo* (1), *Shekaat Hosain* v. *Sost Kar* (2). Therefore, when the section says that all immoveable property situate in a district shall be liable to the payment of cess, it does not in any way create any charge upon the property. Section 41 of the Cess Act deals with the mode of payment of road cess and public works cess. Clause (1) deals with the modes of such payment by the holder of an estate to the Collector and clause (2) deals with the modes of payment by the holder of a tenure to the holder of the estate or tenure within which the land held by him is included. But such liability is subject to the exceptions that may be contained in other portions of this Act, for the section opens with the most important words "Except as otherwise in this Act provided." Section 42, which fixes the time for the payment of road cess, applies only to the rent paying tenures, as is expressly provided in clause (3) of the section. The subsequent sections in Chapter III deal

(1) 30 C. 778; 8 C. W. N. 359.
(2) 19 C. 783; 9 Ind. Dec. (N.S.) 965.

with the modes of payment relating only to the rent paying tenures. In order to secure the cess payable to the Government the Act provides for a penalty upon the holders of estates and tenures on account of their omission to submit their returns of all the lands situate within their estates or tenures. In cases of rent paying lands, whether in possession of tenure holders or in possession of cultivating tenants, section 20 of the Act precludes the superior landlord from suing for or recovering any rent for such lands unless the same are entered in the return submitted to the Collector. This provision applies to the case of rent paying tenures; and in respect of such tenures as well as of rent-paying lands in possession of cultivating tenants section 47 of the Act entitles the holder of an estate or tenure to recover the cess payable from the rent-paying tenants and from the cultivating tenants under the same penalties and in the same manner as if the same were arrears of rent due to him. This provision is for the benefit of the holder of an estate or tenure, who is required to show all his lands within his estate or tenure so that he may be able to discharge his responsibility to the Government in respect of the cesses conveniently and without any loss. Ordinarily section 47 will, therefore, apply to a rent-paying tenure only and as there was a doubt as to whether the provisions of that section extended to the case of rent free tenures, section 64A was added in Chapter V containing provisions similar to those of section 47. But suppose for a moment that section 47 is wide enough to apply to rent free tenures also; but to apply this section, the most important condition must be satisfied and that is that the sum claimed as cess for a rent-free tenure "must be payable under the provisions of this Act." Now in order to make cess payable under the provisions of this Act with respect to rent-free lands the requirements of Chaptar IV must be complied with. Section 50 of the Act deals with the inclusion of rent-free lands in estates or tenures. Section 51 enjoins upon the holder of an estate or tenure in which a rent-free tenure is included to enter such land in the return to be submitted to the Collector; and section 52 then requires a notice to be served upon the holder of the rent-free land with the extract of the valuation roll. It also provides for the publication of such notice and extract. The subsequent sections deal with the disposal of objections, if any, filed by the rent-free tenure-holders. Section 56 is an important section and it says: "After publication of the extracts from the roll as provided in section 52 and in cases in which publication of the notice mentioned in section 54 is required, after publication of such notice and not otherwise, every owner and holder of any rent-free land included in such extracts, and every person in receipt of the rents and profits or in possession and enjoyment of such land, shall be bound to pay year by year to the holder of the estate or tenure in the return of which such land has been included the amount of the road cess and public works cess which may thereafter become due to such holder, calculated on the annual value of such land as entered in such extracts, or on any other annual value which may have been determined by the Collector under section 53, at the full rate or rates which may have been fixed under this Act for the levy of such cesses respectively in the district generally for the year." Therefore, it is only after the publication of the extracts from the valuation roll that the liability to pay cess to the superior landlord arises in the case of a rent-free tenure. When the provisions of Chapter IV are thus fully complied with, then a cess becomes payable under the Act and such a cess a superior landlord is entitled to realize " with the same penalty and in the same manner as if it were an arrear of rent. "

Now as observed already, the onus was upon the plaintiff to prove that the tenure in question was made liable to the payment of cess under section 64A of the Act and that the necessary notices and publications were served upon the tenure and that it was entered in the return submitted by the superior landlord. In the case of *Ashanullah Khan Bahadur* v. *Trilochan Bagchi* (3) it was held that no presumption of section 114, clause (e), of the Evidence Act applies with respect to the notice provided by section 52 of the

(3) 13 C. 197; 6 Ind. Dec. (N. S.) 630.

Cess Act and that the person who claims that a right or obligation, such as the payment of cess by a tenure-holder, has accrued, must prove that the liabilities had been incurred and the things described in the Act had been actually done. In the case of *Bhugwati Kuweri Chowdhurani* v. *Chutterput Singh* (4) a distinction was drawn between rent-paying and rent-free tenures and it was said that "the owners of rent-free lands are not bound to pay road cess before the publication of the valuation rolls under section 52." The point was, however, directly raised and decided in the case of *Rash Behari Mukerjee* v. *Pitambari Chowdhrani* (5). There can, therefore, be no doubt that the tenure in question was not liable for the payment of cess to the superior landlord under the Act. The fact that on a previous occasion a decree for cess was obtained in the year 1897 against Bharat does not at all make the cess payable under the Act, inasmuch as a decree for cess cannot operate as *res judicata*, cess being a recurring charge. The fact that Baldeo himself purchased the property at the previous sale in execution of a cess decree does not at all change the aspect of the question. The Subordinate Judge relied upon certain admissions in the plaint filed by Pitamber in the mortgage suit (Exhibit 4), in order to show that the tenure was admittedly liable to pay cesses. The liability to pay cesses may arise in different ways. It may arise on account of a contract between the parties, for instead of the rate or proportion fixed under the Act a tenant may agree to pay the entire cess or a larger amount than is fixed by the Collector to the superior landlord. A contract to pay cess is not at all illegal, nor is it prohibited under the provisions of section 41 or any other provision of the Cess Act [*Ashutosh Dhar* v. *Amir Mollah* (6).] The Subordinate Judge simply held that the tenure was liable to pay cess and stopped short there. That would not itself make the cess a first charge upon the property so as to pass it at an auction sale free from any encumbrance. The Judicial Commissioner has gone further and, in my opinion, has rightly held that the tenure was not liable to pay cess under the Act. Therefore it could not be enforced and realized in the same manner and with the same penalty as if it were an arrear of rent. Baldeo might have been liable to pay cess and the sale in question might have passed his right, title and interest; but the holding itself did not pass so as to entitle the plaintiff to hold it free from encumbrance created upon it by the mortgage of 1899, in execution of which the defendant has purchased the property. The learned Judicial Commissioner himself upon his finding would have been inclined to dismiss the plaintiff's suit, but he felt embarrassed by the decisions in the case of *Malkarjun* v. *Narhari* (7) and the case of *Moti Lal* v. *Karrabuldin* (8). None of these cases stand in the way of the sale being held to have passed only the right, title and interest of the judgment-debtor, Baldeo Sahay, in the tenure. The second case has distinctly said that there is a wide difference between the setting aside of a sale and deciding that the plaintiff's right was not affected by it. The first case simply held that a sale will not be treated as invalid provided the Court had jurisdiction to execute it, even if there had been a material irregularity. The defendant need not have the sale of the plaintiff set aside and declare it invalid, for he is in possession of the property on the strength of a Court sale in execution of a mortgage decree. The plaintiff wants to have the mortgage lien annulled and to recover possession of the property on the strength of a superior title. That title is based upon a sale which, as observed above, passed only the right, title and interest of the judgment-debtor and not the property itself. The fact that the sale took place under the provisions of section 123 of Act I of 1879 as amended in 1903, does not at all affect the title of the defendant in the property or give a higher title to the plaintiff in it when, as a matter of fact, there was no charge created upon the property by the decree in execution of which he purchased the property.

(4) 25 C. 725; 2 C. W. N. 407; 13 Ind. Dec. (N. S.) 474.

(5) 15 C. 287; 7 Ind. Dec. (N. S.) 743.

(6) 3 C. L. J. 387.

(7) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

(8) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121.

I, therefore, set aside the decree of the Courts below and dismiss the suit of the plaintiff with costs throughout.

Ross, J.—I agree.

Appeal allowed.

F. D. & J. P.

PATNA HIGH COURT.
CIVIL REVISION No. 160 OF 1921.
December 21, 1921.
Present:—Mr. Justice Das.

MAHARAJ BHAGAT—PLAINTIFF—PETITIONER

versus

HARIHAR BHAGAT—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. II, para. 8—Date fixed for filing award—Case not to be disposed of that day.

As the filing of an award is an act of the arbitrator it is unjust to require the parties to the case to be present in Court on the date fixed for the filing of the award.

A Judge does not act within the spirit of paragraph 8 of Schedule II of the Civil Procedure Code by dismissing the suit for non-appearance of parties on the date fixed for the filing of the award, if the award is not filed on that date.

Paragraph 8 means that the Court must wait till the date fixed by the Court for the filing of the award. If the award is not filed on that date, the Court may then, and not in anticipation of the arbitrators not filing the award, make an order superseding the arbitration and fixing a date for proceeding with the suit.

Appeal from a decision of the Munsif, Hajipur (Mozuffarpore).

Mr. *Hareshwar Prosad Sinha*, for the Petitioner.

Mr. *Harihar Prasad Sinha*, for the Opposite Party.

JUDGMENT.—The order complained of must be set aside.

The petitioner was the plaintiff in a suit to recover money on a hand-note alleged to have been executed by the opposite party. The suit was by consent of the parties referred to the arbitration of certain individuals, and it appears that time for filing the award was extended from time to time. On the 3rd March 1921 the Court recorded the following order in the order sheet: "Time extended to 17th March 1921 for filing the award. Pleaders of both parties be informed that parties must come ready with their witnesses, if the award not filed till the date, fixed and the order for arbitration will be superseded."

It appears that the award was not filed on the 17th March 1921 and the learned Munsif at about 4 P. M. called on the suit and dismissed it. Thereafter the petitioner presented an application under Order IX, rule 4, but the learned Munsif dismissed that application in a very elaborate judgment.

In my opinion the learned Munsif has not acted according to the provision of paragraph 8 of the II Schedule, Civil Procedure Code. That paragraph provides as follows:—

"Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit."

In my opinion a Judge does not act within the spirit of this paragraph by proceeding with the suit on the date fixed for the filing of the award. It must be remembered that the filing of the award is an act of the arbitrator, and it will be manifestly unjust to require the party to be present in the Court on the date on which the award is required to be filed by the arbitrator. The paragraph obviously means that the Court must wait till the date fixed by the Court for the filing of the award. If the award is not filed on that date, the Court may then, and not in anticipation of the arbitrators not filing the award, make an order superseding the arbitration and fixing a date for proceeding with the suit. That course was not adopted in this case and the order must accordingly be set aside.

I would set aside both the orders of the learned Munsif and direct him to proceed with the suit.

The petitioner will be entitled to costs of this application, hearing fee one gold *mohur*.

N. H.

Order set aside;
Case remanded.

SECRETARY OF STATE FOR INDIA *v.* ANANDA MOHAN ROY.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 335 OF 1918.

July 23, 1920.

Present:—Mr. Justice Richardson and Mr. Justice Panton.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

ANANDA MOHON ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Taluk—*Permanent tenure*—*Proceeding for substituting variable for fixed rent, effect of*—*Bengal Government Indemnity Regulation XI of* 1822, *s.* 36—*Bengal Land Revenue Settlement Regulation IX of* 1825, *ss.* 2, 5—*Omission of words of inheritance in* patta *and* kabuliyat, *effect of*—*History of tenure and conduct of parties, value of*—*Patni Regulation (VIII of* 1819), *when applicable to non-permanent tenures.*

Although in the *patta* and *kabuliyat* by which a tenure is created there may not be words of inheritance, the omission of such words may be supplied by evidence bearing on the history of the tenure and the conduct of the parties. [p. 150, col. 2.]

Baboo Gopal Lal Thakoor v. *Teluck Chunder Rai*, 10 M. I. A. 183 at p. 191; 3 W. R. P. C. 1; 1 Suth. P. C. J. 558; 2 Sar. P. C. J. 98; 19 E. R. 941, *Rajah Suttasurrun Ghosal* v. *Moheshchunder Mitter*, 12 M. I. A. 263 at p. 268; 11 W. R. P. C. 10; 2 B. L. R. P. C. 23; 2 Suth. P. C. J. 180; 2 Sar. P. C. J. 420; 20 E. R. 338; 1 Ind. Dec. (o. s.) 437, *Naba Kumari Debi* v. *Behari Lal Sen*, 34 I. A. 160; 34 C. 902; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L. T. 433 (P. C.), followed.

A tenure which is not a permanent tenure, may nevertheless by agreement between the lessor and the lessee be saleable under the Patni Regulation (VIII of 1819). [p. 150, col. 2; p. 151, col. 1.]

The word *taluk prima facie* imports permanency. [p. 150, col. 2.]

In the year 1835 the Government purchased at a sale for arrears of land revenue a Zemindari in which there was a *taluk* comprising a *joar* or group of villages. The *joar* had been granted as a *miras taluk* by the then proprietors to one *S* in the year 1827 at a certain annual rent fixed in perpetuity. After the purchase of the parent estate by Government the Revenue Authorities had to consider how the estate should be dealt with, and in the year 1836 a proceeding was drawn up which concluded as follows:—"According to section 36 of Act XI of 1822 and according to the rules under clause II of sections 2 and 5 of Act IX of 1825 the re-assessment of the *taluk* is considered necessary Therefore, it is ordered that the said *taluk* be broken up and the fixed *jama* of it be held null and void and re-assessment be made according to the existing rate of the *pergunnah*." Thereafter the *taluk*, by exchange of *putta* and *kabuliyat*, was settled with successive settlement holders for various terms at variable rents. On the expiry of the last term of settlement with the plaintiffs, the Government having attempted to terminate the *taluk*, the plaintiffs instituted a suit for a declaration of their permanent *talukdari* right in the *joar* and of their right of obtaining settlement and possession of the same at a proper rent:

Held, (1) that the effect of the proceeding of the year 1836 was not to destroy or annul the *taluk* but merely to put an end to fixity of its rent; [p. 150, col. 2.]

Khajah Assanoollah v. *Obhoy Chunder Roy*, 13 M. I. A. 317; 13 W. R. P. C. 24; 2 Suth. P. C. J. 306; 2 Sar. P. C. J. 535; 20 E. R. 570, followed.

Kazee Moonshee Aftabooddeen Mahomed v. *Samioolah*, 23 W. R. 245, dissented from.

(2) that as the proceeding merely had the effect of altering one of the incidents of the old tenure and as it substituted a variable rent for a fixed rent, the terms for which the plaintiffs had engaged might properly be regarded not as terms at the close of which the plaintiffs' tenancy came to an end, but as terms on the expiry of which the rent became subject to re-assessment; [p. 151, col. 1.]

(3) that as there was nothing in the *patta* and the *kabuliyat* as exchanged between the parties or their predecessors which took away from or deprived the plaintiffs of their right to hold the tenure as a permanent tenure, so long as they paid the rent which the Government might assess upon it, the Government could not annul the tenure on the expiry of the term of settlement with the plaintiffs: [p. 151, col. 1.]

(4) that the tenure was a permanent, heritable and transferable tenure. [p. 151, col. 1.]

Prodyot Coomar Tagore v. *Krishnamoni Dasya*, 40 Ind Cas. 513; 21 C. W. N. 809, *Prodyot Kumar Tagore* v. *Bhuban Moyee Dasya*, 46 Ind. Cas. 1, *Trilochun Chuckerbutty* v. *Komala Kant Chuckerbutty*, 25 W. R. 536, *Tarinee Churn Gangooly* v. *Watson & Co.*, 12 W. R. 413; 3 B. L. R. A. C. 437, referred to.

Appeal against a decree of the Additional Subordinate Judge, Dacca, dated the 30th of August 1918.

FACTS appear from the judgment.

Babu *Ram Charan Mitter* (with him Babu *Surendra Nath Mitter*), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for declaration of plaintiffs' *talukdari* right in certain *mouzahs* and their right to obtain settlement at a proper rent. The plaintiffs' case is this. The Government purchased the Zemindari rights in *hisya* 10 annas and old *gandas* of Pargannah Bardakhat in 1835. Prior to that in 1827 the former proprietors created a *shikmi taluk* in this *hisya* in favour of Shyam Sundar Dutt, who had been holding that tenure at variable rent from before the date of the Permanent Settlement. The Government recognised the *shikmi taluk* after its purchase, but enhanced the rent and made *talukdari* settlement with Shyam Sundar and his heirs. The last Settle-

ment with the heirs of Shyam Sundar Dutt was for 10 years from 1847-1857. In the *rubokari* of this settlement, the *shikmi taluk* was described as *patni taluk* Gopalkrishan Dutt — Sarbaraksby — Nabakishore Dutt. This *taluk* was sold for arrears of rent under Regulation VIII of 1819 and was purchased by Gour Mohan, Krishna Govinda and Rajkrishna in 1849. The latter's share was subsequently purchased by Krishna Govinda. Now in 1857 the Collector of Tipperah asked the plaintiffs' predecessors to take a re settlement of the *taluk*. The plaintiffs' predecessors then first came to know that their purchase was subject to enhancement of rent on expiry. They, therefore, took settlement for a term of 50 years from 1st April 1857—31st May 1907. After the expiry of that lease there were summary settlements upto 31st March 1915. Before the expiry of the last settlement the Government served a notice informing the plaintiffs that *khas* possession would be taken and inviting objections, if any, from them. The objection which was filed before the Settlement Officer was rejected on 6th November 1914. An appeal to the Director of Land Records was rejected on 7th May 1915, which was communicated to the plaintiffs on 26th May 1919. The plaintiffs now contend that the Government cannot deny the *talukdari* interest of the plaintiffs and take *khas* possession, after treating that interest as a *talukdari* interest at a variable rent and causing it to be sold under Regulation VIII of 1819. The plaintiffs cannot be evicted except under a proceeding under the Bengal Tenancy Act.

In our defence we admit that the *miras taluk* in favour of Sham Sundar Dutt was created by the former proprietor and that the estate was purchased by the Government in 1835 for arrears of rent. Our contention is that the said *miras taluk* was legally and rightly cancelled by a former proceeding under Regulation XI of 1822 and that the plaintiffs' allegation that they are the successors in-interest of Shyam Sundar is not at all true; that the lease granted to the heirs of Shyam Sundar was not and could not be a permanent one; that it was not a *patni* right in the legal sense of the term; that the said lease was sold erroneously and under misapprehension under the provisions of Regulation VIII of 1819; that the sale did not and could not confer any rights in the lands in suit; that the Government never recognised any permanent right of the plaintiffs and their predecessors-in interest in the said lands and that the lease was renewed to the plaintiffs from time to time as a matter of grace. The Court below decreed the plaintiffs' suit. Refers to section 3 of Regulation VII of 1822. (Reads plaint.) The plaintiffs' only ground is that it is a *patni taluk*. They do not say that the rent is fixed. (Reads written statement.) Refers to section 10 of Regulation I of 1793. The question, therefore, amounts to this *viz.*, whether there was any tenure, permanent and heritable, from before the Permanent Settlement. If it was such, then the suit succeeds; if it was not and if the *taluk* was created in 1827, then I submit the tenure has been annulled. There is no indication whatever of any pre-existing *taluk*. The term "*malikana*" is a misnomer. Refers to section 5 of Regulation VII of 1822.

[RICHARDSON, J.—*Taluk* implies the permaneney of the tenure?]

I submit the terms *patni*, *talukdari*, *malikana*, etc., are loosely used. They do not always imply permaneney. You will have to consider also Regulation XLIV of 1793, which was in force before Act XI of 1822. Reads the case of *Kazee Moonshee Aftaboodeen Mahomed* v. *Samioolah* (1) *in extenso*. Refers to section 3 of Regulation VII of 1822; *Prodyot Coomar Tagore* v. *Krishnamoni Dasya* (2), *Prodyot Kumar Tagore* v. *Bhuban Moyee Dasya* (3). In the *pattah* and *kabuliyat* of 1858 there are no words of inheritance. The whole basis of plaintiffs' title, therefore, goes with it. They cannot claim a permanent tenure on their own document of title. Further, the *kabuliyat* contains no clause entitling the settlement holder to a fresh settlement. Neither does it contain any recognition of the rights of the Government to re-enter. But that does not matter. The whole wording of the lease must be taken together to gather the intention which, I submit, clearly indicates the non-permanent character of the lease.

Babu *Jogesh Chandra Roy* (with him Babus *Gopal Chandra Das* and *Upendra Kumar Roy*), for the Respondents.—I submit the *taluk* was

(1) 23 W. R. 245.
(2) 40 Ind. Cas. 513; 21 C. W. N. 809.
(3) 46 Ind. Cas. 1.

existing from long before the Permanent Settlement. Hence it was not cancelled by virtue of the sale for arrears of revenue in 1835. The learned Subordinate Judge's finding is in my favour. Refers to *Khajah Assanoollah* v. *Obhoy Ohunder Roy* (4), *Trilochun Ohuckerbutty* v. *Komala Kant Ohuckerbutty* (5). These cases are in connection with other *taluks* of this estate. The first is on all fours with the present case. The second case distinguishes the case of *Kazee Moonshee Aftabooddeen Mahomed* v. *Samioolah* (1), where all the facts as in the present were not involved and considered. My next point is that the Government are estopped from setting up the non-permanence of the tenure by reason of the sale of 1859. As regards the absence of words of inheritance from the *pattah* and *kabuliyat* of 1858, I submit the Government have recognised therein my *talukdari* right, which implies that I have got a permanent right in the tenure. As to whether the tenure is permanent or not, you will have to consider the whole history of the tenure and the conduct of the parties. Refers to *Baboo Gopal Lal Thakoor* v. *Teluck Ohunder Rai* (6), *Rajah Suttosurrun Ghosal* v. *Moheshchunder Mitter* (7), *Nuba Kumari Debi* v. *Behari Lal Sen* (8). I submit the tenure is permanent and heritable. Refers to *Tarinee Ohurn Gangooly* v. *Watson & Co.* (9).

Babu *Ram Charan Mitter* replied in brief.

JUDGMENT.—This is an appeal from the judgment and decree of the Additional Subordinate Judge of Dacca dated the 30th of August 1915. The facts of the case are stated in the report of the Settlement Officer dated the 6th November 1914, in the order of the Director of Land Records on appeal dated the 7th May 1915 and in the judgment appealed from. In the year 1835, the Government purchased at sale for arrears of land revenue an eight-anna share of a Zamindari known as Bardakhat. Within this estate, there were several *taluks* created by the former proprietors, each comprising a *joar* or group of villages. The question which arises relates to one of these *taluks* or *joars*. A similar question had previously arisen in regard to other *joars*. The *joar* with which we are concerned was granted as a *miras taluk* by the then proprietor to one Shyam Sunder Datt on the 21st February 1827, the consideration being a lump payment of Rs. 6,600 *sicca* and an annual rent of Rs. 1,237-8-0 *sicca* fixed in perpetuity. After the purchase of the parent estate by the Government, the Revenue Authorities had to consider how the estate should be dealt with. The subject was discussed at length in a letter dated the 15th February 1836, addressed by Mr. Colvin, Secretary to the Board of Revenue, to the Commissioner of Chittagong. The letter is important, because it explains the policy which the Board at that time intended to pursue in regard to this estate and its dependent *taluks*. The *joar* to which the suit relates was the subject of a proceeding drawn up by the Collector on the 11th March 1836, the effect of which is in dispute. It is conceded, however, by the plaintiffs-respondents in this appeal that at any rate, the proceeding so recorded put an end to the fixity of the rent and that the rent became for the future variable and subject to enhancement. It appears that after the *taluk* had been let out in farm for a year or so, an arrangement was made by which it was managed by Shyam Sunder Datt, the *joardar*, on account of Government. The arrangement lasted till the year 1841. In 1842 the *taluk* was settled for a term of five years with the heirs of Shyam Sunder Datt. A *rubokari* was drawn up in which the following heading occurs:—"Description of the Government purchase of the aforesaid *hihya* and enhancement of rent of the aforesaid *taluk* —" the aforesaid *taluk* being the *taluk* in question. Against that heading, the remarks which follow are entered: "After the purchase by Government of the aforesaid *hisya* and after the order for enhancement of rent of the aforesaid *taluk*, the petitioners took settlement of the same at a total rent of Rs. 1,562-2-0 *sicca*, equivalent to Rs. 1,650,

(4) 13 M. I. A. 317; 13 W. R. P. C. 24; 2 Suth. P. C. J. 306; 2 Sar. P. C. J. 535; 20 E. R. 570.

(5) 25 W. R. 536.

(6) 10 M. I. A. 183 at p. 191; 3 W. R. P. C. 1; 1 Suth. P. C. J. 558; 2 Sar. P. C. J. 98; 19 E. R. 941.

(7) 12 M. I. A. 263 at p. 268; 11 W. R. P. C. 10; 2 B. L. R. P. C. 23; 2 Suth. P. C. J. 180; 2 Sar. P. C. J. 420; 20 E. R. 339; 1 Ind. Dec. (o. s.) 497.

(8) 34 I. A. 160; 34 C. 902; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 843; 17 M. L. J. 397; 2 M. L. T. 433 (P.C.).

(9) 12 W. R. 413; 3 B. L. R. A. C. 437.

by enhancement of the former rent by one-fourth." A *kabuliyat* was executed by the settlement-holders dated the 29th September 1842, in which *inter alia* they state:—"We, therefore, of our own accord take a *patni taluki* settlement of the said *mahal* for a term of twenty years from 1249 B. S. to 1268 B. S." We are informed that the term was subsequently reduced to a term of five years by the Commissioner by an order which is not on the record. In 1847 a fresh settlement of the tenure was made with Gopal Kishore Dutt, one of the previous share-holders. The *rubokari* recorded on this occasion is headed: "In the matter of a *patnai talukdar* settlement of *taluk* Shyam Sunder Dutt in *joar* Lakhipura within *bara hisya* of Tapa Kurikhal in Perganna Bardakhat which constitutes the auction purchased Zemindari of Government." The *kabuliyat* executed by the settlement holder on the 30th July 1847 includes this statement: "I, therefore, of my own accord take a *patni* settlement of the said *mahal* for a term of twenty years from 1254 B. S. to 1273 B. S." The term was reduced by the Commissioner from twenty years to ten years. During its currency, the tenure was sold on the 15th May 1849 for arrears of rent. The *rubokari* recording the proceedings is dated the 15th May 1849. The preamble is as follows: "In the matter of sale under Regulation VIII of 1819 for realization of arrears of rent amounting to Rs. 1,875-10-1 due up to March *kist* of 1849 in respect of *patni taluk* Gopal Kishore Dutt" and so forth. The purchasers were the predecessors-in-interest of the plaintiffs. They apparently held the tenure for the remainder of the term. On its expiry the tenure was settled with them for a period of fifty years from 1st April 1857 to 1st March 1907. On this occasion, a *patta* and *kabuliyat* were exchanged, both documents bearing date the 26th April 1858. According to these documents the lessees took settlement of the *joar* for a term of fifty years from 1264 B.S. to 1313 B.S. under a *talukdari* right. It was further agreed that the Government would have the power to cancel the settlement on violation of its terms by the lessees and, in case of non-realization of arrears, to realize the same by auction sale of the said *talukdari* interest in accordance with the provisions of the Regulation. The reference is clearly to the Patni Regulation VIII of 1819. On the expiry of this fifty years' settlement, the estate was settled summarily with the plaintiffs for short terms, the last of which expired on the 31st of March 1915. The Settlement Officer then for the reasons to which we have already referred stated in his report that the tenure should be terminated and the *raiyats* brought into direct relation with the Government. The plaintiffs appealed to the Director of Land Records, who in a carefully considered order confirmed the proposal of the Settlement Officer. Thereafter the plaintiffs instituted this suit on the 7th July 1916. The plaint prays that their permanent *talukdari* right in *joar* Lakhipura and their right of obtaining settlement and possession of the same at a proper rent may be declared. There were also other prayers, including a prayer for mesne profits. The Subordinate Judge in the Court below has decreed the suit in the plaintiffs' favour and, as we have said, this appeal has been preferred on behalf of the Secretary of State.

The plaintiffs found their case, in the first instance, on the contention that this *taluk* was created prior to the Permanent Settlement. On that footing, they say that the *taluk* was not liable to be annulled in consequence of the sale for arrears of revenue in 1835. The learned Subordinate Judge has found in their favour on this point. But this finding we are unable to accept. Looking at the *patta* of 1827 granted to Shyam Sunder Dutt, we can see no reason to hold that it is merely a confirmatory *patta*. It appears to us to be the document or deed of title by which the tenure was created.

The main question is as to the effect of the Collector's proceeding of 11th March 1836. We have already said that a similar question has been debated in connection with other *taluks* of this estate. The case of one *taluk* was taken to the Privy Council in *Khajah Assanoollah* v. *Obhoy Chunder Roy* (4). In another case, *Kazee Moonshi Aftabooddin Mohamed* v. *Samioollah* (1), the final decision was pronounced by the High Court (Sir Richard Couch, C. J., and Birch, J.) Mr. Ram Charan Mitter appearing for the Secretary of State relied on the latter case, while for the plaintiffs reliance was placed by Mr. Jogesh Chander Roy on the decision of the Privy Council.

Now when the judgment in *Katee Moonshee's case* (1) is read, it is clear that it proceeds on facts which are on all fours with the facts of the present case. That case related to a similar *taluk* on the same estate, and it depended on a proceeding of the Collector which is substantially identical with the proceeding on which the present case depends. The learned Judges came to this conclusion: "The proceedings to which we have referred show that the Government having the undoubted right to avoid the *taluk* which had been created by the Zemindar did, as far as language can be used to show what was the intention of the Government proceedings in 1836, annul the *taluk* of the two annas."

That decision would have been binding on us with reference to the construction and the effect of the Collector's proceeding in the present case, had it not been for the previous decision of the Privy Council which we have also to consider.

Since the argument began, Mr. Roy has had printed for us the proceeding of the Collector which the Privy Council had before them. A perusal of that proceeding shows that it differs in no material respect from the proceeding which came before the High Court in 1875 and from the proceeding before us in the present case.

The learned Judges of the High Court, referring to the decision of the Privy Council, distinguished it on this ground: "In that case," they said, "the conduct of the Government was different from what it has been in the present. There were no such proceedings as those in this case which we have referred to, that is to say, a proceedings instituted by the Government before the Collector for the purpose of avoiding the *taluk* and a decision by that officer ordering that the *taluk* be annulled." The learned Judges go on to say:—"The distinction between the case before us and the case before the Judicial Committee is that it appears upon the proceedings which we have now before us that the Government did exercise the power of cancellation."

We have the greatest respect for a decision which has the authority of Couch, C. J., but we are bound to say that an examination of the paper book in the case which went to the Privy Council shows that the distinction suggested is based on a misconception.

The similarity of the proceeding which their Lordships had before them with the proceeding in the subsequent case before the High Court and with that in the case now before us will appear from a comparison of the concluding sentences in each case before the Privy Council the proceeding is dated the 19th June 1837 and the concluding portion runs as follows: "Specially it is well-known that Mirza Hossain Ali, the former proprietor of that share, after the decennial settlement took large sums of money as *nazir* and *selami* (bonus) and granted at insufficient rents (worm-eaten) *taluk* and large quantities of land like this of the said share (worm-eaten) and to some he made grants out of favour. But section 32 of Regulation XI of 1822 provides that if it appears that the former proprietor has granted lands at insufficient rent or out of favour, the auction-purchaser has the power to set aside the same and fix the rent at the Pergunna rate. Therefore, under section 5, Regulation XLIV of 1793, and section 14, Regulation I of 1801 and Regulation / of 1812, and section 2, Regulation VIII of 1819, and sections 29, 30 and 31, Regulation XI of 1822, the said *taluk* having been resumed, it is ordered that the *taluk* be set aside and the rent be fixed according to the Pergunna rate." The concluding part of the proceeding in the subsequent case before the High Court is quoted by the learned Judges in their judgment and follows precisely the same lines.

The proceeding of 1836 in the present case concludes as follows: "It is provided in section 32, Regulation XI of 1822, that if it is found that the former Zamindar out of favour or receiving any amount has granted a *patta* on a less *jama* to any one, then the auction purchaser shall have right to nullify the *patta* and to fix the *jama* according to the prevailing rate of the Pergunna." Farther on, the proceeding continues:—"Therefore, the said *taluk* and its fixed *jama*, granted by the former Zamindar recently after the decennial settlement, are liable to nullification according to the provisions of the said section and section 5 of Regulation XLIV of 1793, in specification and confirmation of which section 14, Regulation I of 1801, section 14, Regulation V of 1814, section 2, Regulation VIII of 1819, and sections 29 and 30, Act XI of 1822, were enacted. Therefore, according to section 32 of Act XI

1822 and according to the rules under clause 11 of sections 2 and 5 of Act IX of 1825, the re-assessment of them (*taluks*) is considered necessary. Therefore, it is ordered that the said *taluk* be broken up and the fixed *jama* of it be held null and void and re-assessment be made according to the existing rate of the Pergunna."

The expressions "set aside" "annulled" and "broken up" probably represent the same word in the originals variously translated. "Set aside" or "annulled" conveys the meaning with sufficient accuracy.

Dealing with the proceeding before them, their Lordships of the Privy Council made the following observation: "Great stress has in the argument for the appellant been laid upon this proceeding. Their Lordships, however, feel that in considering its effect they should look to its nature and not to expressions loosely used in it such as 'it be ordered that the *taluk* be set aside' or the like; and, if this be done it will be found that it is nothing but an ordinary proceeding for the enhancement of rent against a person admitted to be in occupation of the lands."

Their Lordships had already referred to Mr. Colvin's letter of 15th February 1836. They had refrained from deciding the question of law raised in that letter, whether the dependent *taluks* were within the protection afforded by section 32 of Regulation XI of 1822. They had said that whatever might be the extreme rights of the Government, Mr. Colvin's letter was the least evidence available of what the Government actually intended to do in respect of the dependent *taluks* forming part of this estate, and that it was impossible "to read the last paragraphs of that letter beginning with the 52nd without coming to the conclusion that it was then the intention of the Government to make settlements with the *talukdars* of all classes, putting them in the position which they would have held of right before 1822, *viz.*, that of under tenants entitled to retain possession of their lands during the subsistence of their tenure, subject to the condition of having their rents enhanced, according to the Pergunna rates."

Clearly their Lordships interpreted the proceeding of the 19th June before 1837 in the light of Mr. Colvin's letter and came to the conclusion that it was nothing but an ordinary proceeding for enhancement of rent. If that is true of that proceeding, it seems to us that it is equally true of the proceeding with which we have to deal. The question is whether the effect of the proceeding was to destroy or nullify the plaintiffs' tenure. Following the decision of the Privy Council, which we are bound to follow rather than the subsequent decision of this Court which, as we have said, appears to us to be based on a misconception of the materials which the Privy Council had to consider, we must conclude that the effect was not to destroy or annul the *taluk* but merely to put an end to the fixity of its rent. We may add that a similar result was arrived at in still another case relating to this estate [*Trilochun Chuckerbutty* v. *Komala Kant Chuckerbutty* (5)].

Having arrived at that conclusion, it is unnecessary for us to consider the further contention of the plaintiffs that the Government are estopped by the fact that they sold the tenure in 1859 under the Patni Regulation from setting up the case that the tenure is not a permanent tenure.

We ought, however, to add a word or two in reference to the *patta* and *kabuliyat* of 1858 on which the title of the plaintiffs primarily depends. It is true, as the learned Government Pleader has argued, that in these documents there are no words of inheritance. But it has been held on several occasions by the Privy Council that the omission of such words may be supplied by evidence bearing on the history of the tenure and the conduct of the parties. Reference may be made to the case of *Baboo Gopal Lal Thakoor* v. *Teluck Chunder Rai* (6), which was followed in the case of *Raiah Suttasurrun Ghosal* v. *Mohesh-chunder Metter* (7). The same principle was applied in the more recent case of *Naba Kumari Debi* v. *Behari Lal Sen* (8). Moreover, though the documents contain no express words of inheritance, they do refer to the right which the settlement holder acquired under them as a *talukdari* right. It is well-settled that the word *taluk prima facie* imports permanency. There is also the stipulation that the tenure should be liable to be sold for arrears of rent under Regulation VIII of 1819. The reference to that Regulation may not be conclusive. It may be that a tenure which is not a permanent tenure, may nevertheless, by agreement between the lessor and the lessee, be sale-

able under that Regulation. But, undoubtedly, the language used, coupled with the history of the tenure, suggests and implies that it is a permanent, heritable and transferable tenure. We may refer in this connection to the case of *Tarinee Churn Gangooly* v. *Watson and Co.* (9).

It was also said on behalf of the Secretary of State that the *kabuliyat* contains no clause entitling the settlement holder to a fresh settlement at the expiry of the term; on the other hand, it contains no express recognition of the right of Government to re-enter.

The *patta* and the *kabuliyat* no doubt are the title-deeds of the plaintiffs. If there had been anything in these documents inconsistent with the permanency of the tenure, the plaintiffs would doubtless have been bound thereby to deliver the land to the Government on the expiry of the term of fifty years or of the further terms for which the tenure was settled with them. But we can see nothing in the *patta* and *kabuliyat* which is inconsistent with the interpretation which we have placed on the Collector's proceeding of 1836. If that proceeding merely had the effect of altering one of the incidents of the old tenure, if it merely substituted a variable rent for a fixed rent, then the terms for which the plaintiffs engaged may properly be regarded not as terms at the close of which the plaintiffs' tenancy came to an end, but as terms on the expiry of which the rent became subject to re assessment. In our opinion there is nothing in the *patta* and the *kabuliyat* exchanged between the parties or their predecessors which takes away from or deprives the plaintiff of their right to hold this tenure as a permanent tenure, so long as they pay the rent which the Government may assess upon it.

That being so, though we do not assent to all the reasoning of the learned Subordinate Judge, our conclusion is in agreement with the conclusion at which he arrived and the appeal must be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

April 19, 1921.

Present :—Lord Buckmaster, Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Musammat SUKHI—APPELLANT

versus

Munshi GHULAM SAFDAR KHAN AND OTHERS—RESPONDENTS.

Mortgage—Prior and puisne mortgagees, rights of—Civil Procedure Code (Act V of 1908), O. XXXIV.

An owner of a property, who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee, who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield. [p. 153, col. 2.]

An omission by a prior mortgagee to make a puisne mortgagee a party to the suit instituted by him to execute his mortgage does not prevent him from setting up that prior mortgage in a subsequent suit by the puisne mortgagee in cases where he would have been so entitled before the Transfer of Property Act, 1882. [p. 153, col. 2.]

Het Ram v. *Shadi Lal*, 45 Ind. Cas. 798; 45 I. A. 130; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 72 (P. C.), *Matru Mal* v. *Durga Kunwar*, 55 Ind. Cas. 969; (1920) M. W. N. 338; 18 A. L. J. 396; 38 M. L. J. 419; 11 L. W. 529; 2 U. P. L. R. (P. C.) 75; 22 Bom. L. R. 553; 32 C. L. J. 121; 42 A. 364; 47 I. A. 71; 27 M. L. T. 319; 25 C. W. N. 397 (P. C.), *Vanmikalinga Mudali* v. *Chidambara Chetty*, 29 M. 37, referred to.

Where a puisne mortgagee not made a party to the suit of a prior mortgagee seeks to enforce his mortgage, it is the duty of the Court to give the plaintiff the opportunity of occupying the position which he would have occupied if he had been a party to the former suit. [p. 154, col. 1.]

Appeal from a decree of the Allahabad High Court, dated the 16th January 1917, modifying that of the Subordinate Judge, Agra, dated the 23rd February 1915.

Mr. *K. V. L. Narasimham*, for the Appellant.

Mr. *Kenworthy Brown*, for the Respondent.

JUDGMENT.

LORD DUNEDIN.—This is a suit by a mortgagee, *Musammat* Sukhi, to sell a property called Rasulpur. The facts out of which the suit arises are as follows.

Nand Ram and others, the owners of the property in question and of other properties,

executed on the 3rd January 1874 and the 10th June 1875 two simple mortgages in favour of Kirpa Ram, now deceased, the husband of the plaintiff. Subsequently, on the 15th January 1883, they executed another mortgage of the property in question alone by way of conditional sale in favour of the first respondent, Ghulam Safdar Khan, and another person whom the second and third respondents now represent. These mortgages were all duly registered. In 1886, Kirpa Ram, the mortgagee, raised an action for payment and sale, but he omitted to implead the holders of the mortgage of 1883. In that suit he obtained a decree for sale. The property was sold and Kirpa Ram himself purchased at the judicial sale. Kirpa Ram died leaving a Will dated in 1895 in favour of the widow, the plaintiff. She obtained Probate in 1898. She thereafter made a gift of the properties to which she had succeeded, including the property in question, to Jag Ram and Net Ram, her nephews. They at the same time covenanted to pay her Rs. 1,200 a year for maintenance and in security of this obligation they hypothecated the properties, including the property in question, by way of mortgage. The mortgage was dated the 14th October 1902 and was duly registered.

In 1910 the respondents, the mortgagees in the mortgage of 1883, brought a suit on their mortgage against Jag Ram and Net Ram, but omitted to implead the plaintiff. Jag Ram and Net Ram put forward the mortgages of 1874 and 1875 as a shield and accordingly the respondents had to pay into the Court the sum of Rs. 2,954. Having so done and Jag Ram and Net Ram not choosing to redeem, the respondents were adjudged owners of the property. This was finally settled in 1913.

In 1914, the plaintiff raised the present suit in respect of her mortgage, the sums due under the agreement to pay maintenance amounting to over Rs. 10,000. It was not defended by Jag Ram and Net Ram, but appearance was made for the respondents who held the property, in virtue of the decree they had obtained in 1913, upon their mortgage of 1883. The Subordinate Judge decreed the suit, but on condition that the plaintiff re-paid to the respondents the sum of Rs. 2,954 which they had paid to the first mortgagees. On appeal the High Court altered this by adding the condition that the plaintiff should also pay the sum of Rs. 8,649-13-7, being the sum found due to the respondents in the suit of the mortgage of 1883, in respect of which they were given the foreclosure decree of the property. Appeal has now been taken to His Majesty in Council.

The appellant's Counsel relied entirely on the case of *Het Ram* v. *Shadi Lal* (1). In that case a property had been twice mortgaged by way of simple mortgage, one in 1880, and another in 1881. Het Ram purchased the property from the mortgagee in 1883. In 1885 the mortgagee of 1880 obtained against the mortgagor and Het Ram a decree absolute for sale under section 89 of the Transfer of Property Act, 1882. He did not implead the mortgagee under the mortgage of 1881. He took no further steps under the decree and the property was not brought to sale. He died, and was succeeded to by Het Ram as his heir. In 1910, the mortgagee under the mortgage of 1881 instituted the suit. It was held that Het Ram could not set up the mortgage of 1880 as a shield, because the decree of 1885 was (1) barred by limitation, (2) inoperative as against the plaintiff who had not been made a party to the suit and because the mortgage itself was gone because of the terms of section 89 of the Transfer of Property Act, 1882. The appellant urged that the same result followed in this case. The mortgagor of 1883 having omitted to implead the appellant, she was not bound by the decree. The mortgage of 1883 was no longer available because it was merged in the decree.

The respondents on the other hand relied on the case of *Katru Mal* v. *Durga Kunwar* (2). In that case a property had also

(1) 45 Ind. Cas. 798; 45 I. A. 130; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 72 (P. C.).

(2) 55 Ind. Cas. 969; (1920) M. W. N. 338; 18 A. L. J. 396; 38 M. L. J. 419; 11 L. W. 529; 2 U. P. L. R. (P. C.) 75; 22 Bom. L. R. 553; 32 C. L. J. 121; 42 A. 364; 47 I. A. 71; 27 M. L. T. 319; 25 C. W. N. 397 (P. C.).

been the subject of two mortgages of 1872 and 1879 respectively. The mortgagee of 1872 obtained in 1884 a decree for sale under the same section 89 of the Transfer of Property Act, 1882, but omitted to implead the second mortgagee. A lady who was an assignee of the second mortgage raised suit in 1909. The owner resisted the decree unless he was paid the whole amount due under the first mortgage with interest calculated at the rate stipulated therein. The plaintiff offered to pay the amount under the decree of 1884, but refused to pay the amount of the mortgage so calculated. The Subordinate Judge gave effect to the condition of the owner. The High Court altered and gave effect to the offer of the plaintiff. The owner then appealed. The Board adhered to the judgment of the High Court.

It will be noticed that the plaintiff there offered to pay the sum in the decree of 1884. *Het Ram's case* (1) had not at the date of the High Court judgment been decided, and it does not appear to have suggested itself to the plaintiff that she could argue that the effect of section 89 was to destroy the mortgage of 1872 and prevent its ever being set up again. The head-note of that case, however, bears that it was held that the condition upon which the second mortgagee was entitled to a sale decree was the payment to the decree-holder of the amount due under the decree in respect of the first mortgage. If this were really so, it would be necessary to consider how far such a pronouncement could stand beside the decision in *Het Ram's case* (1). In their Lordships' view it is not necessary to consider that question. The decision in *Het Ram's case* (1) is based on two propositions. The first is that the puisne mortgagee is not barred by the decree and the sale following thereon. That in *Het Ram's case* (1) is based on two points, which are, it must be admitted, alternative and not cumulative: (1) that the decree was useless in respect of limitation and (2) that the second mortgagee had not been impleaded. Although the first point has no application to this case, the second has. But the second proposition which was absolutely necessary for the judgment was that the mortgage was gone for ever so soon as the decree of sale was obtained; and that was based on the express words of section 89 of the Transfer of Property Act, 1882, which ends after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." Now the group of sections 85—90 inclusive of the Transfer of Property Act, 1882, were repealed by the Code of Civil Procedure of 1908, and were replaced by the rules under Order XXXIV. In these rules the words above quoted are omitted in the rule which corresponds to section 89. They do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of Order XXXIV, which are limited to providing for the extinction of the debt.

The difficulty which had arisen as to these words in several cases, *e. g.*, *Vanmi. kalinga Mudali* v. *Chidambara Chetty* (3) which case it may be mentioned does not seem to have been brought to the notice of the Board in *Het Ram's case* (1)—therefore no longer arises. The decree in this case was in 1910, and was, therefore, under the Code of Civil Procedure Rules and not under the section of the Transfer of Property Act, 1882.

Now the words being gone, their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, *viz.*, that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee, who is not bound by the sale or the decree on which it proceeded. to set up the first mortgage as a shield. From this it follows that the omission by the respondent Ghulam Safdar Khan to make the plaintiff a party to the suit instituted by him to execute his mortgage of 1883 does not prevent him from setting up that mortgage in cases where he would have been so entitled before the Act of 1882; and the present dispute is within the benefit of this ruling.

But then there is the question of the position due to the original mortgages of Rs. 2,924, and unfortunately this seems not to have been very carefully considered: in

(3) 29 M. 37.

the judgment below. The Subordinate Judge held that the defendants were entitled to set up this as a shield because the defendants had paid this sum to the original first mortgagees as a condition of getting the property; and that as the plaintiff's title flowed from the first mortgagees, she could have no higher right than the first mortgagees, and must be bound by anything done by them. The High Court seemed to think that the same arguments that applied to the mortgage of 1883 also applied to the earlier mortgages.

The situation, however, must be looked at more closely than this. The general principle is stated rightly by the High Court. It is this:—"The plaintiff is a puisne mortgagee seeking to enfore her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit." Now the original mortgagee having bought the estate at the sale in the suit, was the owner of both the mortgage and the equity of redemption merged in one by the decree of the Court. He was succeeded by his widow and she made the gift to Jag Ram and Net Ram. When they in turn mortgaged to the widow, the present plaintiff, they mortgaged both the original mortgage and the equity of redemption merged as aforesaid. When in the suit of the present defendants on the mortgage of 1883, Jag Ram and Net Ram, so to speak, revived the original mortgage as a shield, they revived something which in a question with the widow they had mortgaged. Whether the decision of the Court that the sum in the prior mortgages should be made a condition of the decree in the suit was right or wrong—for if *Het Ram's case* (1) had been decided it would have been wrong, the sale having taken place in 1886—is immaterial, for the present defendants acquiesced in and paid under the judgment. If the widow had been made a party to the suit, as she ought to have been, she would have been entitled in right of her mortgage to have been put in possession of the amount which was being put forward as a shield by Jag Ram and Net Ram against the then plaintiffs and the present defendants. She was not made a party and the result was that owing to the laches of the present defendants, Jag Ram and Net Ram were allowed to carry off in money the part of the estate represented by the value of the first mortgage which they had really impledged by their mortgage to the widow. It follows that to carry out the general principle expressed above, the widow must not be deprived of the rights which had she been called she could have made good.

The result must be that unless the defendants pay the plaintiff Rs. 2,925 with interest thereon at 6 per cent. from 3rd December 1914, the plaintiff must get her decree for sale of so much of the estate as will realise that sum. If, however, the defendants pay that sum or the said sum is realised by sale of part of the estate, then the plaintiff can only have decree and sale of the rest of the estate on condition that she pay to the defendants Rs. 8,649-13-7, being the sum in the decree of 1883 as brought out by the High Court. The defendants will have a right to recover from Net Ram and Jag Ram the sum wrongly carried off by them in fraud of their own mortgage to the present plaintiff, but the right cannot be given effect to in this suit.

Neither party should have any costs in the Courts below and any costs paid on order of the Courts below should be returned; the appellant will have the costs of the appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty accordingly.

N. H. & J. P. *Decree varied.*

Solicitor for the Appellant:—Mr. *H. S. L. Polak.*

Solicitor for the Respondents:—Mr. *Douglas Grant.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2162 OF 1918.

December 19, 1921.

Present:—Mr. Justice Chevis and Mr. Justice Campbell.

RAM LOK—DEFENDANT—APPELLANT

versus

BHAGWAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Non-propietors—Ownership of sites—Alien-

ation of sites—Mauza Khan Khanan, Jullundur District—Town or village.

There is a general custom in the Punjab against the power of alienation of sites in villages by non-proprietors. [p. 155, col. 2.]

The non-proprietors of Mauza Khan Khanan in the Jullundur District are not entitled, by custom, to alienate the sites of their houses. [p 159, col. 2.]

The fact that proprietors have acquiesced in previous sales of sites of houses does not necessarily imply a renunciation of their discretionary right to object to a subsequent sale. [p. 158, col. 1.]

Maya Das v. *Jan Muhammad*, 13 P. R. 1889, *Khudayar* v. *Kapur Singh*, 50 P. R. 1889 and *Kharak Singh* v. *Alladitta*, 85 P. R 1882, relied on.

Teja Singh v *Mirza Sayad Muhammad Khan*, 124 P. R. 1888, *Buta Mal* v. *Ruldu*, 40 P. R. 1889, *Nandu* v. *Punjab Singh*, 45 Ind. Cas 96: 35 P. R. 1918; 62 P. W. R. 19 8, *Kala Khan* v. *Saru*, 48 P. R. 1881, *Gurditta Mal* v. *Mota Singh*, 102 P. R. 1891, *Prem Singh* v. *Nathu Ram*, 73 P. R. 1854, *Harsahai* v. *Ganga Ram*, 7 P. R. 1900; P. L. R. 1900 p. 145 and *Bhag Singh* v *Kanhaya Mal*, 38 P. R. 1895, discussed.

Evidence to the effect that there are a number of *pakka* built shops, houses and wells in a village, a private school outside the *abadi*, a population of 3,000, that artisans for whom the place is famous sell their wares in neighbouring towns, and that land is owned in the village by Khatris, Brahmans and other non-agricultural tribes, is not sufficient to convert the village into a town. [p. 155, col 2.]

Mauza Khan Khanan, in the Jullundur District, is not a town. [p. 155, col. 2.]

Second appeal from a decree of the Additional Judge, Jullundur at Ludhiana, dated the 17th April 1918, affirming that of the Munsif, First Class, Nawanshahr, District Jullundur, dated the 14th January 1918.

Bakhshi *Tek Chand*, for the Appellant.

Pandit *Sheo Narain*, R B., for the Respondents.

JUDGMENT.—This second appeal involves a question of custom, regarding which the District Judge has granted a certificate under section 41 (3), Punjab Courts Act, 1913, whether the non-proprietors of the village of Khan Khanan in the Jullundur District have a right to alienate the sites of their houses.

On the 10th November 1916, Naurang Singh of Khan Khanan, a Rahlia by caste and a weaver by profession, sold for Rs. 200 to Ram Lok, Chamar of the same village, a vacant site in *Patti* Jawahir Singh of Khan Khanan. On 4th December 1916, five owners of the *patti* (who were afterwards joined by four others) sued for possession of the site on the ground that the vendor had no power to dispose of it. The vendor pleaded that Khan Khanan had expanded into a town and that in any case the non-proprietor residents are entitled to sell the sites of their houses. Both Courts below have found in favour of the plaintiffs and Ram Lok, the vendee, appeals.

The learned District Judge considered that oral evidence of the one side was neither better nor worse than that of the other, but held that the defendants had failed to establish the special custom pleaded by them for the following reasons :—

(1) An entry in the *wajib-ul arz*, to be described presently, is directly against them.

(2) There are three judicial decisions relating to the same village in favour of the plaintiffs, and the similar decisions relied on by the defendants are of less value.

(3) The number of previous alienations proved by the defendants is not sufficient to establish a custom, being less than those held to be inadequate in *Teja Singh* v. *Mirza Sayad Muhammad Khan* (1), *Maya Das* v *Jan Muhammad* (2) and *Khudayar* v. *Kapur Singh* (3) and sales in execution being of little value owing to a popular idea that a sale by order of Government cannot be disputed.

(4) Khan Khanan is in no sense a town and there is a universal and well recognised custom in the Punjab that a non-proprietor in a village has no right to alienate the site of his house.

On the last point we agree with the learned District Judge. The evidence that there are a number of *pakka* built shops, houses and wells, a private school outside the *abadi*, a population of 3,000, that carpenters for which the place is famous sell their wares in Phagwara and elsewhere, and that land is owned by Khatris, Brahmans and other non agricultural tribes does not, in our opinion, distinguish Khan Khanan from any of the other large and prosperous villages which are numerous in the Punjab. The general custom against the power of alienation of sites by non proprietors is clear and has been recognised in numerous previous decisions of the Court.

(1) 124 P. R. 1888.
(2) 13 P. R. 1889.
(3) 50 P. R. 1889.

On the first point we do not agree. The clause in the *wa ib-ul arz* referred to is to the following effect:—

The proprietors receive nothing from the non proprietors. The latter can drop their refuse and manure where they please, and these are made use of by the proprietor on whose field they are dropped. Refuse is not dropped on one place nor is it divided. Non-proprietors cannot sell it nor can they take it to another village.

We cannot infer, as the learned District Judge has done, that this is an indirect imposition on the non-proprietors of rent for their house sites. It seems to us to be merely a rule of village economy in furtherance of the principles of good husbandry that what has come from the land should go back to fertilize that land, and not to affect in any way the question now before us.

The previous judicial decisions are the following. The first three are relied upon by the plaintiffs, the last two by the defendants. In no case was there a final decision by a Court of Appeal.

(1) A judgment by Maulvi Ghulam Mohy-ud-Din Munsif, dated 21st July 1889. A *haveli* belonging to Labhu, non-proprietor, was sold in execution of a decree in favour of Prabhu, also a non-proprietor. The suit was by Dewa Singh, a proprietor, for cancellation of the sale on the ground that Labhu was not the full owner. The suit was first dismissed and an appeal was remanded for re-decision after joining the whole proprietary body as parties. It was then referred to arbitrators and on the award was decreed in favour of the plaintiff. There was an issue about the customary rights of non proprietors, but the arbitrator found that the materials of the house as well as the site belonged to the plaintiff.

(2) A judgment by Lala Ganpat Rai, Munsif, dated 23rd April 1893. The suit was by a single proprietor, Dewa Singh, against Hirda Ram and others and the plaintiff alleged that he had given the house to the non-proprietor alienor. He succeeded. There was an issue whether there was any custom by which a non-proprietor could alienate and it was held that no such custom contrary to the general Punjab Custom had been proved.

(3) A judgment by Lala Kundan Lal, Munsif, dated 30th August 1905, in *Diwan Singh* v. *Tani*. The first issue was whether *kamins* have the right of alienation in *Patti* Khazan Singh of Khan Khanan. Tani, the defendant, produced no evidence and the issue was decided against him. The plaintiff succeeded on other issues as to value, etc., and it was held that the house was worth Rs. 13 and the site Rs. 10 and the plaintiff proprietor obtained a decree for possession against the alienee on payment of the former amount.

(4) A judgment by Lala Khan Chand, Munsif, dated 26th March 1902. The suit followed objections in execution proceedings and was for possession of a vacant site which had been auctioned in satisfaction of a decree against the occupant Shibbu Ashharaj. The plaintiffs were village proprietors and the Court seems to have taken it as admitted that ultimate ownership of the ground rested with them. The actual issues were (1) whether the site had been released from attachment and the materials only (apparently of a ruined house) sold and (2) whether Shibbu had power to alienate the right of residence. Both were found in the affirmative and the suit was dismissed. Six previous executions and four private sales (one only of the latter supported by deed) were cited. The Munsif referred to Lala Ganpat Rai's decision of 1893 (No. 2 above) and did not follow it on the grounds that it was old and that there had been no full enquiry.

(5) A judgment by Agha Muhammad Sultan Mirza, Munsif, dated 29th July 1915, in *Bhana* and *Gurbachan* v. *Shibu* and others. In this case an alienation by a Khatri non-proprietor was contested unsuccessfully by a proprietor, but the plaintiff distinctly asserted that he was suing as an individual and not as a representative of the proprietary body. There was no discussion of custom, although it was pleaded by the defendant *inter alia* that non proprietors had a customary right to alienate. The finding was that the plaintiff had failed to prove that the house was his and had been leased by him to certain defendants and that the alienor defendant's long possession was *prima facie* proof that he was owner.

There is nothing very conclusive to be derived from these cases. Nos. (2), (3) and (4) most directly concern the point now in issue. The latest, No. (3), is in favour of the plaintiff but No. (4) is not alluded to in the judg-

ment of No. (3) and shows that there was evidence which the defendant in No. (3) could have produced and, in No. (4) there is express dissent from No. (2). The defendant-appellant lays much stress on No. (4), but it is argued on the other side that the case is of no more value than those disregarded in *Buta Mal* v. *Ruldu* (4), to which reference will be made later. The plaintiffs-respondents urge further that at any rate the five cases show that proprietors have from time to time contested alienations and that there has been no universal acknowledgment of the right now asserted by the appellants.

The uncontested alienations prior to the date of institution of the suit proved by the defendant consist of 12 sales in execution of decrees, seventeen private sales and six mortgages. The execution sales date from 1878 to 1915. In two of them the decree was that of a proprietor against a non-proprietor, and in the earliest in 1878 the list of bidders was attested by Jawahar Singh *zaildar*, grandfather of Bhagwan Singh, one of the plaintiffs. Of the seventeen private sales there are only three previous to the judicial decision by Lala Khan Chand (No. 4 above) and those were in 1875, 1881 and 1883. The rest are from 1905 to 1915. Eleven are by *kamins* to *kamins* and in the rest one or both parties were Brahmans or Khatris. One mortgagee was a Jat Lambardar, the mortgagor being a *tarkhan* and the property being described as a *karkhana*. In 1915 there was a sale for Rs. 400 and another for Rs. 450 and a mortgage for Rs. 700. Otherwise there were only six sale or mortgage prices of over Rs. 100.

Nine proprietors gave evidence for the defendants that non-proprietors had by custom the right to dispose absolutely of their house sites. Similar statements are proved to have been made in 1882 in *Deva Singh* v *Prabhu* case No. (1) above by the proprietors as witnesses, (a third is on the record but is of doubtful admissibility), one by the Lambardar of another *patti* and the other by an uncle of one of the present plaintiffs.

For authorities the appellant rely mainly on *Nandu* v. *Punjab Singh* (5) and Civil Appeal No. 1652 of 1918, and have also cited *Kala Khan* v. *Saru* (6), where ten uncontested sales were accepted as proof of a custom in favour of alienation in Bahtar in Rawalpindi District and *Gurditta Mal* v. *Mota Singh* (7). The latter case does not help them, for there much weight was given to the fact that Kot Muhammad Khan, the village in question, was not historically a mere village homestead, and there was a *wajib-ul-arz* entry in favour of the non-proprietors.

In *Nandu* v. *Punjab Singh* (5) the custom now asserted was held to prevail in the village of Tuto Mazara in the Hoshiarpur District. There was documentary evidence of 32 previous sales and 49 mortgages; the majority referred to the actual sites of houses and there was a previous decision by a Munsif in favour of the non proprietors in a case of 1880, in which there had been a local enquiry and in which three Lambardars had given evidence for the non proprietors. In that case, as in this, there was no *wajib-ul arz* entry one way or the other and it was held that Tuto Mazara was a village and not a town, but the learned Judge of this Court considered it to be the kind of place (being of considerable size and having a bazar) where it might reasonably be expected that a custom of disposition by the non-proprietary body would establish itself.

Civil Appeal No. 1652 of 1918 related to Killa Pakka, a Sub-Division of Chabal Khan in Amritsar District, in which place it was declared in *Prem Singh* v. *Nathu Ram* (8) that no custom existed permitting non-proprietors to transfer their sites. In this later appeal it was held on the following facts that the proprietors had lost the right which they possessed up to 1884 of objecting to the alienations both of houses and of sites by non-proprietors.

(1) Since 1884 there had been 50 sales, including 22 execution sales and 44 mortgages.

(2) Two objections only had been taken to Court. Both had been unsuccessful, one being dismissed in default and the other without reference to the question of custom.

(4) 40 P. R. 1889.
(5) 45 Ind. Cas. 96; 35 P. R. 1918; 62 P. W. R. 1918.
(6) 48 P. R. 1881.
(7) 102 P. R. 1891.
(8) 73 P. R. 1884.

(3) In three suits relating to mortgages where the mortgagees were proprietors, admissions of the mortgagors' ownership rights were made by the mortgagees.

(4) In six of the execution sales the executing decree holders were proprietors and in one case a *Jat* proprietor was a bidder.

On the other hand it has been laid down in several cases, *e. g.*, *Kharak Singh* v. *Alladitta* (9) and *Harsahai* v. *Ganga Ram* (10), that the fact that proprietors have acquiesced in previous sales does not necessarily imply a renunciation of their discretionary right to object to a subsequent sale. In *Kharak Singh* v. *Alladitta* (9) the Judges held further that it was not enough to show that in a particular case some of the proprietors objected without success and also remarked as follows:—

"Proof of particular sales having taken place without objection would be very good evidence of the title of the purchaser to the lands actually sold. But while such sales would give a good title to individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished and that possession, whether by proprietors or non-proprietors, had come to be the only measure of right."

In *Maya Das* v. *Jan Muhammad* (2) it was held that 31 sales and 26 mortgages, out of which 10 sales and 7 mortgages were to proprietors, were insufficient to establish a custom in favour of the non-proprietors in Hassellanwala in Gujrat District. It was remarked that instances of the transfers of *kamins'* houses are valueless as proving any particular rights, unless it is shown that the proprietors either objected unsuccessfully or did not object under circumstances which fairly led to the inference that they knew the existing custom to be against them. And the judgment concludes with the following sentence which is emphasized for the present plaintiffs-respondents as applying to this or any other case about a site without a house on it:—

"No doubt as Hassellanwala has increased in size and prosperity, many substantial houses have been built by non-proprietors under the expressed or implied condition that the proprietors of the village have surrendered their right in the site, but it by no means follows from this that a custom has been established by which all non-proprietors have a right to deal with the sites of their houses, even when, as in the present case, they are mere mud huts, without any reference to the proprietors."

In *Buta Mal* v. *Ruldu* (4) (Mauza Ghartal, Sialkot District) there were two judicial decisions in favour of the non-proprietors, one by an Assistant Commissioner in 1861 and one by a Tahsildar in 1873. There were also seven sales from 1865 to 1884. It was held these were insufficient to prove that by custom the non-proprietors could sell even their houses, apart from the sites, without the consent of the proprietors. The previous decisions were dismissed as not being by Courts of such standing and experience as to carry much weight of themselves, as containing no exhaustive enquiry into custom and as both "proceeding upon the erroneous idea that a few instances of sales uncontested prove a custom."

Another case relied on by the respondents and referred to by the lower Appellate Court is *Khudayar* v. *Kapur Singh* (3). It was there held proved that by custom non-proprietors could transfer the materials of their houses without the consent of the proprietors in Bhagowal in Gujrat District, but this did not involve a power to transfer the sites also. The power of the proprietors to interfere with the sale of sites was stated to rest on the fact that the sites were a part of the *shamilat deh* of which the proprietors admittedly are owners, "and ordinarily it would be for the person claiming to deal with a site forming part of the *abadi* to prove that the right to that particular site had passed from the proprietary body to him, and the mere fact that the numerous other non-proprietors had acquired a title to their particular sites would be no proof of this." It was found that there were from 500 to 700 houses in the village, but out of 97 sale-deeds filed to prove that the proprietors had abandoned their rights over the *abadi* only twenty referred specially to sites as included in the sale, and that in no case was the deed registered, although in several instances registration was compulsory. The appeal was decreed in favour of the plaintiff proprietors so far as the site of the house in dispute was concerned.

(9) 85 P. R. 1882.
(10) 7 P. R. 1900; P. L. R. 1900, p. 145.

There are other rulings in favour of the contention that a number of previous sales without objection do not prove a custom, but in most of them, including *Tej Singh* v. *Mirza Sayad Muhammad Khan* (1) quoted by the lower Court, the proprietors also had the support of an entry in the *wajib ul-arz* and for that reason they need no discussion. With reference, however, to the suit of 1902 quoted above No. (4), we are asked to notice that in *Bhag Singh* v. *Kanhaya Mal* (11) distinction between the right to sell a right of residence and the right to sell a site was recognised in Khem Karan, Lahore District.

In that case a non-proprietor sold a shop to another non proprietor in 1889 without objection at the time. In the following year the purchaser pulled down the shop and proceeded to build a large *pakka* shop on the site. Sixteen proprietors immediately sued for possession, contending that by the demolition the site became an open site and reverted to the proprietors. There was, as here, no relevant entry in the *wajib-ul-arz*. It was held (*a*) that by the custom of Khem Karan (which had ceased to be a village and was a town) a non proprietor could not transfer any proprietary right in the site of his house, (*b*) that his right to sell or remove the materials was undisputed, (*c*) that he could transfer a right of residence in the house and that in this particular instance there had been no discontinuance of occupation. The decree of the lower Appellate Court dismissing the suit was modified by the grant to the plaintiffs of a decree declaring them to be owners of the site.

In the present case the sale to the appellant was of a site of four *marlas* which had a roofed *kotha* on it, with the proviso that the vendor was to remove the roof materials and was also to fell certain *kikkar* trees. The transfer thus was not one of a right of residence in a certain house. The Khem Karan decision apparently recognised a distinction between the transfer of a site with a habitable house standing on it and that of a vacant site. In Lala Khan Chand's judgment of 1902 the place then in suit is described as *taur safaid* and thus the situation was not the same as in the Khem Karan case, but what Lala Khan Chand seems to have intended to hold transferable by a non-proprietor was something less than a right of full ownership in the site which in the present suit is claimed to have been held by the defendant alienor.

We think on careful consideration of the evidence and the previous authorities that the concurrent decisions of the lower Courts should be maintained. Cases of this nature are unquestionably difficult. There is in this case dissension among the proprietors and possibly some genuine doubt about what the custom really is. The general custom against unrestricted alienation by non proprietors is well-established and it lay upon the defendants to prove with certainty that a contrary custom is observed in Khan Khanan. We do not think that they have done so. The main effect of the previous suits about Khan Khanan, in our opinion, is to show that there has been no universal acquiescence in alienations. We do not think that the Munsif's decision of 1902 was conclusive as regards ownership rights in sites and we observe that nearly all the private alienations proved took place after and no doubt in consequence of that decision. The total number of alienations also is not large according to the standards adopted in several decisions of this Court mentioned above. The admissions in favour of the non proprietors by witnesses who are proprietors undoubtedly deserve serious attention, but they are capable of explanation as due to disagreement in the proprietary body and we do not think that they suffice to distinguish this case from *Kharak Singh* v. *Alladitta* (9) and *Khudayar* v. *Kapur Singh* (3) and particularly *Maya Das* v. *Jan Muhammad* (2). In the present suit there were non-proprietors who appeared as witnesses for the plaintiffs.

The case made out for the non-proprietors of Tuto Mazara in *Nandu* v. *Punjab Singh* (5) was considerably stronger, as there were more alienations and only one contest many years previously, in which the proprietors failed very definitely. The evidence of the three Lambardars in 1880 which greatly influenced the decisions was clearly of much more value than that of the two proprietors of Khan Khanan in the suit decided by Maulvi Ghulam Mohy-ud-Din in 1884, for the latter's testimony was not upheld in the final decision and its truth was questioned in other subsequent suits.

(11) 88 P. R. 1895.

For these reasons we hold that the appeal must fail and we order that it be dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 73 OF 1921.

November 7, 1921.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

ABDUL HUSSEIN ADAMJI MASALA-VALLA—DEFENDANT—APPELLANT

versus

MAHOMEDALLY ADAMJI MASALA-VALLA—PLAINTIFF—RESPONDENT.

Letters Patent (Bom.), cl. 12—Administration suit—Immoveable property outside jurisdiction—Jurisdiction—Reference—Procedure.

An administration suit is not a suit for land and can proceed on the Original Side of the High Court, even although it appears that there are immoveable properties, alleged to belong to the estate, outside the jurisdiction.

It is only when the reference commences before the Commissioner on the accounts being filed that it can be ascertained what are the contentions of the parties and whether the accounts filed together with the objections and surcharges show that there are properties either inside or outside the jurisdiction belonging to the estate. When claims to such properties are raised before the Commissioner, then it is a matter for him to decide what action to take, and even if he is of opinion that he has jurisdiction to decide questions of title to immoveable property, it will be open to the parties to ask him to make a reference for the opinion of the Court, when the Court will be in a position to decide how the disputed questions of title should be tried.

Messrs. *Jinnah* and *Kania*, for the Appellant.

Mr. *Desai*, for Respondents Nos. 1, 2 and 3.

JUDGMENT.—We think that the Judge was right in holding that the suit, being an administration suit, could go on, even although it appeared that there were immoveable properties, alleged to belong to the estate, outside the jurisdiction, as, in our opinion, an administration suit is not a suit for land. It is only when the reference commences before the Commissioner on the accounts being filed that it can be ascertained what are the contentions of the parties and whether the accounts filed together with the objections and surcharges show that there are properties either inside or outside the jurisdiction belonging to the estate. When claims to such properties are raised before the Commissioner, then it is a matter for him to decide what action to take, and even if he is of opinion that he has jurisdiction to decide questions of title to immoveable property, it will be open to the parties to ask him to make a reference for the opinion of the Court, when the Court will be in a position to decide how the disputed questions of title should be tried, but it certainly does appear that the first declaration in the decree should not have been inserted as it is not in consonance with the judgment. From the declaration now appearing in the decree that the Court had jurisdiction to administer the said Kurla property, it would appear that the Court had already decided that the question to whom the Kurla property belonged should be dealt with in this suit. But that, as I have pointed out, is a question which falls to be decided hereafter. That an administration suit is not a suit for land seems to us to be obvious from the difficulties which might arise if the opposite contention should prevail. If an administration suit is a suit for land, because it is alleged that part of the estate consists of land, leave would have to be obtained when part of the land was outside the jurisdiction, but if all the land mentioned in the plaint appeared to be outside the jurisdiction, such land could not be dealt with in the suit, although afterwards it was proved that part of it was within the jurisdiction. A similar difficulty arises in this very suit, because all the properties mentioned in the particulars to the plaint were outside the jurisdiction and no leave could have been granted. Now one party alleges that a property not mentioned in the proceedings which is within the jurisdiction belongs to the estate; and if the suit must be treated as a suit for land, then leave ought to have been obtained before the suit was filed and once the suit is filed without obtaining leave, if leave is necessary, the defect cannot be remedied.

The order, therefore, which we make on the appeal is that the decree be amended by striking out the first declaration.

Costs of the appeal to be costs in the suit.

Z. K. *Decree amended.*

VIDYA VARUTHI THIRTHA SWAMIGAL v. BALUSAMI AYYAR.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

July 5, 1921.

Present:—Lord Buckmaster, Lord Dunedin, Lord Shaw and Mr. Ameer Ali.

Sri VIDYA VARUTHI THIRTHA SWAMIGAL—DEFENDANT—APPELLANT

versus

BALUSAMI AYYAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Charitable endowments—Mutts, *incidents of*—Matathipathe, *legal character of—Permanent lease of ordinary* mutt *property by* matathipathe—*No justifying necessity or special custom proved—Lessee in possession for more than* 12 *years under successor to* matathipathe—*Lessee does not acquire title by adverse possession—Limitation Act (IX of* 1908), *s.* 10, *Sch. I, Arts.* 134, 144, *applicability of.*

There are two systems of law in force in India, Hindu and Muhammadan Laws, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well-recognised rules relating to their religious and charitable institutions. It would be a serious inroad into the rights of Hindus and Muhammadans if the rules of the Hindu and Muhammadan Laws are to be construed in the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in *pari materia* [p. 164, col. 2.]

Vidyapurna Tirtha Swami v. *Vidyanidhi Tirtha Swami*, 27 M. 435; 14 M. L. J. 105 and *Kailasam Pillay* v. *Nataraja Tambiran*, 5 Ind Cas. 4; 33 M. 265; 7 M. L. T. 1; 19 M. L. J. 778, referred to.

A "trust" in the sense in which the expression is used in English Law is unknown in the Hindu system, pure and simple [p. 164, col. 2; p. 165, col. 1.]

Under Hindu Law the image of a deity of the Hindu pantheon is a "juristic entity" vested with the capacity of receiving gifts and holding property Hindu religious institutions, such as Mutts, and various others known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them *eo nomine*. The heads of these institutions have ample discretion in the application of their funds, but always subject to certain obligations governed by custom and usage. Called by whatever names, they are only the managers or custodians of the institutions In no case is any property "conveyed" to or "vested" in them, nor are they "trustees" in the English sense of the word, although they are answerable as trustees in the general sense for maladministration. [p. 165, col. 1.]

Sammantha Pandara v. *Sellappa Chetti*, 2 M. 175; 3 Ind. Jur. 559; 1 Ind. Dec. (N. S.) 393, *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*, 10 M. 375; 3 Ind Dec. (N. S.) 1015, *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal*, 19 Ind. Cas. 694; (1913) M. W. N. 381; 38 M. 856; 13 M. L. T. 498; 25 M. L. J. 898, *Mahomed* v. *Ganapati*, 13 M. 277; 4 Ind. Dec. (N. S.) 905, *Muppidi Papaya* v. *Ramana*, 7 M. 85; 7 Ind. Jur. 595; 2 Ind. Dec. (N. S.) 641, *Jama Saheb* v. *Murgaya Swami*, 10 B. 34; 5 Ind. Dec. (N. S.) 406, *Madho Kooery* v. *Tekai Ram*, 9 C. 411; 11 C. L. R. 508; 4 Ind. Dec. (N. S.) 922, *Sathianama Bharati* v. *Saravanabagi Ammal*, 18 M. 266; 4 M. L. J. 223; 6 Ind. Dec. (N. S.) 535, *Chockalingam Pillai* v. *Rayandi Chettiar*, 19 M. 485; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1042, *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*, 2 M. I. A. 390; 6 W. R. 3 (P. C.); 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348 and *Muhammad Rustam Ali Khan* v. *Mushtaq Husain*, 57 Ind. Cas. 329; (1920) M. W. N. 565; 39 M. L. J. 263; 12 L. W. 539; 18 A. L. J. 1089; 28 M. L. T. 220; 47 I. A. 224; 32 C. L. J. 471; 42 A. 609; 25 C. W. N. 122; 1 P. W. R. 1921 (P. C.), referred to.

A Matathipathe cannot, in the absence of justifying necessity or special custom, grant a lease of Mutt property to endure beyond his lifetime. [p. 173, col 1.]

In 1884 the Matathipathe of a Hindu religious institution in the town of Madura granted a permanent lease of certain lands which were "ordinary" Mutt property, not appropriated to any specific purposes. The Matathipathe died shortly afterwards, but his successor who held office till 1906 continued to receive rent from the lessee. The present head of the Mutt, who succeeded next, became aware of the transaction of 1891 in 1908. Meanwhile the lessee had granted a sub-lease of the lands which was to expire in 1912. Before its expiry, however, the sub-lessee took a direct fresh lease from the present Matathipathe. The lessee in 1913 sued his sub-lessee and the Matathipathe for declaration of title, for ejectment and for possession, alleging that he had acquired a good title against the Mutt under Articles 134 and 144 of the Limitation Act:

Held, that as Article 134 of the Limitation Act related to cases of specific trust and property "conveyed in trust," and was controlled by section 10 of the Act, it had no application to the present case; nor had the lessee acquired any title by adverse possession under Article 144 of the Limitation Act for, in the absence of justifying necessity or special custom, the permanent lease granted by the Matathipathe expired at his death, after which the receipt of rent by the next Matathipathe must be considered to have been with the knowledge, which must be imputed to him, that the tenancy created by his predecessor ended with the predecessor's life and could, therefore, only be properly referable to a new tenancy created by himself and that under these circumstances the proper inference was that the tenancy of the lessee did not become adverse till the death of the second Matathipathe in 1906. [p. 167, col. 1; p 173, cols. 1 & 2.]

Dattagiri v *Dattatraya*, 27 B. 363; 4 Bom. L. R. 743, *Behari Lal* v *Muhammad Muttaki*, 20 A. 482; A. W. N. (1898) 123; 9 Ind. Dec. (N. S.) 669 (F. B.), *Nilmony Singh* v. *Jagabandhu Roy*, 23 C. 536; 12 Ind. Dec. (N. S.) 357, disapproved.

Abhiram Goswami Mohant v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 C. 1003; 36 I. A. 148; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.), followed.

Prosunno Kumari Debya v. *Golab Chand Baboo*, 14 B. L. R. 450; 2 I. A. 145; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102 (P. C.), *Konwar Doorganath Roy* v. *Ram Chander Sen*, 2 C. 341; 4 I. A. 52; 3 Sar. P. C. J. 681; 1 Ind. Dec. (N. S.) 508

Maharanee Shibessouree Debia v. *Mothooranath Acharjo*, 13 W. R P. C. 18; 13 M I. A. 270 at p 275; 2 Suth. P. C J. 300; 2 Sar. P. C J 528; 20 E. R 552, *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi*, 39 Ind. Cas 722; (1917) M. W. N. 507; 44 I. A. 147; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222 (P. C.), *Ram Parkash Das* v. *Anand Das*, 33 Ind. Cas. 583; (1916) 1 M. W. N. 406; 20 C. W. N. 802; 14 A. L. J. 621; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L J. 116; 43 C. 707; 20 M. L. T. 267; 43 I. A 73 (P. C.), *St. Mary Magdalen, Oxford* v. *Attorney-General*, (1857) 6 H. L. C. 189; 26 L. J. Ch. 620; 3 Jur. (N. S.) 675; 5 W. R. 716; 10 E. R. 1267; 29 L. T. (O. S.) 239; 108 R. R. 62, *Narayan Manjaya* v. *Shri Ramchandra Devasthan*, 27 B. 373; 5 Bom. L. R. 241 and *Piran* v. *Abdool Karim*, 19 C. 203; 9 Ind. Dec. (N. S.) 591, referred to.

Appeal from a judgment and decree of the High Court of Judicature at Madras, dated 19th October 1916, reported as 40 Ind. Cas. 531, against a judgment and decree of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 61 of 1914.

Mr. *Olausen*, *K. C*, and Mr. *Kenworthny Brown*, for the Appellant.

Mr. *DeGrather*, *K. C.*, and Mr. *K. V. L. Narasimham*, for the Respondents.

JUDGMENT.

MR. AMEER ALI.—The suit that has given rise to this appeal relates to certain lands lying in the Town of Madura in the Madras Presidency which admittedly belong to an old Mutt (Math) situated within the Mysore State. The origin, development, and *raison d'etre* of these Mutts have been discussed in a number of cases decided in the Madras High Court to some of which their Lordships propose to refer in the course of this judgment. In their general characteristics they are almost identical with similar institutions in Northern India and in the Bombay Presidency. The heads of these foundations bear different designations in respect of the rights and incidents attached to the office; the difference arises from the customs and usages of each institution. The superior of this particular Mutt has been called in these proceedings Matathipathe and sometimes Pandara Sannadhi, which their Lordships understand connote the same idea of headship. At the time this action was brought, the 26th defendant held the office of Matathipathe. He has since died and the present appellant is the head of the institution. In 1891 one Srinivasa was the Matathipathe and he on the 17th March of that year granted to the 2nd plaintiff, a near relative, a permanent lease of the lands in suit, on a small quit rent of Rs. 24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by one Samudra who held the office until 1906. On his death the now deceased defendant No. 26 became the head. In 1902 the second plaintiff sub leased the lands to the first and second defendants for a period of ten years.

Since 1905 the Mutt has been under the management of the Mysore State under a power-of attorney, executed at first by the Matathipathe Samudra and afterwards by his successor, in favour of the Dewan and his successors-in-office. About the same time the second plaintiff conjointly with his son (the third plaintiff) assigned their right and interest in the lands in suit to the first plaintiff. It is in evidence and, so far as appears from the judgments of the two Courts in India, does not appear to be contradicted, that it was only in 1903 that the representative of the Dewan acting under the power granted by the Matathipathe became aware of the transaction of 1891 under which the plaintiffs claim title. The sub-lease created in 1902 by the second plaintiff in favour of the first and second defendants was to have expired in 1912. But before its expiry they obtained a lease for 17 years from the representative of the Dewan. They are now in possession of the lands in suit under this lease. The plaintiffs are and were at the time they brought their suit on the 5th March 1913, in the Court of the Subordinate Judge of Madura, admittedly out of possession. The present action is for declaration of title and for ejectment and possession, principally directed against the Matathipathe as the head of the Mutt and the first and second defendants, lessees, holding possessions under him. The other defendants have been joined as parties apparently in consequence of certain rights they possess or exercise under those defendants.

The plaintiffs base their title on two grounds: Firstly, that the permanent lease under which they claim was created under circumstances that would bind not only the grantor but all his successors; and secondly, that even if the lease was not valid they had acquired a title under the

Statute of Limitation by adverse possession for over twelve years from the date of the grant.

Their case throughout has been that Srinivasa was a "trustee" and that all his successors are "trustees," that the lands were granted on a "specific" trust, and that consequently under Article 134 of the First Schedule of the Indian Limitation Act (IX of 1908) they have acquired a good title against the Mutt.

The Matathipathe controverted both allegations. He denied that the alienation by Srinivasa was of such a character as would bind the Mutt; he further denied that he and his predecessors were "trustees" of the Mutt or that the second plaintiff or his assignee had acquired any right to the Mutt lands by adverse possession. On these contentions, two points arose for determination which are embodied in the first two issues. The Trial Judge, after giving the substance of the second plaintiff's evidence and of the other witnesses, formulates the position which the Pleader took up.

"He contends," says the learned Judge, "that the plaint property is trust property set apart for the worship of the titular deity of the Mutt, that the head of the Mutt is a trustee merely, and that the permanent lease to second plaintiff is an alienation of Mutt property and that 26th defendant at this distance of time could possibly have no right to such property. The alienation being *ab initio* void, the 6th defendant had no right to plaint property as he succeeded only in 1906 and first plaintiff had perfected his title by adverse possession for over twelve years."

The Subordinate Judge negatived this contention; he held upon the admissions of the second plaintiff that the property in suit was "ordinary Mutt property" and was not set apart on any specific trust; that the head of the Mutt was not a "bare trustee," as it was admitted that the income was at his absolute disposal and that "none had a right to question him about it."

He found also that the second plaintiff took the lease with full knowledge of the character of the endowment and had learnt on enquiry that "he could not safely purchase it."

With regard to the question of estoppel arising from the alleged acceptance of rent by the 26th defendant as the plaintiffs contended, the Subordinate Judge held:—

"In fact the first plaintiff never paid money as rent and the 26th defendant or his agent never accepted payment with knowledge that the payment was as rent for plaint property. In these circumstances, I find that these defendants are not estopped from denying plaintiffs' title. I find this issue against plaintiffs."

He accordingly dismissed the suit save and except in respect of a money claim against the first and second defendants.

The plaintiffs appealed to the High Court of Madras, which reversed the Trial Judge's order and decreed the claim. The learned Judges do not negative the finding of the first Court that the second plaintiff took the lease with notice. But they considered that the matter in dispute fell within Article 134 referred to above. They summed up their conclusion in the following words: "that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of Article 134 have been complied with."

The findings of the learned Judges on the issue relating to limitation and the aquisition of right by adverse possession require notice. They deal first with the question of justifiable necessity, which they decide against the plaintiffs. They say: "there is no doubt that the head of a Mutt cannot in the absence of necessity bind his successors-in office by a permanent lease at a fixed rent for all time." And then add: "There is no allegation, much less proof, of any such necessity. The first contention must be rejected."

They then proceed to discuss the *nature of the endowment* in question and the position of its head. Their finding on this point is important; they say as follows:—

"In connection with the second point a question arises as to the nature of the endowment and the position of the head of the Mutt in relation to it. The exact terms of the origical grant are not in evidence. It was conceded in argument that the grant was made by one of the Naiken dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose, *i. e.*, for the worship of

Gopalakrishnaswami, who is described by defendants' first witness as the 'titular deity of the Mutt.' The evidence does not support this contention and it has been found against in the lower Court. A statement made by a local agent of the Mutt during the Inam Commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence. The description of the Inam as given at the close of the inquiry is that it was granted 'for the support of Vyasaraya Matam' (Exhibit L). Compare also description in Exhibit F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the Mutt. I think the grant must be held to have been made for the general purposes of the Mutt."

They thus concur with the First Court that there was no "specific trust" which was the foundation of the plaintiffs' case. But after examining some of the judgments of their own Court, they apparently felt constrained to hold that the decision of this Board in *Ram Parkash Das* v. *Anand Das* (1) had crystallised the law on the subject, and definitely declared the Mohant to be a "trustee." It is to be observed that in that case the decision related to the office of Mohant, but in the course of their judgment their Lordships conceived it desirable to indicate *inter alia* what upon the evidence of the usages and customs applicable to the institution with which they were dealing, and similar institutions, were the duties and obligations attached to the office of superior; and they used the term "trustee" in a general sense, as in previous decisions of the Board, by way of a compendious expression to convey a general conception of those obligations. They did not attempt to define the term or to hold that the word in its specific sense is applicable to the laws and usages of the country. As pointed out by their predecessors in *Greedharee Doss* v. *Nundokissore Doss Mohunt* (2), "The only law as to these Mohants and their offices, functions and duties is to be found in custom and practice, which is to be proved by testimony." Generally speaking, however, the duties and obligations resting on the superior indicated in *Ram Parkash Das* v. *Anand Das* (1) do not seem to vary. In this particular institution the position of the Matathipathe in relation to the Mutt was clearly established by testimony and concurrently found by both Courts. But the learned Judges misapprehended their Lordships' judgment and proceeded to hold that as Srinivasa who granted the permanent lease was a "trustee," his act fell under Article 134. To this Article their Lordships will presently refer. Before doing so, however, they consider it necessary to observe that there are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well recognised rules relating to their religious and charitable institutions. From the year 1774 the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs so far as they are not in conflict with the statutory laws, by Hindus and Muhammadans. It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Muhammadan Laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in *pari materia*. The vice of this method of construction by analogy is well illustrated in the case of *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (3), where a Mohant's position was attempted to be explained by comparing it with that of a bishop and of a benefised clergyman in England under the ecclesiastical law. It was criticised, and rightly, in their Lordships' opinion, in the subsequent case, which arose also in the Madras High Court, of *Kailasam Pillay* v. *Nataraja Tambiran* (4). To this judgment their Lordships will have to refer further later on.

It is also to be remembered that a "trust," in the sense in which the expression is

(1) 33 Ind. Cas. 583; (1916) 1 M. W. N. 406; 20 C. W. N. 802; 14 A. L. J. 621; 31 M. L. J. 1; 18 Bom. L. R. 450: 3 L. W. 556; 24 C. L. J. 116; 43 C. 707; 20 M. L. T. 267; 43 I. A. 73 (P. C.).

(2) 11 M. I. A. 405 at pp. 419, 428; 8 W. R. P. C. 25; 2 Suth. P. C. J. 86; 2 Sar. P. C. J. 306; 20 E. R. 154.

(3) 27 M. 435; 14 M. L. J. 105.

(4) 5 Ind. Cas. 4; 33 M. 265; 7 M. L. T. 1; 19 M. L. J. 778.

used in English Law, is unknown in the Hindu system, pure and simple. (J. C. Ghose, "Hindu Law," page 276.) Hindu piety found expression in gifts to idols and images consecrated and installed in temples, religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system, to Brahmins, Goswamis, Sanyasis, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu Law the image of a deity of the Hindu pantheon is, as has been aptly called, a "juristic entity" vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them *eo nomine*. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of Mutt were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee, in the general sense for maladministration.

The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Muhammadan influence has been predominant, such as Upper India and the Carnatic, the expression *wakf* is used to express dedication.

But the Muhammadan Law relating to trusts differs fundamentally from the English Law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf* or the tenor of the document shows, as in the case of *Jewun Doss Sahoo* v. *Shah Kubeer ool deen* (5), that a dedication to pious or charitable purposes is meant, the right of the *wakif* is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the *wakf* is the *mutwalli*, the governor, superintendent, or curator. In *Jewun Doss Sahoo's case* (5) the Judicial Committee call him "procurator." It related to a Khankah, a Muhammadan institution analogous in many respects to a Mutt where Hindu religious instruction is dispensed. The head of these Khankahs, which exist in large numbers in India, is called a *sajjadanashin*. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary *mutwalli*. But neither the *sajjadanashin* nor the *mutwalli* has any right in the property belonging to the *wakf*; the property is not vested in him and he is not a "trustee" in the technical sense.

It was in view of this fundamental difference between the juridical conceptions on which the English Law relating to trusts is based, and those which form the foundations of the Hindu and the Muhammadan systems that the Indian Legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope, the rules of law applicable to *wakf* and Hindu religious endowments. Section 1 of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance," lays down, "but nothing herein contained affects the rules of Muhammadan Law as to *wakf*, or the mutual relations of the members of

(5) 2 M. I. A. 390; 6 W. R. 3 (P. C.); 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348.

an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments....." Section 3 of the Act gives a definition of the word "trust" in terms familiar to English lawyers. It says:—

"A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust-property' or 'trust-money'; the 'beneficial interest' or 'interest of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust.'"

In this connection it may be observed that in the case of *Muhammad Rustam Ali Khan* v. *Mushtaq Husain* (6) the dedication was of specific property created by an instrument called a "trustee-namah." Lord Buckmaster, delivering the judgment of the Board, dealt thus with the objection as to the validity of the document:—

"It is argued," said the noble Lord, "that the 'trustee-namah' must have dealt with an interest in immoveable property, for otherwise the trustees could have no right to maintain the suit; and such an argument at first sight makes a strong appeal to those who are accustomed to administer the English Law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the assumption that the trustees of the *wakf-nama* in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The *wakfnama* itself does not purport to assign property to trustees."

In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Muhammadan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Government considered it expedient to divest itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object, Act XX of 1863 was enacted: a system of committees was devised to whom were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents": rules were enacted to ensure proper management and to empower the superior Court in the District to take cognisance of allegations of misfeasance against the managing authority. Their Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee"; it uses indifferently and indiscriminately the terms "manager, trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863 the committees, to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of "managers, trustees or superintendents."

Article 134 of the First Schedule to the Indian Limitation Act (IX of 1908) is in these terms:—"To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration," the period prescribed for the institution of the suit is twelve years "from the date of transfer." In the Id Act XV of 1877 the words were "purchased from the trustee or mortgagee." The alteration was made with the object of including permanent leases in transactions of the character contemplated in the Article.

Article 134, as pointed out in *Abhiram Gowami Mohant* v. *Shyama Charan Nandi* (7), controlled by section 10 of the Limitation Act, which runs thus:—

(6) 57 Ind. Cas. 329; (1920) M. W. N. 565; 39 M. L. J. 263; 12 L. W. 539; 18 A. L. J. 1039; 28 M. L. T. 220; 47 I. A. 224; 32 C. L. J. 471; 42 A. 609; 25 C. W. N. 122; 1 P. W. R. 1921 (P. C.).

(7) 4 Ind. Cas. 449; 36 C. 1003; 36 I. A. 148; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 630; 14 C. W. N. 1 (P. C.).

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

The language of section 10 gives the clue to the meaning and applicability of Article 134. It clearly shows that the Article refers to cases of specific trust, and relates to property "conveyed in trust." Neither under the Hindu Law nor in the Muhammadan system is any property "conveyed" to a *shebait* or a *mutwalli* in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Muhammadan Law, the moment a *wakf* is created all rights of property pass out of the *wakif* and vest in God Almighty. The curator, whether called *mutwalli* or *sajjadanashin*, or by any other name, is merely a manager. He is certainly not a "trustee" as understood in the English system.

In *Sammantha Pandara* v. *Sellappa Chetti* (8) the position of the superior in relation to the properties of the Mutt was laid down in terms which have an important bearing on the present case. The learned Judges say there:—

"The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his *mattam*, and debts so contracted might be recovered from the *mattam* property and would devolve as a liability on his successor to the extent of the assets received by him."

The origin and nature of these Mutts were again considered at great length in a case which arose in the same Court in 1885. In this case, *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (9), the learned Judges pronounced that the head of the institution held the *mattam* under his charge, and its endowment in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection therewith according to usage. An almost identical question came up for consideration in 1904 in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (3) already referred to. In this case the learned Judges, after an elaborate examination of English institutions which they conceived to be analogous to Hindu Mutts, came to the conclusion that whilst a *dharmakarta* of a temple who has specific duties to perform might be regarded as a trustee, the superior of a Mutt is not a trustee but a "life tenant."

The same question in another form came up again for consideration in 1909 before a Divisional Bench of the Madras High Court in the case of *Kailasam Pillai* v. *Nataraja Tambiran* (4). The learned Judges before whom the point arose considered that the view taken in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (3) was in conflict with that pronounced in the two earlier cases *Sammantha Pandara* v. *Sellappa Chetti* (8) and *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (9), and referred the question to a Full Bench. The reference was in these terms: "Does the head of a Mutt hold the properties constituting its endowment as a life tenant or as a trustee?"

The Officiating Chief Justice expressed his opinion in the following terms:—

"I think, then, that it cannot be predicated of the head of a Mutt, as such, that he hold the properties constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long-continued and

(8) 2 M. 175; 3 Ind. Jur. 558; 1 Ind. Dec. (N. S.) 898.

(9) 10 M. 375; 3 Ind. Dec. (N. S.) 1015.

well-established usage and custom of the institution in respect thereto."

Mr. Justice Wallis substantially agreed in this view.

Mr. Justice Sankaran Nair pointed out that in the case of these Mutts:—

"Any surplus that remains in the hands of the Pandara Sannadhi, he is expected to utilise for the spiritual advancement of himself, his disciples or of the people. But his discretion in this matter is unfettered. He is not accountable to any one and he is not bound to utilise the surplus. He may leave it to accumulate."

And he further added, "It is also true in my opinion that he is under a legal obligation to maintain the Mutt, to support the disciples and to perform certain ceremonies which are indispensable. That will be only a charge on the income in his hands and does not show that the surplus is not at his disposal." In the result, he was of opinion "that in the absence of any evidence to the contrary, the Pandara Sannadhi (the superior) as such is not a trustee. He is not also a life-tenant for the reasons already stated." All three Judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes he might be regarded a "trustee" with regard to that property; but that in the absence of any such evidence the superior was not a trustee in respect of any part of the endowment.

The point came up for discussion again in a concrete form in 1913 in *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (10), where the exact point for decision was the question of limitation. The facts which gave rise to the litigation were almost identical with the present case before their Lordships, with this difference, that the suit there was brought by the head of the Mutt to recover possession of the leased properties.

Mr. Justice Miller states thus the question for determination:—

"The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded for the appellants that the lease is in excess of the powers of the Matathipathe, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890."

The learned Judges held in substance that there was no specific trust, that the properties were given or endowed generally for the performance of the worship of the deities in the Mutt and other attendant duties and for the support of the superior and his disciples; that a lease granted by him was valid for his life, and if adopted by his successor would enure during his term of office; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession.

These cases deal exclusively with the position of the superior of a Mutt in relation to its endowment. But there are some others respecting the powers of the managers of religious institutions generally. In *Mahomed* v. *Ganapati* (11) a lease was granted by the *dharmakarta* of a temple; and the suit to recover the leased land was brought by his successor in office. The defence was limitation running from the date of alienation. Mr. Justice Sheppard (Muthusami Ayyar, J., concurring) held as follows:—

"In the present case, though the plaintiff may in point of time have succeeded the *dharmakarta* who made the alienation, he does not derive his title from that *dharmakarta* and is, therefore, not bound by his acts. Subject to the Law of Limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors (*Muppidi Papaya* v. *Ramana* (12), *Jamal Saheb* v. *Murgaya Swami* (13), *Madho Koery* v. *Tekait Ram* (14)], and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession. Accordingly, Raman Pujari having died so recently as 1885, the plaintiff's suit cannot be barred by limitation."

This was followed in *Sathianama Bharati* v.

(10) 19 Ind. Cas. 694; (1913) M. W. N. 581; 38 M. 356; 13 M. L. T. 498; 25 M. L. J. 393.

(11) 13 M. 277; 4 Ind. Dec. (N. S.) 905.

(12) 7 M. 85; 7 Ind. Jur. 525; 2 Ind. Dec. (N. S.) 644.

(13) 10 B. 34; 5 Ind. Dec. (N. S.) 406.

(14) 9 C. 411; 11 C. L. R. 508; 4 Ind. Dec. (N. S.) 922.

Saravanabogi Ammal (15). In this case the superior is called the "manager."

In *Chockalingam Pillai* v. *Rayandi Chettiar* (16) it was conceded that "the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation." But from the long lapse of time between the alienation and the challenge of its validity, coupled with other circumstances, the learned Judges came to the conclusion that necessity may reasonably be presumed.

From the above review of the general law relating to Hindu and Muhammadan pious institutions it would *prima facie* follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English Law. Of course, a Hindu or a Muhammadan may "convey in trust" a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English Law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term.

But the respondents rely on three decisions of the Indian Courts in support of their contention that persons holding properties generally for Hindu and Muhammadan religious purposes are to be treated as "trustees." The first is a decision of the Bombay High Court in *Dhattagiri* v. *Dattatraya* (17). The facts of that case were peculiar. The Mutt there was an old one and the dedication was recognised and confirmed by the Maharatta Government. The village was granted to a holy ascetic for the maintenance of a charity attached to the Mutt, the governance went by succession to the disciples of the *guru* (the spiritual preceptor or head). In 1871 the village was divided between two disciples, Shivgiri and Shankargiri, in equal moieties, and each held his half separately from the other. In the same year one of them, Shankargiri, sold the lands in dispute to the defendant. In 1897 Shankargiri obtained a Sanad from Government under Act II of 1863 declaring him to be the absolute owner of his share. He died in August 1897, after appointing the plaintiff as his successor, who in 1898 brought an action to recover possession of the alienated lands on the ground that Shankargiri had no power to alienate them as they were dedicated property. The defence was firstly, that the Sanad had altered the character of the property, and secondly that the suit was barred. The lower Appellate Court found that the lands in suit were private alienable property and that consequently the action was barred. The first finding was strongly challenged by the plaintiff's Counsel on second appeal. He contended that as it was dedicated property its holders from time to time "could not allow the Government to treat it as private property." The learned Judges of the High Court refrained from deciding that point and confined their attention solely to the question of limitation. They proceeded to deal with the case, as they expressly say, "on the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads of the Mutt and as trustees therefor." On that hypothesis the conclusion at which they arrived was inevitable. The position of the head of the Mutt in relation to its property under the Hindu Law, custom and practice was not considered; he was simply assumed to be a trustee. The pith of the judgment consists in the following words:— "We have then here a suit to recover possession of immoveable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration." "Conveyed in trust" is hardly the right expression to apply to gifts of land or other property for the general purposes of a Hindu religious or pious institution. The learned Judges relied on the two decisions of the Allahabad and Calcutta High Courts to which their Lordships will presently refer. The case, however, was practically decided on the exposition of the law in the case of *St. Mary Magdalen, Oxford* v. *Attorney General* (18).

(15) 18 M. 266; 4 M. L. J. 223; 6 Ind. Dec. (N. S.) 535.

(16) 19 M. 485; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043.

(17) 27 B. 363; 4 Bom. L. R. 743.

(18) (1857) 6 H. L. C. 189; 26 L. J. Ch. 620; 3 Jur. (N. S.) 675; 5 W. R. 716; 10 E. R. 1267; 29 L. T. (O. S.) 239; 108 R. R. 62.

With respect to it they say as follows:—

"In further support of this conclusion we would also refer to the already cited case of *St. Mary Magdalen, Oxford* v. *Attorney-General* (18), for though it is a decision on the English Statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law applicable to cases of this class. We propose to refer to that case in some detail, as it probably is not within the reach of most Mofussil Courts in this Presidency."

They set out the provisions of sections 2, 24 and 25 of Will. IV, c. 27, and then add "the section (section 25), it will be seen, corresponds more or less with our Articles 134 and 144 and section 10 of the Limitation Act."

Speaking with respect, it seems to their Lordships that the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Muhammadan Law was overlooked and the case was decided on analogies drawn from English Law inapplicable in the main to Hindu and Muhammadan institutions. That case can hardly be treated as authority in the decision of the present controversy.

The case of *Narayan Manjaya* v. *Shri Ramchandra Devasthan* (19) only followed the view expressed in *Dattagiri* v. *Dattatraya* (17). But the facts, when examined, show a marked difference in the legal position of the parties in the two cases. The *mulgeni* lease under which the defendant claimed title was granted in 1845, and the suit to set it aside was brought somewhere in 1899. Repeated attempts were made by successive managers of the temple to obtain enhancement of rent, but the suits were invariably withdrawn. There was thus clear acquiescence on the part of successive managers in the validity of the transaction. The case fell within the principle of *Chockalingam Pillai* v. *Rayandi Chettiar* (16) and might well have been decided without distrubance of Hindu Law or usage.

The second decision relied upon in support of the respondents' contention is the case of *Behari Lal* v. *Muhammad Muttaki* (20), which related to a Muhammadan "shrine." The origin and history of these "shrines" or *durgahs* as they are called is described compendiously in the judgment in *Piran* v. *Abdool Karim* (21):—

"The *sajjadanashin* has certain spiritual functions to perform. He is not only a *mutwali*, but also a spiritual preceptor. He is the curator of the *durgah* where his ancestor is buried, and in him is supposed to continue the spiritual line (*silsila*). As is well-known, these *durgahs* are the tombs of celebrated dervishes, who in their lifetime were regarded as saints. Some of these men had established Khankahs where they lived and their disciples congregated. Many of them never rose to the importance of a Khankah, and when they died their mausolea became shrines or *durgahs*. These dervishes professed esoteric doctrines and distinct systems of initiation..... The preceptor is called the Pir, the disciple the Murid. On the death of the Pir his successor assumes the privilege of initiating the disciples into the mysteries of *dervishism* or *sufism*. This privilege of initiation, of making Murids, of imparting to them spiritual knowledge, is one of the functions which the *sajjadanashin* performs or is supposed to perform. The endowment is maintained by grants of land to the shrines by pious Moslems. The head of the institution, like that of a Khankah, is called a *sajjadanashin*. The governance (*towliat*) of the endowment is in his hands; he is a *mutwali*, with the duty of imparting spiritual instruction to those who seek it. The property of the 'shrine' is *wakf* 'tied up in the ownership of God.'"

The appointment of the *sajjadanashin* is regulated by usage and practice. This is referred to in the same judgment:—

"Upon the death of the last incumbent, generally on the day of what is called the Sium or Teja ceremony (performed on the third day after his decease), the Fakirs and Murids of the *durgah*, assisted by the heads of neighbouring *durgahs*, instal a competent person on the Gaddi; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to

(19) 27 B. 373; 5 Bom. L. R. 241.
(20) 20 A. 482; A. W. N. (1898) 123; 9 Ind. Dec. (N. S.) 669 (F. B.).

(21) 19 C. 203; 9 Ind. Dec. (N. S.) 581.

communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent."

The duties in connection with the "shrine," apart from giving spiritual instruction, consist in the due observance of the annual ceremonies at the tomb of the saint, the distribution of charity at fasts and festivals, the celebration of the birthday of the Prophet, and the performance of other rites and ceremonials prescribed either by the religious law or by usage and practice. Ordinarily speaking, the *sajjadanashin* has a larger right in the surplus income than a *mutwali*, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the Mohant of a Hindu Mutt, has full power of disposition over it.

In *Behari Lal* v. *Muhammad Muttaki* (20) the plaintiff as *sajjadanashin* sued to set aside the certain mortgages executed by his predecessor in-office, and dated his cause of action from the time he was appointed as *sajjadanashin*. The learned Judges, on a misconception of the rules of the Muhammadan Law and of the judgment of their Lordships in *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* (3), held that the *sajjadanashin* was a "trustee." One Judge held that the suit was barred either under Article 134 or Article 144; the two others held that Article 134 was applicable as the mortgages were created by a "trustee."

Their Lordships have to differ from this conclusion. In their opinion this case was not, in view of the considerations set forth above, correctly decided.

As regards the third case, *Nilmony Singh* v. *Jagabandhu Roy* (22), the suit was brought by the plaintiff as the *shebait* of a Hindu idol to set aside a *dur mokurrari pottah*, executed in respect of certain of the *debuttar* lands by two ladies who acted as *shebaits* during his minority. He alleged that he became entitled to sue for possession of the alienated lands on his appointment to the office of *shebait* by a decree of the Court. The material defence was that the claim was barred. It should be observed that the *dur-mokurrari* was created in 1857 and the suit was brought after 1868. In the judgment of the High Court the words *shebait* and trustee are used as synonymous and convertible terms; the expression is always "*shebait* or trustee." Probably the fact that the *shebait* has duties and obligations in connection with the dedication, influenced the employment of the word "trustee" in a general sense. Mr. Mayne uses the expression in the same general sense to connote the same idea. That the learned Judge did not regard the *shebait* as a trustee in the specific sense may be inferred from his indecisive conclusion as to the application of Article 134 to the plaintiffs' claim. It is quite clear, however, that the legal position of a *shebait* is quite different from that of a trustee to whom the specific property is "conveyed" on a specific trust. In *Prosunno Kumari Debya* v. *Golab Chand Baboo* (23), where the question for determination was whether a particular transaction challenged as invalid had been entered into for such necessity as would make it binding on the dedication, Sir Montague E. Smith, in delivering the judgment of the Board, scrupulously avoided the use of the confusing word "trustee". Dealing with the powers of the *shebait*, he said as follows:—

"But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the *shebait* of property dedicated to the worship of an idol, in the capacity as *shebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Knight Bruce, L. J.

"It is only in an ideal sense that property can be said to belong to an idol;

(22) 23 C. 536; 12 Ind. Dec. (N. S.) 357.

(23) 14 B. L. R. 450; 2 I. A. 145; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102 (P. C.).

the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

The identical question relating to the powers and position of a *shebait* was again before the Board in the case of *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (7), already referred to. With regard to the powers of the *shebait*, their Lordships say as follows:—

"The second question is whether, this being so, the Mohant had power to grant a *mokarari pottah* of the Mouzah. It is well settled law that the power of the Mohant to alienate *debottar* property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity; *Prosunno Kumari Debya* v. *Golab Chand Baboo* (23). In the case of *Konwar Doorganath Roy* v. *Ram Chander Sen* (24) a *mokarari pottah* of *debottar* lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (25), that apart from such necessity 'to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty' in the Mohant. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the *pottah* of 1860, which on the most favourable construction enured only for the lifetime of the grantor, Prananda, who died in 1891, or of the *pottah* of 1896, which, at best, could only be deemed operative during the lifetime of Raghubananda, who died in 1900."

The question came up again for consideration by the Board in the case of *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (26). The suit was instituted by the head of a Mutt to recover possession of certain land which formed part of the endowment of a Hindu temple attached to the Mutt, and had been granted by his predecessor to the defendant by a perpetual rent-free lease in consideration of a small sum of money paid at the time. The contention in that case was that the alienation was for the benefit of the institution; that contention was overruled, and the decision proceeded on the basis that the *shebait* was only a manager. Lord Atkinson, delivering the judgment of the Board, further added:—

"Three authorities have been cited which establish that it is a breach of duty on the part of a *shebait*, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of *debottar* lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the *debottar* estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased."

In that case the leased lands were situated in the street of a village; here they are in the town of Madura.

Reverting then to the judgment in *Nilmony Singh* v. *Jogabandhu Roy* (22), their Lordships think that the expression "trustee" was loosely and, speaking with respect, wrongly applied to the *shebait* in order to bring the case under Article 134. It is to be observed that in none of the three cases was there any examination of the laws and usages governing the respective institutions, or of the Madras decisions, in which the subject had been elaborately considered.

In the present case the character of the endowment in relation to the superior is proved beyond contradiction. It has been

(24) 2 C. 341; 4 I. A. 52; 3 Sar. P. C. J. 681; 1 Ind. Dec. (N. s.) 508.

(25) 13 W. R. P. C. 18; 13 M. I. A. 270 at p. 275; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

(26) 39 Ind. Cas. 722; (1917) M. W. N. 507; 44 I. A. 147; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222 (P. C.).

found concurrently by both the Courts in India that the endowment was held by the defendant No. 26 for the general purposes of the institution. Considerable stress was laid on behalf of the respondents on the entry in the Inam Register that the dedication was for a specific purpose, *viz.*, the worship of the idol. The Inam proceedings did not create any dedication. They were instituted simply with the object of investigating titles to hold lands revenue free as belonging to valid endowments. The gifts were made long before the Inam proceedings by the Hindu kings or chiefs who then held the country. The purposes of the dedication must, therefore, be gathered from established usage and practice, and that has been found by the Courts in India. Again, "valuable consideration" forms the essence of both section 10 of the Limitation Act and of Article 134 of the Second Schedule. Even if this were a specific trust, which it is not, it would be ridiculous to hold that the rent reserved in the grant to the second plaintiff was "valuable consideration."

In the Courts below the plaintiffs rested their claim mainly, if not entirely, on Article 134. Before the Board an alternative argument has been advanced. It is contended that the second plaintiff acquired the title he is seeking to establish by twelve years' adverse possession under Article 144. That Article declares that for a suit "for possession of immoveable property or any interest therein not hereby (*i. e.*, by the Schedule) otherwise specially provided for" the period of limitation is twelve years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by Mohant No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity which does not here arise) a Mohant is incompetent to create any interest in respect of the Mutt property to endure beyond his life. With regard to Mohant No. 2 he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life: and in these circumstances the proper inference is that it was so continued and consequently the possession never became adverse until his death.

There is one other point which deserves notice. The administration of the second Mohant lasted until 1906. In 1905, however, the Mutt went under the management of the Dewan of the Mysore State, under a power-of-attorney granted by the Mohunt and his successor, who may conveniently be designated as Mohunt No. 3. Certain persons to whom the second plaintiff had sub-leased the lands for ten years thereupon obtained from the Dewan during the currency of their term a lease for seventeen years. It is a direct lease from the Dewan as holder of a power-of-attorney from Mohunt No. 3. The lessees thereunder have been in possession for some years prior to this suit, and the object of the present action is not to keep the plaintiff in possession, but to eject these possessors, who hold under a title proceeding from the Dewan and Mohunt No. 3, and to upset the act of administration of Mohunt No. 3 on the ground of rights acquired adversely to the Mutt by lapse of time during the incumbency of Mohunt No. 2.

For the foregoing reasons their Lordships are of opinion that neither Article 134 nor Article 144 applies to this case; that the plaintiffs have acquired no title by adverse possession under either of those Articles; that the judgment and decree of the High Court of Madras must, therefore, be reversed, and the order of the Subordinate Judge dismissing the suit restored with costs here and of the Appellate Court.

Their Lordships will humbly advise His Majesty accordingly.

N. H. & J. P. *Appeal allowed.*

Solicitors for the Appellant.—Messrs. *T. L. Wilson and Co.*

Solicitor for the Respondents.—Mr. *H. S. L. Polak.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 217-B OF 1920.

June 27, 1921.

Present:—Mr. Kotval, A. J. C.

TARACHAND DIPCHAND—PLAINTIFF—APPELLANT

versus

NARAYAN—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 83—"Amount due on mortgage," meaning of.

The expression "the amount due on the mortgage" as used in section 83 of the Transfer of Property Act should be interpreted to mean what would be due according to law on the mortgage or what the Court would allow as due, and not what would be due according to any penal stipulation.

Ayyakutti Mankondan v. *Periasyami Kavandan*, 30 Ind. Cas. 497; 39 M. 579; 2 L. W. 585; 18 M. L. T. 161, followed.

Appeal against a decree of the District Judge, Amroati, dated the 18th December 1919, in Civil Appeal No. 112 of 1919.

Mr. *K. K. Gandhe*, for the Appellant.

Mr. *V. N. Bapat*, for the Respondent.

JUDGMENT.—The principal sum secured by the mortgage with which we are concerned and which is dated the 18th September 1915 is Rs. 600. Interest is to be paid at Re. 1-8-0 per cent. per mensem. The principal is to be paid in six instalments of Rs. 100 each with interest on the whole amount. On a defaulted instalment interest is to be paid at Re. 1-12-0 per cent. per mensem. In default of two instalments the whole amount is to be paid with the penal interest.

The mortgagor on the 30th January 1919 made a deposit under section 83, Transfer of Property Act, in Court of the amount then due with interest calculated at Re. 1-12-0 per cent. simple rate. The mortgagee refused to accept the deposit, simply stating that it was insufficient and brought the present suit in which he claims interest calculated at Re. 1-8-0 per cent. per mensem compound rate. The lower Appellate Court has allowed interest as calculated by the mortgagor and reversing the decree of the First Court, directed the mortgagee to withdraw the sum deposited and to bear all costs of the litigation. The mortgagee appeals and contends that the deposit was not a valid and sufficient deposit under section 83 as it was not a deposit of the full amount due according to the penal stipulation in the mortgage.

The section speaks of the deposit of "the amount due on the mortgage." This, I think, should be interpreted as meaning what would be due according to law on the mortgage or what the Court would allow as due on it, and not what would be due according to the original penal stipulation. I am supported in this view by *Ayyakutti Mankondan* v. *Periyasami Kavandan* (1). The plaintiff must be taken to have understood that the Court would not allow interest according to the penal stipulation, for he does not claim it in this suit. Both parties knew that it was open to the Court to hold that the amount of interest as calculated by the mortgagor was proper, in which case the deposit would not be insufficient, and each took his chance of an adverse decision by the Court on the point. The Court has now found, and the finding is not challenged before me, that the amount deposited was the amount then remaining due on the mortgage and the plaintiff must take the consequences of his refusal to accept the deposit.

The appeal fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

(1) 30 Ind. Cas. 497; 39 M. 579; 2 L. W. 585; 18 M. L. T. 161.

MUNSHI LAL v. RAMASIS PURI.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 127 OF 1920.

December 21, 1921.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

MUNSHI LAL AND ANOTHER—APPELLANTS

versus

Mahanth RAMASIS PURI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25—Letters Patent (Pat.), cl. 10—Remand order by Appellate Court, if can be challenged in final appeal by party not filing Letters Patent Appeal against remand order—Judgment, meaning of.

It is not open to a Judge hearing an appeal from an order passed by a lower Court on remand by a High Court to call in question the earlier judgment of the High Court remanding the case to the lower Court for re-decision after setting aside the order of the Court below. A party not having filed a Letters Patent Appeal against such a judgment of a single Judge remanding the case, cannot question the propriety of the order when the case again comes back to the High Court for final determination. [p. 176, col. 1.]

When a High Court sets aside the judgment of the lower Court and remands the case whether it orders a re-hearing or not it is a final judgment and Letters Patent Appeal lies against such judgment but an order merely referring an issue for trial by the lower Court before the final determination of the appeal is not such a judgment. [p. 175, col. 2.]

Bara Estate Ltd. v. *Anup Chandra*, 41 Ind. Cas. 337; 2 P. L. W. 71; (1917) Pat. 342; 2 P. L. J. 663, referred to.

Letters Patent appeal against a judgment of Mr. Justice Jwala Prasad, dated the 17th August 1920, reported as 58 Ind. Cas. 538.

Mr. *A. B. Mukharji*, for the Appellants.

Mr. *K. Sahay*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal under the Letters Patent by Munshi Lal and Parbhu Narain, the principal defendants in the suit, from a decision of Jwala Prasad, J., dated the 17th August 1920.

The plaintiffs, who are proprietors of 8-annas 3-pies share in Mauza Medhiganj Birwachak, instituted the suit before the Munsif of Patna claiming possession of 11 *cottahs* of land together with mesne profits against the appellants, who claimed it as included in their holding. The plaintiffs also claimed in the alternative assessment of rent.

The case for the appellants was that the land originally formed part of the holding of Gobind Mahto which was mortgaged to them, and that they obtained a mortgage-decree against Gobind and purchased his holding at a sale in execution of their decree in May 1913, and had been in possession ever since that date. The case of the respondents on the other hand was that the land in suit never belonged to Gobind but was part of a holding in occupation of Tilak Keori, and that Tilak having disposed of all his holding, except the 11 *cottahs* in dispute, had abandoned that portion, so that the respondents as landlords were entitled to possession. The respondents have recognised the appellants as tenants of Govind's holding and the main issues between the parties were, first, whether the land originally formed part of Gobind's holding or the holding of Tilak, and, in the latter case, whether Tilak had abandoned it so as to entitle the plaintiffs to possession.

The Munsif before whom the trial originally came found in favour of the plaintiffs and his decision, dated the 5th December 1916, was confirmed on appeal by Mr. Ross, District Judge of Patna, on the 20th July 1917.

The defendants appealed to the High Court from the decision of the District Judge. The appeal was heard by Das, J. The learned Judge considered that the lower Appellate Court had misdirected itself in finding that there was no evidence on the record, apart from the mortgage-decree, that Gobind had ever had any title to the 11 *cottahs* in dispute and in relying on the Record of Rights which was not in evidence in the case. He further considered that the judgment was defective as it contained no finding that Tilak had ever abandoned the land. He accordingly was of opinion that the whole case should be reconsidered by the lower Appellate Court, with special reference to two rent-decrees obtained by the respondents against Govind in 1883 and 1884, which, in addition to the mortgage proceedings, went to shew that Gobind had been in possession of the disputed land. He, therefore, remanded the case to the lower Appellate Court for decision on the 14th May 1919. The re-hearing came before Mr. Ashutosh Chatterjee, then District Judge of Patna, on the 28th June 1919. He found that Tilak had ceased to have any concern with his holding before the suit was instituted and, if the land belonged to him, he must be taken to have abandoned it. He found, however, that the land was not in Tilak's holding but

in that of Gobind and passed by the mortgage sale to the appellants. He further found that the evidence produced by the appellants was sufficient to rebut the presumption arising from the entry in the Record of Rights. He accordingly allowed the appeal, set aside the decree of the Trial Court and dismissed the suit with costs.

From this decision the respondents appealed to the High Court. The appeal was heard by Jwala Prasad, J. The learned Judge found that the decision of Das, J., remanding the whole case for re-hearing was based upon a misapprehension because the rent-decrees had in fact been considered by Mr. Ross in his judgment, and, secondly, because although the Record of Rights was not on the record in the suit, it was the case of both parties that the land in suit was recorded in Tilak's name. He accordingly held that the judgment of Das, J., remanding the case was invalid and consequently that the judgment come to by Mr. Ashutosh Chatterjee on remand was also invalid and could not displace the former judgment of the same Court. He then held that Mr. Ross's judgment, not having been legally set aside, must be restored. With great respect to the learned Judge I am unable to accept his view that it was open to him to call in question the earlier judgment remanding the case for a re-hearing. The effect of that judgment was to set aside the judgment and decree come to by the lower Appellate Court in the plaintiffs' favour. It was, in my opinion, open to the plaintiffs to appeal from the judgment of Das, J., under section 10 of the Letters Patent. They did not avail themselves of that remedy and the decision cannot be called in question in a subsequent appeal against the decree made on remand. The learned Judge whose decision is now under appeal considered that the decision of this Court in *Bara Estate Ltd.* v. *Anup Chandra* (1) applied to facts of the the present case. In the case cited it was held that an order, made by the High Court in second appeal, directing the trial of a certain issue without setting aside the decree of the lower Court, was not a judgment from which an appeal lay under the Letters Patent, and, therefore, the propriety of the order could be called in question when the case came back again to the High Court for the final determination of the appeal. With that decision I entirely agree, but where the Appellate Court sets aside the decree appealed from, whether it orders a re-hearing or not, the decision, in my opinion, is a judgment within the meaning of the Letters Patent, whereas an order merely referring an issue for trial by the lower Court before the final determination of the appeal has not been so regarded. It was no doubt this distinction which induced the Legislature to differentiate between rules 23 and 25 of Order XLI of the Civil Procedure Code. In the former case where the decree is reversed on appeal, the decision is appealable under Order XLIII, rule 1, where an appeal would lie from the decree of the Appellate Court; in the latter case no appeal is allowed under the Code, as an order under rule 25 is in no way final and can be called in question when the appeal is finally determined after the issue has been decided by the lower Court. I think it was not competent to the learned Judge to question the propriety of the order of remand made by Das, J.

That, however, does not determine the question for consideration in this appeal. The learned Judge held that the finding of the lower Appellate Court on remand that the land in suit was part of Gobind's holding was not based upon legal evidence. It seems to me with respect to the learned Judge that in dealing with this part of the case he was in error in failing to distinguish between a document which creates title and a transaction which may be regarded as evidence in support of a title created long ago. He held that because the mortgage of the land in suit given by Gobind to the appellants in 1906 did not necessarily give them a title to the 11 *cottahs* in dispute, it could, therefore, be disregarded as evidence of the fact in issue, namely, whether the land was included in Gobind's holding. The questions of possession and assertion of title by Gobind some years before the dispute arose were, in my opinion, relevant facts upon the issue and cannot be entirely disregarded. I agree that the evidence on either side was of a very meagre kind, but it must not be supposed that the learned District Judge was unmindful of the fact that there was oral evidence

(1) 41 Ind. Cas. 337; 2 P. L. W. 71; (1917) Pat. 342; 2 P. L. J 663.

adduced by the appellants in support of Gobind's possession, whilst there was similar evidence, in support of Tilak's possession given on behalf of the respondents. Little, if any, value could be attached to the oral evidence, but it was for the Court to say which story was best supported by the admitted circumstances and probabilities. The case set up by the respondents that Gobind's holding was originally less than 6 *bighas* 2 *cottahs* 4 *dhurs* according to the Zemindary measurement was conclusively proved to be false in face of the rent decrees of 1883 and 1884, and the learned District Judge rejected the village papers produced by the respondents in support of that part of their case as fabrications, and found that all along Gobind's holding consisted of 6 *bighas* 2 *cottahs* 4 *dhurs*. This alone, he thought, was not sufficient to establish the appellants' case, but it was a material factor in determining the probabilities and on which he was entitled to rely and there was a further fact found by the learned Judge, namely, that Tilak made no claim to the 11 *dhurs* in question. The learned Judge did not expressly rely upon this as a ground for his decision, but it was a fact which he found and which he must have had in mind. He considered, however, that he was entitled to rely upon the mortgage and the fact that the respondents took possession under the mortgage-decree in 1913 without opposition from any one as sufficient evidence to enable him to decide in the appellants' favour. The question for this Court to determine is not whether the weight of evidence was in favour of the appellants or the respondents, but whether there was any evidence to justify the finding. The appellants' title to Gobind's holding is not in dispute and their recognition as tenants of that holding is admitted. The only question for decision was whether the particular plot in dispute was in Gobind's holding or in that of Tilak. This was a question of fact upon which evidence of assertion of title and of acts of possession over the property was material. I think the decree appealed from should be set aside and the judgment of the District Judge dated the 28th June 1919 restored. The appellants will have their costs of this appeal and of the appeal to Jwala Prasad, J.

COUTTS, J.—I agree.

J. P. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE No 322 OF 1921.

August 2, 1921.

Present:—Justice Sir N. R Chaterjea, Kt., and Mr. Justice Chotzner

BATA KRISTO PRAMANIK—PETITIONER

versus

A. K. ROY—OPPOSITE PARTY.

Calcutta Improvement Tribunal—Calcutta Rent Act (III B. C. of 1920), s. 18, 24—Power of President exercising jurisdiction under s. 18—Order for costs passed by him

The jurisdiction exercised by the President of the Calcutta Improvement Tribunal under section 18 of the Calcutta Rent Act is civil jurisdiction, so that in proceedings under that section the President is a Court of civil jurisdiction within the meaning of the Code of Civil Procedure, and under section 141 of that Code as well as under the specific provision of section 24 of the Rent Act the procedure laid down in the Code in regard to suits applies, as far as may be, to such proceedings. [p. 178, cols. 1 & 2.]

Consequently the President being vested with all the powers of a Civil Court for the trial of suits has power to award costs and has inherent power to enforce an order for costs passed by him. [p. 179, col. ; p. 180, col. 1.]

Gobordhone Das v. *Doolli Chand*, 6 Ind. Cas. 210; 25 C. W. N. 661; 33 C. L. J. 551; 22 Cr. L J. 354, applied.

Jogendra Chandra Sen v. *Bibee Wazidunnissa Khatun*, 34 C. 860; 11 C. W. N. 856, *Chaitan Patjosi* v. *Kunja Behari*, 11 Ind. Cas. 207; 38 C. 832; 15 C. W. N. 863; 14 C. L. J. 284, *Nilmoni Singh Deo* v. *Taranath Mukerjee*, 9 C 295; 12 C. L. R. 361; 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 392; 6 Ind. Jur. 547; 4 Ind. Dec. (N s) 846, referred to.

Rule against an order of the Court of the President of the Calcutta Improvement Tribunal, in Revision Case No. 1 of 1920.

FACTS appear from the judgment.

Babu *Surendra Madhab Mallick*, for the Petitioner.—The President of the Calcutta Improvement Tribunal has been invested with all the powers of a Civil Court. See section 24 of the Calcutta Rent Act. See also rules 4 and 24 of the rules framed by the Local Government under the Act. If, therefore, in revising the decision of the Controller of Rent the President of the Tribunal exercises all the powers of a Civil Court, there is no reason why he should not have the power to award costs and also the power to enforce the order for costs. Every Court has inherent power to enforce its own orders. Refers to *Jogendra Chandra Sen* v. *Bibee Wazidunnissa Khatun* (1), *Chaitan Patjosi* v. *Kunja Behari* (2). and *Nilmoni Singh Deo* v. *Taranath*

(1) 34 C. 860; 11 C. W. N. 856.

(2) 11 Ind. Cas. 207; 38 C. 832; 15 C. W. N. 863; 14 C. L. J. 284.

Mukerjee (3).

Babu *Tarakeswar Pal Chowdhury*, for the Opposite Party.—The Calcutta Improvement Tribunal is not a Court of execution. See section 77, sub-section (2) of the Calcutta Improvement Act. If the Tribunal cannot execute its own orders passed under the Calcutta Improvement Act, it seems anomalous that it can do the same under the Calcutta Rent Act. Refers to *Gobordhone Das* v. *Doolli Chand* (4). Then again section 24 of the Rent Act and rule 24 framed by the Local Government make those portions of the Code of Civil Procedure applicable to proceedings under the Rent Act as relate to the regular trial of suits. The portions of the Civil Procedure Code relating to execution have not been made applicable to proceedings under the Rent Act.

Babu *Surendra Madhab Mallick* replied.

JUDGMENT.—This Rule is directed against an order of the President of the Calcutta Improvement Tribunal refusing to execute an order for costs passed by him on the ground that he had no power to execute such an order.

The petitioner applied to the President of the Tribunal under section 18 of the Rent Act for revision of an order of the Rent Controller fixing the standard rent of certain premises which the opposite party occupied as tenant. The President fixed the standard rent and awarded costs, amounting to Rs. 89-8, to the petitioner against the opposite party. The petitioner thereupon applied to the President of the Tribunal for execution of the order awarding costs. The learned President held that he had no power to execute the order for costs awarded by him.

It appears that two contentions were raised before him by the opposite party, namely, first, that the President had no jurisdiction to pass the order about the payment of costs and, secondly, that he had no jurisdiction to execute such an order.

So far as the first question is concerned, the learned President held, and we think rightly, that he is a Court and that the jurisdiction exercised by him under section 18 of the Rent Act is civil jurisdiction, so that in proceedings under that section the President is a Court of civil jurisdiction within the meaning of the Code of Civil Procedure, and under section 141 of that Code as well as under the specific provision of section 24 of the Rent Act the procedure laid down in the Code in regard to suits applies, as far as may be, to such proceedings.

Section 4 of the Calcutta Rent Act lays down that in revising the decisions of the Controller, the President of the Tribunal or the principal Civil Court shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure, 1908, for the regular trial of suits. Rule 4 of the rules framed by the Local Government also provides that in making enquiries under the Act, the Controller or the President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure, 1908, for the regular trial of suits, the substance only of the evidence being recorded as in unappealable cases, and rule 24 lays down that in all proceedings before them under the Act, the Controller and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trial of suits.

Now, the Tribunal being vested with all the powers of a Civil Court for the trial of suits, has certainly power to award costs, as the power possessed by a Civil Court for the trial of suits also includes the power of awarding costs. So far as the power to award costs is concerned, it is not disputed before us that the President has such power. But the learned President was of opinion that he had no power to execute the order for costs and that is also the contention of the opposite party before us.

The learned President relied upon the provisions of section 4 of the Code of Civil Procedure. That section lays down that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit, or otherwise affect, any special or local law now in force, or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force.

But that section only means that the provisions of the Code would not apply if they are inconsistent with the provisions of such special or local law, nor affect any

(3) 9 C. 295; 12 C. L. R. 361; 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 392; 6 Ind. Jur. 547; 4 Ind. Dec. (N. S.) 846.

(4) 61 Ind. Cas. 210; 25 C. W. N. 661; 33 C. L. J. 551; 22 Cr. L. J. 354.

special jurisdiction or special procedure prescribed by any other law.

The learned President points out that under section 77, sub-section (2) of the Calcutta Improvement Act, every award of the Tribunal, and every order made by the Tribunal for the payment of money shall be enforced by the Calcutta Small Cause Court as if it were a decree of that Court. That merely shows that the special Act, *viz*, the Calcutta Improvement Act, has made a special provision for execution of decrees of the Tribunal by some other Court, namely, the Calcutta Small Cause Court. It may be said that if the Tribunal is not to execute its order under the Improvement Act, it is not likely that the Legislature intended that it should execute its order under the Rent Act. Possibly it was a case of omission, but in the absence of any provision that the orders of the President of the Tribunal under the Rent Act are to be enforced by the Calcutta Small Cause Court, we must hold that the President of the Tribunal has the power of enforcing his own order passed under that Act.

On behalf of the opposite party we are referred to the case of *Gobordhone Das* v. *Doolli Chand* (4). We do not think, however, that that case has any bearing on the present case. In that case the question raised was whether rule 4 framed by the Local Government, which makes the provisions of the Civil Procedure Code applicable to enquiries made under the Act by the President, was *ultra vires* in so far as an enquiry into an offence under section 20 of the Rent Act is concerned. Here no such question arises, as the Local Government has power to frame rules for regulating the procedure for the President of the Tribunal in matters like the present.

It is contended that section 24 of the Act and rule 24 make some portion only of the Civil Procedure Code, *viz.*, that relating to regular trial of suits, applicable to proceedings under this Act, and not those relating to execution. But rule 24 lays down that the President shall have all the powers of a Civil Court for the regular trial of suits. It is to be observed that under section 18 of the Calcutta Rent Act, the application for revising the order of the Rent Controller in respect of premises outside Calcutta is to be made to the principal Court of original jurisdiction in the district. Rule 24 does not lay down the procedure to be adopted in such Civil Court, because no provision is necessary to be made with respect to proceedings in a Civil Court. A Civil Court can surely execute its own orders and it would be anomalous that an order for costs under section 18 when passed in a case relating to premises outside Calcutta can be executed, whereas such an order with respect to a case relating to premises inside Calcutta cannot be executed.

In *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3) the question arose whether a Collector under Act X of 1859 could transfer a decree for rent for execution to a Civil Court in another district, there being no provision in that Act for such a transfer. The Judicial Committee, in deciding the question in the affirmative, observed that the Rent Court was a "Civil Court in the sense, that it is deciding on purely civil questions between persons seeking their civil rights" and being a Civil Court in that sense it falls within the provisions of the Civil Procedure Code, and further that "there is nothing in the Act X of 1859 which provides for any execution beyond his (Collector's) jurisdiction, and there is nothing to forbid the conclusion that such executions are left to the operation of Act XXXIII of 1852, or the corresponding portion of Act VIII of 1859." In *Chaitan Patjosi* v. *Kunja Behari* (2) the learned Judges, referring to the above observations of the Judicial Committee in *Nilmoni Singh's case* (3) observed: "this and the other reasons given for the decision seem to leave no room for doubt that their Lordships thought that except upon points expressly provided for by Act X of 1859, the procedure of the Revenue Courts when trying questions arising under that Act must be governed by the Civil Procedure."

It may be said that Act X of 1859 laid down a procedure relating to execution although it did not provide for transfer of decrees to another district, whereas rule 24 under the Calcutta Rent Act merely provides for the procedure for trial of suits. It is unnecessary, however, to discuss the matter further, because even if no provision is made in the Act or in the rules for execution of orders under the Rent Act, once it is held that the President is a Court of civil jurisdiction and has power to award costs,

we think it must be held that the Court has inherent power to enforce the order for costs passed by it. In the case of *Jogendra Chandra Sen* v. *Bibee Wazidunneissa Khatun* (1) Sir Francis Maclean, C. J., observed as follows:—"But it is now urged that the Court has no jurisdiction to do this, which means, in effect, that the Court has no power to enforce its own orders. I hope that is not so, and I do not think that it is so. There is apparently no section in the Code of Civil Procedure which applies directly to the case. But the Code is not exhaustive, and it seems to me that when the Court had jurisdiction, as undoubtedly it had, to make the order as to costs, there is an inherent power in the Court to have that order carried into effect; otherwise the order would be a farce."

We think the principle stated above, *viz.*, that a Court has inherent powers to execute its own orders is applicable to the present case.

We accordingly hold that the President of the Tribunal has power to execute the order for costs passed by him.

The Rule is accordingly made absolute.

We make no order as to costs.

B. N.

Rule made absolute.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 314 OF 1920.

August 30, 1921.

Present:—Mr. Hallifax, A. J. C.

SUNDARLAL—PLAINTIFF—APPELLANT

versus

BISAMBHAR—DEFENDANT—RESPONDENT.

C. P Tenancy Act (XI of 1898), s. 70—Landlord and tenant—Personal law—Hindu Law—Widow—Surrender—Acceleration of succession—Agreement—Resumption.

In all matters of tenancy the personal law applies except in so far as it is limited or altered by the Tenancy Law. [p. 181, col. 1.]

There is nothing in the Central Provinces Tenancy Act to limit a Hindu widow's power to accelerate the succession to her late husband's estate by retiring from the ownership of it. [p. 181, col. 1.]

When a Hindu widow voluntarily surrenders her late husband's estate to his next heir, she is regarded as having died so far as her late husband's property is concerned, and even an ordinary tenancy holding included in the estate passes to his heir, not by transfer but by inheritance. If the next heir in such a case is a daughter, in the Central Provinces she holds only a limited woman's estate in the tenancy, which on her death reverts to her father's heirs, and in default of any such heir the *malguzar* is entitled to resume possession. [p. 181, cols. 1 & 2.]

In the contract creating a tenancy the parties may agree that it shall be subject to any conditions that are not forbidden by the law, *e. g.*, that on the death of a female tenant the tenancy should revert to her father's other heirs, and in default of any such heirs to the landlord. [p. 181, col. 2.]

Appeal against a decree of the District Judge, Raipur, dated the 9th April 1920, in Civil Appeal No. 18 of 1920.

Sir *B. K. Bose* and Mr. *V. Bose*, for the Appellant.

JUDGMENT.—Baijnath Chamar was an ordinary tenant of land in the village of Gordi, of which the plaintiff in this case is the *malguzar*. Baijnath died about 1892 leaving a widow, *Musammat* Kesar, who is still alive and two daughters, *Musammat* Asmat and *Musammat* Manjar, who both married Bisambhar Chamar, the defendant. In 1907 *Musammat* Kesar transferred the whole of the moveable and immoveable property left by her husband, including the ordinary holding, to her two daughters jointly. In token of the transfer she executed an unregistered deed of gift on a one rupee stamp, which was attested by the *malguzar* among others, and the *malguzar* accepted the two daughters as ordinary tenants. Both the daughters died in 1918 and their husband took possession of the holding. The landlord has accordingly sued to eject him as a trespasser, on the ground that by the transfer made by Baijnath's widow his daughters succeeded to the tenancy as his heirs and not as her donees, so that on their death the tenancy would not pass to their heirs but would revert to himself in the absence of any heir to Baijnath.

The suit was dismissed in both the Courts for reasons that are stated as follows by the learned District Judge in the appellate judgment: "It is specifically laid down under section 46 of the Tenancy Act that an occupancy tenant may transfer his rights to any person, who, if he survived the tenan would inherit the right of occupancy. N

such provision is, however, made in favour of an ordinary tenant in section 70 of the Act. Kesar had no more right to transfer her tenancy right to her daughters than she had to transfer them to a stranger. In either case it was open to the landlord to apply to be placed in possession under section 71. Actually, however, he had recognised the transferees as ordinary tenants of the land. In the circumstances I consider that Asmat and Manjar were tenants in their own right by virtue of the contract of tenancy with the landlord and not as heirs to their deceased father. There can be no question of acceleration of succession, as an ordinary tenant is not entitled to accelerate succession by transferring his right to his heir."

It is clear from the pleadings of the parties and from the unregistered deed of gift, which is admitted by them both, that what *Musammat* Kesar transferred to her daughters was not merely the ordinary tenancy but absolutely all the property, moveable or immoveable, that she had inherited from her husband, and that her reason for doing so was that they would, in any case, inherit it later on as her husband's heirs at her death. This is not a transfer but an acceleration of the succession, a sort of suicide in respect of the property. Now in all matters of tenancy the personal law applies except in so far as it is limited or altered by the Tenancy Law, and there is nothing in the Tenancy Act to limit a Hindu widow's power to accelerate the succession to her late husband's estate by retiring from the ownership of it. It is true that the provision that an occupancy tenant can transfer his holding to the next heir must imply that an ordinary tenant cannot. We are not, however, dealing with a transfer at all but with a devolution, which under the Hindu Law can take place during the lifetime of the widow.

Any exactly similar devolution does frequently take place when a widow marries again. She is regarded as having died, so far as her husband's property is concerned, and even an ordinary tenancy holding included in it passes to his heirs not by transfer but by inheritance. If the next heir in such a case is the daughter, in the Central Provinces she holds only a limited woman's estate in the tenancy which at her death reverts to her father's heirs. It seems to me impossible to differentiate between the cases of a widow who commits metaphorical suicide in respect of the property by a second marriage and of one who does so by a voluntary retirement from the ownership of it. I hold, therefore, that *Musammat* Asmat and *Musammat* Manjar were not absolute owners of the tenancy, but held a limited estate in it so that it passed on the death of the survivor of them to their father's heirs and not to their own heir, their husband, the defendant. In the absence of any heir of Baijnath the tenancy lapses and the *malguzar* is entitled to resume possession.

There is also another point of view from which the case might be regarded. In the contract creating a tenancy the parties may agree that it shall be subject to any conditions that are not forbidden by the law, and in this case the agreement between the landlord and Baijnath's daughters was that they should be tenants of the land with only such an interest in the tenancy as they would have if they had inherited it from their father, that is to say, that it should revert after them to their father's other heirs, and in default of any such heirs to the landlord. There is nothing in the Tenancy Act to prevent such a condition being attached to a contract of tenancy. In fact tenancies subject to that condition are of the commonest occurrence. *Musammat* Kesar's own was one. The decree of the lower Appellate Court is accordingly set aside and in lieu thereof the decree of ejectment for which the plaintiff sued will issue. The defendant will pay all the costs in all three Courts.

Z. K.

Appeal allowed.

TARAMONI v. GOPAL DAS.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 190 OF 1919.

July 22, 1921.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Cuming.

TARAMONI CHAUDHURANI—PLAINTIFF—APPELLANT

versus

GOPAL DAS CHAUDHURY—DEFENDANT—RESPONDENT.

Appeal—Burden of proof—Relief, different, whether can be given—Survey and thak *maps—Presumption—Rebuttal.*

In an appeal it is for the appellant to clearly establish that the judgment under appeal is wrong. [p. 132, col. 2.]

Where a plaintiff sues for certain land on the basis of a survey map, though a reference is made to a *thak* map in plaint as well as in issues, and fails, he cannot, in appeal, claim that he should be given a decree for the land to which he may be found entitled on the basis of the *thak* map. [p. 185, col. 2.]

There is a *prima facie* presumption in favour of the accuracy of survey and *thak* maps, and it is for the party impugning their correctness to show that they are inaccurate. Such a map may be shown to be incorrect by the admission of parties or adjudication by a Court or by evidence intrinsic or extrinsic to the map in question, but such evidence must be clear and certain. [p. 194, col. 2; 185, col. 1.]

Appeal against a decree of the Subordinate Judge, Fourth Court, Mymensingh, dated the 24th March 1919.

FACTS appear from the judgment.

Babu *Jogesh Chandra Ray* (with him Babus *Gobinda Chandra Ray*, *Gunada Charan Sen* and *Akhil Bandhu Guha*), for the Appellant:—The appeal arises out of a suit for *khas* possession of the properties described in schedule 1—4 and establishment of title to derive profits from the river Bhogai as described in schedule 5 of the plaint. The suit has been dismissed by the learned Subordinate Judge. There are two Mouzahs, Gorkanda and Chhitpara, belonging to the plaintiff. The adjoining Mouzah ,Lalitabari, belongs to the defendant by right of purchase in 1905. In the year 1855 a *thukbast* was made of these *mouzahs*. A revenue survey was also made in 1857. At the survey the river Bhogai, which separated the two *mouzahs*, was fixed as the boundary line between the two *mouzahs*. In course of time, however, the river gradually went westward and entered into these two *mouzahs* and in 1885 there was a further change of the river course, with the result that the land belonging to the plaintiff has been diluviated and has reformed since on the east bank of the river as existing at present. Some of these reformations are either firm lands or *chars*. The defence is that the lands on both banks of the river belong exclusively to the defendant and appertain to his Mouza Lalitabari. He disputes the correctness of the survey map and says that the river has not changed. Now the lands in dispute were acquired by the plaintiff in 1841 who established a *hat* opposite the defendant's *hat* at Lalitabari. There were criminal proceedings. In 1876 there were also a suit by the defendant's predecessor in respect of this *hat*. There the river Bhogai was described as forming the western boundary of the *hat*. That suit came up to this Court and has been reported as *Gopi Mohun* v. *Taramoni Chowdhrani* (1). there was another suit in 1876 between the plaintiff and the defendant's predecessor, in which the latter recovered two pieces of land on the east bank of the river. In that case it was not possible for us to produce the survey map. My contention is that the survey map is correct. (Reads and discusses evidence.) I submit we are entitled to such land as has been shown to belong to us in the *thak* map. The learned Court below was wrong in giving effect to the defendant's contention that the survey map was not correct. The evidence rebutting the map ought to be clear and certain. The test of landmarks is not safe to rely upon. The evidence as to the trees is not trustworthy. As regards the high lands I submit these might have been pushed up by an earthquake which frequently occurs in the District of Mymensingh. Then there are certain settlement plots to the north of the river as shown in the survey map, and these are *char* lands. This shows that the river once flowed there. That goes also to prove the correctness of the survey map. I submit the *amin's* report is wholly wrong. The case ought to go back for further and fresh hearing upon a correct report of the *amin*.

Babu *Dwarkanath Chakraburty* (with him Dr. *Sarat Chandra Basak*, Babus *Bimal Chandra Das Gupta* and *Prafulla Chandra Nag*), for the Respondent:—The whole dispute is about my *hat*, which the plaintiff

(1) 5 C. 7 (F. B.); 4 C. L. R. 309; 2 Shome L. R. 217; 2 Ind. Dec. (N. s.) 617.

wants to appropriate to herself. The theory about the change in the course of the river was never suggested at any time before, not even in the suit of 1876, and in that suit it was found that there had been no change of the river from the time of the survey up to the date of that suit. The plaintiff has practically admitted that there was no change in the river in 1885. Further in the suit of 1876 they did not care to produce the survey map. We have proved the incorrectness of the survey map and the learned Subordinate Judge has found it to be incorrect. The finding is that the plaintiff has wilfully suppressed certain papers because they would prejudice her case. The evidence adduced in the case has clearly made out that the defendant is the owner of the lands in dispute. Further at the trial the plaintiff did not rely upon the *thak* map. She merely relied on the revenue survey map. On the basis of the *thak* map her case is bound to fail. The landmarks now existing would not be consistent with the survey map. The appellant is bound to prove the incorrectness of the survey map before the case can succeed. The *amin* who was on the *locale* has found that the river could not have run in the position in which it has been depicted in the survey map. I submit the findings of the learned Court below are unassailable. The plaintiff has not been able to make out a case for remand. The appeal ought to be dismissed.

Babu *Jogesh Chandra Ray* replied in brief.

JUDGMENT.—The question in dispute is as to the site of the boundary between the Mouzahs Garkanda and Chhitpara, which belong to the plaintiff, and Lalitabari, which belongs to the defendant, purchased by him in 1905 (1312). The value of the land in question is not much, but the parties who are both rich Zemindars have been quarreling for years past and it is said that the carrying on of a certain *hat* is indirectly concerned in the decision. The case has lasted some ten days, the parties being indisposed to settle the matter. The Subordinate Judge has held that the river which forms a boundary between the properties of the two parties has been incorrectly shown in the revenue survey map, at least so far as it passes between the Mouzahs Garkanda and Chhitpara on the one hand and Lalitabari on the other. A long argument has been addressed to us on the various maps and the other aspects of the case. Whatever value may be attached to some of the points made by the appellant, it must be remembered that this is an appeal and that whatever might have been the decision in the case at the original hearing, it is for the appellant to clearly establish that the judgment in appeal is wrong.

A *thukbast* was made of these *mouzahs* in 1855 and a Revenue Survey in 1857. At the survey, the boundary line between there two *mouzahs* was fixed in the middle of the river, above mentioned, which is called Bhogai and which river separated them. It is stated in the plaint that in the course of time the Bhogai river gradually went westward and entered into the plaintiff's two *mouzahs* and afterwards at the trial, that there was a sudden change in the river on some day in 1885. It is thus alleged that there has been a change in the course of the river from what it was at the time of the survey measurement, with the result that some of the land belonging to the plaintiff has been diluviated and has since reformed on the east bank of the river, either as firm lands or as adherent *chars* on the east of the present existing river, the centre of which was the boundary line and which river now flows in the plaintiff's *mouzahs*, the exception mentioned being a small island *char*, which is stated by the defendant to have been detached from the eastern bank after the survey.

The property in dispute is comprised in five schedules. The last including the river is now under attachment of a Criminal Court. The plaintiff claims *khas* possession of the property in schedules Nos. 1, 2, 3 and 4 and establishment of her title to derive profits from the river in schedule 5. She also claims *wasilat* in schedules 1 and 2 from the defendant for three years prior to the institution of the suit till the delivery of possession. As regards the property in schedule 2 which includes the *hat* itself, it is admitted in appeal that this cannot be recovered since the suit in this respect is barred by adverse possession.

The defendant claims the lands in schedules 1 to 4 as appertaining to his Mouzah

Lalitabari. He tried to assert the exclusive right to be the owner of that *mouzah* and to the river with both of its banks. He denies that any land has been curtailed from the plaintiff's land as alleged. He originally claimed both the land and water in suit as his own and says that both the *thak* and the survey maps are erroneous. This claim is, however, now abandoned, so far as regards the river in respect of which the defendant claims up to the middle line of its course, and the appeal has been argued on the footing that the boundary line between the plaintiff's and defendant's property is the middle line of the river Bhogai as the river was at the time of the survey in 1857.

For the plaintiff it is alleged that the survey map was correct and that the river has changed its position. What the defendant says is that the survey map is incorrect and that the river has not changed. The main issue then is whether the survey map is correct or not and whether the river has changed.

The plaintiff acquired her land in 1841 and shortly after, she established a new bazar opposite the defendant's *hat* at Lalitabari and then disputes commenced. The defendant's *hat* is mentioned as being in existence in 1795, having originated in 1783. In 1841 there were criminal proceedings against the defendant's predecessor and cross-charges. In 1876 there was a suit by the defendant's predecessor in respect of this *hat*, the boundaries of which are given in the plaint. The western boundary is given as the Bhogai river. The case came up on appeal to the High Court and was referred to a Full Bench [*Gopi Mohun* v. *Taramoni Chowdhrani* (1)]. This was followed by a suit (No. 57 of 1876) between the same parties. The defendant's predecessor, plaintiff in that suit, recovered two pieces of land which are located as lands on the east of the bank of the Bhogai river, which lands are still in the same position and have been identified by the *amin* as on the eastern bank of the present river Bhogai. The defendant in that suit claimed the lands as reformed lands and no suggestion was made that the river had changed. On the contrary the judgment, as it stood, showed that the river had undergone no change from the date of the survey up to 1857. According to the plaintiff's case, however, made at the trial the change in the river occurred suddenly in one day in 1885 at the time of an earthquake. This involves the assertion that there was no change between 1876 and 1885. From the true position of the river as indicated in the survey map the change was, according to this case, very considerable and obvious. Yet as the learned Judge has pointed out, it is a strong circumstance against the plaintiff's case that she never laid any claim to land on the Lalitabari side of the river till shortly before the institution of the suit, though she had occasions to do so both in the last settlement survey and in the proceedings under sections 144 and 145 of the Criminal Procedure Code. This is strong evidence against her in that the parties had been fighting with bitterness over the site of the old *hat*. It is practically conceded before us that this story of the sudden change of the river in 1885 is not true, and was probably a device to meet the case of possible estoppel, having regard to the judgment in the suit of 1876 to which we have referred. As regards this litigation of 1876 it is said that it did not, at that time and for the purposes of that suit, suit the appellant to produce the survey map to show the true facts to the Court; rather the facts were made subservient to the plaintiff's case. These two admissions bear out the learned Judge's adverse comment on the plaintiff's suit that he rarely came across cases in which respectable Zemindars could take recourse, "to so much inequities and cunningness." The appellant, however, cannot throw up her case in this way when she finds it inconvenient, in order to ask the Court to go on the assumption of another state of facts. If, however, we exclude this evidence of change in the river, there is none except so far as an inference of change is to be drawn from the survey map, if the same is held to be correct. There is a *prima facie* presumption in favour of the accuracy of the *thak* and survey maps and it is for the defendant-respondent to show that they are incorrect, if he so alleges. The learned Judge has held that he has shown that the survey map is incorrect. The fact that no claim was made till shortly before the suit remains, but its significance is no doubt diminished if there were a change in the river which was of a gradual

character, a supposition contrary to the case made by the appellant's evidence. Whatever may be the justice of the finding of the learned Judge as regards the appellant's conduct of the case, (conduct which may have affected the value of the oral evidence adduced in support of it) the appellant contends that such a finding cannot affect the value of the evidence derived from the maps, particularly from the survey maps. To some extent, however, the evidence as to the change of the river has a bearing on the question before us, because if the river has changed then the survey map may be correct, as the appellant contends. Whereas if there has been no change or substantial change as the defendant contends, then it follows that the survey map is incorrect in so far as it establishes that the survey line of the river goes through certain existing landmarks.

As I have stated, the presumption is in favour of the appellant as regards the maps, although it is to be remembered that this is an appeal in which the onus is upon her to establish that the learned Subordinate Judge was wrong when he found that the survey map had been proved to be incorrect, Such a map may be shown to be incorrect by the admission of parties or adjudication by a Court or by evidence intrinsic or extrinsic to the map in question. We have admittedly in the present appeal nothing to do with either of the first three of these cases but with the fourth only, it being alleged and found by the learned Subordinate Judge that the survey map is erroneous by reason of certain extrinsic circumstances with which I will deal. To these circumstances may be added, as bearing upon this point, the very important evidence of possession. The absence of claim by the plaintiff, so far as it goes and so far as it is held not to have been explained, is inconsistent with the change in the course of the river which she alleges. On this point the learned Subordinate Judge states that the parties had been for a long time fighting bitterly, that all the time the plaintiff had been the aggressor and had shown a resolution to destroy the defendant's *hat* somehow or other, that if the plaintiff had really any land of her *mousahs* on the Lalitabari side—specially on the Bazar site of Lalitabari—and the defendant had taken wrongful possession of the same in the latter part of 1315, then it could hardly be imagined that the plaintiff would have remained silent during the survey settlement which took place in the years 1910 and 1911. No doubt the appellant has given evidence for the purpose of explaining these facts. But the learned Judge, who saw the witnesses and heard evidence, has not accepted their story. He further found that the plaintiff had wilfully suppressed certain papers because they would be of material help to the Court and prejudicial to her case. The plaintiff's officer Jatindra was present in Court but not examined. The people of the Taraganj Bazar also dealt with the defendant, as owner of the land on the Lalitabari side. The Judge observes that the plaintiff did not examine a single respectable *mohajan* of that Bazar.

Before proceeding to a discussion of certain other circumstance, namely, the landmarks which are said to show the incorrectness of the revenue survey map, I may observe that in this appeal it was argued that if the appellant were not successful in showing that the learned Judge was wrong in his conclusion as regards the survey map, at any rate, the plaintiff appellant is entitled to such land as, she might be able to show, belonged to her according to that *thak* map. There was, it is true, a reference to the *thak* map both in the plaint and in the issues. But as the learned Judge has pointed out, what the plaintiff relied upon at the trial was not the *thak* map but the revenue survey map, and it is obvious why this should be so. For it is admitted that only upon the establishment of the revenue survey line of 1857 could the plaintiff hope to obtain what is her main object in this suit, the possession of the Lalitabari *hat*. On the basis of the *thak* map, if correct, she would not establish her title to the *hat*. We think that in the circumstances, as the case was made and based on the survey map and as this was really the subject of discussion in the lower Court, we should confine ourselves to the survey map. This case is not like that of a plaintiff who suing for a certain sum establishes his right to a lesser sum in respect of which he is entitled

to an award. This is a case in which the boundary line and, therefore, relief to be given differ as such line is ascertained according to the *thak* or survey map respectively: the former of which, it is to be observed, has been found to be incorrect in several particulars by the *amin*. It was to the survey map that the argument and the main evidence were directed in the lower Court. Had we come to a contrary conclusion on this head, it might have been necessary to remand the case for a re-hearing on the question whether the plaintiff was entitled to any, and if so, what relief on the basis of the *thak* map. The question then is whether the survey map is correct and whether it is consistent with certain landmarks. For the defendant-respondent it is contended that it is not so consistent and that certain landmarks, such as high lands and trees, are shown to be in the bed of the river if the survey map be laid down in the actual locality. The appellant contends that this class of evidence is not of a sufficiently strong and weighty character to overcome the presumption of accuracy which is attached to this class of maps. The question in this appeal then resolves itself into one of fact, namely, allowing that there is such presumption in favour of the survey map, a presumption which may be rebutted, are the facts which have been proved in this case, sufficient to rebut that accuracy; or rather has the appellant made out a sufficiently strong case, which would justify us in holding that the learned Judge was in error when he held that the circumstances to which he referred were sufficient to rebut the presumption of the survey map's accuracy?

The *amin* has found that if the respondent has established the existence and position of the landmarks alleged by him, then the survey map is incorrect. The question then is narrowed down to this; do these alleged landmarks show that the survey map is incorrect so far as the river is concerned? The learned Vakil for the appellant has pressed the argument upon us that it is a strong thing to hold that a survey map is incorrect. It may be conceded that the evidence in rebuttal of an official survey map as this should be clear and certain. The learned Judge, however, has held that it is incorrect and it is, therefore, for the appellant to show us clearly that he is wrong. It is not sufficient to show that something may be said against the judgment or that if the case were now being heard for the first time that the presumption in favour of the map has not been rebutted. The appellant must show clear reasons for reversal of the judgment on this question of fact.

In dealing with the question of the correctness or otherwise of the survey map clearly considerable weight must be attached to the opinion of the *amin*, which he drew from certain conditions which he observed on the spot, which led him to come to the conclusion that the river could not have run in the position which the survey map would represent it to have run.

In considering the probabilities of the correctness or otherwise of the survey map it is to be remembered that the Commissioner had no field book from which to relay the position of the river. This he states in his evidence. There is nothing to show whether a field-book was or was not prepared by the party who did the delineation of the boundary after the traverse had been made. If there was no field-book the likelihood of error is largely increased. The fact remains, however, that no field-book was available to the *amin* to relay the position of what may be called the survey river.

There are two main reasons on which the *amin* relies in coming to the conclusion, namely, the presence of certain old trees and high land on the site where the survey river is shown to be at the time of the survey in 1857. The evidence about the trees is not very strong, for it may be argued to be a matter of uncertainty to what trees the witnesses are deposing who depose as to the age of the trees. No expert evidence as to the age of the trees was given. The *amin* himself wrote that he could not say whether a tree was 30 years old or 100 years old. One of the plaintiff's own witnesses has deposed to the existence of a certain tree at the time of survey in 1857. The witness has given his age as 100 years and if this is correct, he could no doubt have seen the trees in question at the time of the survey or before that time. It may, however, be argued, as it has been, that there may still be a question as to the identifying

of the tree he is deposing about. It would not be safe perhaps to rely on this circumstance alone. But in dealing with the evidence as to the high land we are on firmer ground. The *amin* has found that in the site of the survey river there are certain high lands, in some places 12 feet high, and he gives it as his opinion that looking at these high lands the river could not have flowed over them at the time of the revenue survey of 1857. It has been suggested that these high lands might have been pushed up by an earthquake, an occurrence to which the district of Mymensingh is frequently exposed. If this had been so, it seems likely there would have been some evidence on this point. The appellant has tried to prove the correctness of the survey map by showing that there are certain settlement plots to the north which are on the site of the survey river as shown in the map of 1857 and that these plots are *char* land, and hence he argues that the river once flowed there and that the fact proves the correctness of the survey map. This fact would at the most prove that the river at some time or other did flow there, but it would not prove that the river was flowing there in 1857, which is the issue in the present case.

Taking all the facts and circumstances of the case into consideration, we are not prepared to say that the Trial Court was wrong in relying on the *amin's* evidence to show that the river could not have flowed at the time of the revenue survey of 1857 in the site on which the revenue survey map of 1857 would represent it to have flowed and that, taking this view of the evidence, the Trial Judge was wrong in holding that the survey map, in so far as it represented the boundary between the plaintiff's and defendant's *mousahs*, was incorrect.

The result is that the appeal fails and is dismissed with costs.

There was a cross-objection by the respondents which was not pressed. It was withdrawn and, therefore, no order is made as to the costs thereof.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 59 OF 1921.
October 13, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

K. & J. COOPER—DEFENDANTS—APPELLANTS

versus

MACMILLAN & CO.—PLAINTIFFS—RESPONDENTS.

Copyright—Matter copied from non-copyright work—Notes—Original work—Abridgment.

The plaintiffs, a firm of publishers, had, in 1911, brought out in England an abridged edition of North's Translation of Plutarch's Life of Alexander, edited by a Mr. Parr, for the use of Secondary Schools. The abridgment was not effected by giving the substance of the original work in the language of the editor, but by excising various portions of the original work which were not considered suitable for the purpose for which the book was published. The portions which were retained were divided into an introduction and various Chapters, marginal notes were added and at places where original matter had been left out, transitional notes were inserted so as to link up the thread of the narrative. At the end there were a few pages of notes. This book was prescribed by the University of Bombay in October 1917 as a text book for the Matriculation Examination of 1919. In January 1919, the defendants published another abridgment of the same original work. The book was styled Plutarch's Life of Alexander, North's Tanslation, with notes prepared by Mr. Darby, and contained (*a*) a statement of the contents, (*b*) an introduction divided into sections as to the author, the translator, Phillip of Macedon, a sketch of Alexander's career and the character of Alexander, (*c*) the text consisting of selected passages, which in fact included all the passages selected by Mr. Parr for the plaintiffs' publication and certain other passages from North's Translation, with marginal notes, (*d*) notes and additional notes, (*e*) a summary, and (*f*) a map Some of the notes in the defendants' book coincided with those in the plaintiffs' book. These notes were very elementary and such as any annotator, having sufficient familiarity with the ancient history and mythology of Greece, would be able to reproduce. The plaintiffs complained that the defendants had infringed their copyright in the text and in the notes:

Held, (1) that as regards the text, North's Translation of Plutarch's Life of Alexander was available to any one who wished to reprint it and that when the plaintiffs chose for their book about half of the original translation, they were not abridging it in the legal sense of the word, and that looking at their text by itself, it could not be considered an original literary work so as to be entitled to copyright; [p. 189, col. 2.]

(2) that as regards the notes, considering them as a whole and taking into consideration the nature and

the extent of the use of the plaintiffs' notes in preparing the defendants' notes, it could not be said that that use was unfair ; [p. 192, cols. 1 & 2.]

Macmillan v. *Suresh Chunder Deb*, 17 C. 951 at pp. 960, 961; 8 Ind. Dec. (N. S.) 1180, referred to.

(3) that, therefore, there was no infringement of the plaintiffs' copyright either in respect of the text or in respect of the notes. [p. 190, col. 2; p. 193, col. 2.]

Per *Macleod, C. J.*—Skill and labour by themselves will not make up for the want of originality, while there is nothing original in picking out for publication portions of a work which is not copyright. [p. 189, col. 2.]

In law a selection of passages from a non-copyright work is not entitled to protection. [p. 190, col. 2.]

Per *Shah, J.* —There can be no copyright in respect of matter which is word for word part of a non-copyright work. [p. 193, col. 1.]

The word "original" in the definition of copyright should be so construed as to give to the person who has used his brain the benefit of that use as far as possible, but it cannot be held that matter which is word for word taken from a non-copyright work, though only partially, constitutes an original work. [p. 193, cols. 1 & 2]

Independent labour must be apparent, and the reduction of the size of a work by copying some of its parts and omitting others, confers no title to authorship; and the result will not be an abridgment entitled to protection. To shorten a work by leaving out the unimportant parts is not to abridge it in a legal sense. To abridge, in the legal sense of the word, is to preserve the substance, the essence of the work, in language suited to such a purpose; language substantially different from that of the original. To make such an abridgment requires the exercise of the mind; labour, skill and judgment are brought into play and the result is not merely copying. To constitute a proper abridgment, the arrangement of the book abridged must be preserved, the ideas must also be taken, and expressed in language not copied, but condensed. To copy certain passages and omit others, so as to reduce the volume in bulk, is not such an abridgment as the Court would recognise as sufficiently original to protect the author. [p. 193, col. 2.]

Mr. *Setalvad* (with him Mr. *B. J. Desai*), for the Appellants.

Messrs. *Coltman* and *M. V. Desai*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—This is an appeal from the decision of Fawcett, J., decreeing the plaintiffs' claim.

The plaintiffs, a firm of publishers, had, in 1911, brought out in England an abridged edition of North's Translation of Plutarch's Life of Alexander edited by a Mr. Parr, for the use of Secondary Schools.

The abridgment was not effected by giving the substance of the original work in the language of the editor, but by excising various portions of the original work which were not considered suitable for the purpose for which the book was published. The portions which were retained were divided into an introduction and various Chapters, marginal notes were added and at places where original matter had been left out, transitional notes were inserted so as to link up the thread of the narrative. At the end there were a few pages of notes.

On the 4th October 1917 the University of Bombay published a list of the Text Books in English prescribed for the Matriculation Examination of 1919. Amongst them was "Plutarch's Life of Alexander" translated by North (Macmillan & Co.). The educational year would commence in March 1918 and any student who wished to enter for the examination would ordinarily seek to buy the plaintiffs' book.

Sometime in November the defendants, who are also educational publishers, issued hand bills containing a list of the books published or about to be published by them for the Bombay Matriculation, 1919. Amongst them was the following: "Plutarch's Life of Alexander (North's Translation abridged) edited with introduction, full notes, etc., by the Rev. A. Darby." Beneath the list of books was this advertisement :—

"In response to (illegible) should bring out reliable annotated edition of English texts prescribed for the Bombay Matriculation examination, we have this time published such editions in the confident hope that they will prove equally useful to teachers and pupils.

"These editions will be found more useful than any published in England as having been specially prepared for Indian pupils by those competent to understand their needs; and in every respect more reliable than similar editions brought out in this country by editors more or less incompetent for the tasks they undertake."

This was clearly an invitation to pupils and teachers to purchase the defendants' work instead of the plaintiffs'.

Mr. K. M. Cooper, a partner in the defendants' firm, described how he came to publish the defendants' book. He said that he came to know in October 1917 that the University had prescribed North's Translation of Plutarch's Life of Alexander as published by Macmillan & Co. He had a copy of plaint-

iffs' book and a copy of Rouse's edition. He thought plaintiffs' book had cut down the original too much, thus omitting many interesting episodes and passages which had particular reference to India. He asked Mr. Darby to help him by writing the notes. It is admitted that a copy of plaintiffs' book was sent to Mr. Darby and the first notes which Mr. Darby sent to the defendants referred to the pages in plaintiffs' book. Afterwards Mr. Darby sent additional notes on defendants' book, but the defendants, apparently being in a hurry to publish their book, printed Mr. Darby's notes in two parts just as they received them. Owing to various circumstances beyond their control, the plaintiffs were unable to get a sufficient number of copies of their book out to India in time for the commencement of the educational year, with the result that the defendants' book being then the only one available, the first edition was sold out.

On the 20th June 1918, the plaintiffs wrote to the defendants complaining that the defendants had infringed the plaintiffs' copyright in the plaintiffs' book by publishing their book and asked defendants to furnish them with certain particulars regarding defendants' book, to deliver to the plaintiffs all copies remaining unsold, to pay to the plaintiffs the profits made by the sale of defendants' book, to apologise for the infringement, and to undertake not to infringe thereafter the plaintiffs' rights.

The defendants replied that their abridgment was independent, and was the result of skill and labour of the editor who made it. There were material differences between the two abridgments.

The plaintiffs filed this suit on the 30th October 1918 claiming an injunction, an account of the copies sold of defendants' book, delivery of copies unsold, and the profit made by the defendants by way of damages.

In their written statement the defendants denied that they had copied the text of the plaintiffs' work. They denied that there had been anything original or peculiar in the method followed by the plaintiffs in abridging the various portions of the text. There was no other alternative left to anybody abridging the text and deleting unsuitable portions but to adopt the method followed in the two abridgments. They denied that the additional matter was included by the defendants to avoid, if possible, too close and direct an imitation of the plaintiffs' work as alleged in the plaint. The defendants' book was an independent abridgmet and was the result of great skill and labour on their part and had the special features as detailed in paragraph II.

The following issues were raised at the trial :—

(1) Whether the plaintiffs as publishers of an abridged edition of *Plutarch's* Life of Alexander were entitled to a copyright therein ?

(2) Whether the publication of the plaintiffs was such original literary work as was entitled to copyright ?

(3) Whether the defendants by their publication had infringed the copyright, if any, of the plaintiffs' publication ?

The first issue was not pressed.

The second and third issues were found in the affirmative.

Evidence was taken at great length and in the most minute detail, much of which would have been found unnecessary if the question had first been considered how much of the plaintiffs' book was copyright. I think there can be no doubt that the defendants intended to publish a book which students should be encouraged to buy instead of the plaintiffs' book, and Mr. Cooper's denial of such an intention was obviously false. But the important point to notice was that North's Translation of Plutarch's Life of Alexander was available to any one who wished to reprint it. When the plaintiffs chose for their book about half of the original translation, they were not abridging it in the legal sense of the word, and looking at their text by itself, it could not, if published, have been considered an original literary work so as to be entitled to copyright. Skill and labour by themselves will not make up for the want of originality, while there is nothing original in picking out for publication portions of a work which is not copyright.

Once this is recognised, the case is very much simplified. The original portions of the plaintiffs' book are the marginal and transitional notes, and the notes at the end, while it may be said that the division of the text into an introduction and various Chapters possesses some element of originality. There are also amongst

the contents a map, an introduction, an analysis of contents, chronological table, glossary and some test questions. Before us it was not contended that the defendants had been guilty of piracy with regard to these. Admitting that the plaintiffs were entitled to protection to this extent, in what respect can it be said that the defendants' book infringes the plaintiffs' rights? The defendants have not divided their text, their marginal notes are not the same as the plaintiffs', and they have omitted the transitional notes entirely. The annotations to the text at the end of the book remain. The defendants sent the plaintiffs' book with Blackies' book and their own, with no name on it, to Mr. Darby, so that he might write notes, but they did not tell him which book was to be annotated. So Mr. Darby at first annotated the plaintiffs' book as he knew that had been prescribed by the University, and his notes necessarily referred to the pages in the plaintiffs' book. When Mr. Darby was informed that the defendants' book was to be annotated, he wrote out additional notes for the additional passages which appeared in the defendants' text, but the defendants were so anxious to get their book published that they printed Mr. Darby's notes in two parts just as they were received. Now North's Translation uses mediæval English so that there are many expressions which would not be easily understood by Indian students and Mr. Darby's main object in writing his notes was to render these expressions into modern English, while the usual information regarding places, persons and peoples and technical terms mentioned in the text would necessarily have to be given. A minute comparison between Mr. Darby's notes and those in the plaintiffs' book resulted in the discovery that some of Mr. Darby's notes of the latter class coincided with the plaintiffs' notes. Undoubtedly Mr. Darby had the plaintiffs' notes before him. In some cases instead of going to a dictionary or other book of reference he may have saved himself the trouble by accepting the information given by the plaintiffs' notes, in other cases there might be a difficulty in using different language to explain the same term. But all the instances which could be collected appear in an appendix to the judgment and considering all the circumstances, it would be difficult to say that a few instances of similarity in the explanation of classical names necessarily constituted an infringement of plaintiffs' copyright. Another of plaintiffs' complaints was that the defendants, where it was necessary owing to the excision of a passage in the original text to transpose a word or two so that their text should run smoothly, have adopted the same method of transposition as the plaintiffs, but even if this were a legitimate cause of complaint it seems too trivial to be noticed. Admitting that the defendants were at liberty to excise a particular passage which the plaintiffs had excised, the alteration of a word or two in the passage immediately following the excised passage would often follow as a matter of course.

It seems to me that the plaintiffs were exceedingly ill-advised in bringing this action unless they could satisfy the Court that in law a selection of passages from a non-copyright work was entitled to protection, since the mainstay of their case was the fact that the defendants included in their text the whole of the passages selected by the plaintiffs for their text. Publications of selections from the classical authors for the use of schools must be exceedingly numerous and if selection connoted originality, the question would certainly be covered by authority. But it can easily be reduced to an absurdity, since if *B* is entitled to reprint the whole of a non-copyright work, it would be very strange if *A*, because he has printed one-half, could restrain *B* from printing three-quarters.

In my opinion the appeal should be allowed and the plaintiffs' suit dismissed with costs in both Courts.

SHAH, J.—The principal question in this appeal is whether the copyright of the plaintiffs in their publication, Exhibit B, is infringed by the defendants by their having published Exhibit E.

Exhibit B is published by Macmillan & Co., Ld., and edited by Mr. Parr. In the main it is an abridgment of North's Translation of Plutarch's Life of Alexander and is one of a series of books entitled "English Literature for Secondary Schools." The book contains (*a*) a map, (*b*) an introduction as to the book and its translators and as to Alexander's place in history, (*c*) an analysis of the contents, (*d*) a chronological table giving the principal dates in Alexander's life, (*e*) the text consisting of selected passages from

North's Translation, with marginal notes and a few short transitional notes, divided into a preface and six Chapters, (*f*) notes on the text, (*g*) glossary, and (*h*) a few test questions on each Chapter. This book was originaly published in England in 1911, and it was prescribed by the University of Bombay in October 1917 as a text book for the Matriculation Examination of 1919.

The defendants published Exhibit E in January 1918, which is another abridgment of the same original work. The book is styled Plutarch's Life of Alexander, North's Translation, with notes prepared by Mr. Darby. The book contains (*a*) a statement of the contents, (*b*) an introduction divided into sections as to the author, the translator, Phillip of Macedon, a sketch of Alexander's career, the character of Alexander, (*c*) the text consisting of selected passages, which in fact include all the passages selected by Mr Parr for the plaintiffs' publication and certain other passages from North's Translation, with marginal notes, (*d*) notes and additional notes (*e*) a summary, and (*f*) a map.

The defendants thought of having another abridgment like the plaintiffs' book of the same work in November 1917 after the University Notification was out, and they published Exhibit E with the notes by Mr. Darby.

I have given a brief description of the two books above, but in order to have a clear idea thereof it is necessary to have the books before oneself.

In spite of the argument of the appellants to the contrary, I do not feel any doubt as to the fact that the defendants had used the plaintiffs' book along with the original book (North's Translation) in selecting the passages for their publication and it was a part of their idea, it seems to me, to have another abridgment which would include the whole of the text in Exhibit B. The notes were undoubtedly prepared originally on the text as appearing in Exhibit B and supplemented with additional notes on the passages appearing in Exhibit E but not in Exhibit B.

The object of the defendants in preparing and publishing this book is not very material; but I agree with the conclusion of the Trial Court on this point that it was intended to serve as a substitute for the publication Exhibit B. Whether it could have served as a substitute to the students is another matter; and, had it not been for the accident that the copies of the plaintiffs' publication were not available to the students at the commencement of the school year in or about March 1918 in the Indian market, it is very doubtful whether the work could have been so easily sold as a substitute. In any case the notes and the text published by the defendants would undoubtedly enter into competition with the plaintiffs' publication so far as the sale among the students reading for the University Examination is concerned. These are questions which really do not affect the decision on the principal point that arises for consideration in this appeal.

The question is whether the copyright of the plaintiffs is infringed by the defendants. It may be stated at once that so far as the parts of the two publications other than the texts and the notes are concerned, it is not suggested that there has been any infringement of the copyright. The map, which has been referred to in the judgment of the Trial Court, was not relied upon before us on this point; and as I read the judgment of the Trial Court, the map forms no part of the subject-matter of the plaintiffs' copyright. The introductions are different in the two books. The marginal notes are different. The transitional notes in the plaintiffs' book are not reproduced in the defendants' book; nor is the division of the text into Chapters in the plaintiffs' book followed in the defendants' book. The plaintiffs' case rests on the use said to have been made of the *text* and the *notes* in Exhibit B by the defendants in preparing Exhibit E.

I shall first deal with the notes. It is not disputed and cannot be disputed that it was open to the defendants to publish notes suited to the requirements of the Indian students on the text of Exhibit B so long as no unfair use of the notes appearing in Exhibit B was made. The notes were undoubtedly prepared by Mr. Darby and I do not feel any doubt that he had the plaintiffs' publication before him, which would necessarily include the notes prepared by Mr. Parr. The notes prepared by Mr. Darby are very copious and full and extend over more than sixty printed pages. The

additional notes run over about eight pages. There is no complaint about the additional notes, as they relate to matter not included in the text published by the plaintiffs.

The other notes include the points touched in the notes prepared by Mr. Parr. It must be remembered, however, that the notes by Mr. Parr are largely confined to proper names; and any person writing fresh notes would necessarily have to include the best part of the points touched by Mr. Parr. Without having any means of knowing the personal equipment of the annotator and his aptitude for the task, it is not easy to say how far Mr. Darby made an unfair or improper use of Mr. Parr's notes. Any annotator having sufficient familiarity with the ancient history and mythology of Greece would be able to reproduce the substance of the notes by Mr. Parr. The notes are very elementary and without attributing undue ignorance of his subject to Mr. Darby, it is not reasonably possible to hold that he made what may be justly described as an unfair use of the notes by Mr. Parr. I do not see any good reason to doubt that Mr. Darby's notes were in the main prepared by means of his own knowledge and judgment, of course referring to such materials as are open to all readers and writers. I do not doubt that he referred to Mr. Parr's notes. But any person writing notes on any text may fairly look at all the existing notes and so long as he does not make any use which may be called unfair, he can use them in preparing his own independent notes. It is difficult and not desirable to lay down any general rule on this point. It must be decided as a question of fact in each case. It seems to me that the learned Trial Judge has gone too far in holding that the fact that Mr. Darby has added a lot of notes and certainly improved the annotations for the purpose of the use of the text by an Indian schoolboy is irrelevant. I think that we ought to consider the notes as a whole, and taking into consideration the nature and the extent of the use of the one in preparing the other as indicated by the materials on the record, we have to see whether the use is unfair or not. In point of bulk and the nature of the notes, Mr. Darby's notes form an independent work, and simply because they include the best part of Mr. Parr's notes which are very short and elementary, I do not think that any unfair use of Mr. Parr's notes can be said to have been made by Mr. Darby. It is not without significance that the notes as such were not relied upon in the plaint as constituting an infringement; and though they were relied upon in the argument before us as in the Trial Court, the learned Counsel for the plaintiffs-respondents principally relied upon the publication of the text as constituting the infringement of the copyright. After a careful consideration of the judgment of the Trial Court as also of the arguments and the notes in question, I take the same view of the inclusion of Mr. Parr's notes in the defendants' publication as Wilson, J., took in *Macmillan* v. *Suresh Chunder Deb* (1) of Mr. Palgrave's notes in relation to the publication by the defendant in that case.

This brings me to the question whether there has been any infringement of the right in respect of the *text*. The few facts about the text are that both purport to be abridgments of North's Translation of Plutarch's Life of Alexander the Great. It has been stated by the Counsel for the parties before us that roughly the plaintiffs' text contains about twenty thousand words, that the defendants' text contains about twenty seven thousand words and that the original translation by North (Exhibit F) contains about forty thousand words. The learned Trial Judge makes the following observations as regards the additional passages in the defendants' book:—

"Then no doubt it is the fact that in Exhibit E there are some additional passages. These are mostly short passages, for out of twenty seven in all, fifteen are under ten lines; seven are between eleven and twenty lines; four between twenty-one and forty lines, while one is of sixty-five lines.'

Thus the defendants' publication contains all the passages in the plaintiffs' text and some more. They are taken word for word from the original translation by North of Plutarch's Life of Alexander the Great. In neither case is there any attempt at real abridgment in the language of the abridger, but the texts are practically quotations from the original work. As regards the text published by the plaintiffs there can be no

(1) 17 C. 951 at pp. 960, 960; 8 Ind. Dec. (N. S.) 1180.

doubt that there has been an infringement of the copyright, if there could be any copyright in respect of the text. I am, however, not satisfied that there could be any copyright in respect of the text published by the plaintiffs, which contains selected passages word for word from North's Translation. I need not refer to the very few expressions used by way of introducing some passages in the text (Exhibit B) as they form no material part of the text, which consists of certain passages copied from North's Translation. It is common ground that there is no copyright in North's Translation of Plutarch's Life of Alexander and that it is open to any one to reproduce the whole of the translation. The question then is whether there can be any copyright in respect of matter which is word for word part of a non-copyright work. North's Translation in question is open to anybody to copy in part or in whole as he pleases. The plaintiffs have copied it in part and the defendants have copied it in part which includes the part copied by the plaintiffs.

The section defining "copyright" requires, so far as the point under consideration is concerned, that it must be 'original literary work.' It is not a matter of any moment in this case whether the use of the word 'original' in the Statute of 1911 has made any alteration in the law as it existed before. But it has to be determined whether the passages selected from one book, like North's Translation of Plutarch's Life of Alexander, can be treated as 'original literary work.' I do not deny that some mental labour, skill, and judgment are needed to select passages for the use of schoolboys. But at the same time it must be remembered that that by itself is not necessarily sufficient to constitute what one may call original work. The matter for all practical purposes remains the matter contained in North's Translation. There is no decided case which can be said to cover a case like the one before us. The cases which Mr. Coltman has referred to and relied upon do not help us in deciding the present case. I fully recognise that the word 'original' should be so construed as to give to the person who has used his brain the benefit of that use as far as possible; but unless the word is to be completely divested of its plain and natural meaning, I find it difficult to hold that the matter, which is word for word taken from North's Translation, though only partially, constitutes an original work.

There have been decisions to the effect that selections made by an author from different authors may well form the subject-matter of copyright. Palgrave's Golden Treasury affords an instance in point. But such works stand on a different footing. In the case of an abridgment it seems to me that the following observations at pages 64 and 158 of Copinger's Law of Copyright (5th edition) are in point:—

"Independent labour must be apparent, and the reduction of the size of a work by copying some of its parts and ommitting others, confers no title to authorship; and the result will not be an abridgment entitled to protection. To shorten a work by leaving out the unimportant parts is not to abridge it in a legal sense. To abridge in the legal sense of the word is to preserve the substance, the essence of the work, in language suited to such a purpose; language substantially different from that of the original. To make such an abridgment requires the exercise of the mind; labour, skill and judgment are brought into play and the result is not merely copying.

"To constitute a proper abridgment, the arrangement of the book abridged must be preserved, the ideas must also be taken, and expressed in language not copied, but condensed. To copy certain passages and omit others, so as to reduce the volume in bulk, is not such an abridgment as the Court would recognise as sufficiently original to protect the author."

Applying this test, and I think that is the test which ought to be applied, to the text in question, it is clear that the text in Exhibit B cannot be treated as being entitled to any protection.

It is true that the defendants have not accepted this position with reference to their own abridgment. But that can make no difference in the case. It may be that their own abridgment, such as it is, is not an 'original literary work' within the meaning of the Copyright Act. That, however, does not prevent them from showing that they have not infringed any copyright by copying either from North's Translation or from the text of the plaintiffs' publication. I do not say that the plaintiffs' book as a whole is

not entitled to protection against any infringement of the copyright. But in the present case as the infringement complained of, apart from the notes with which I have already dealt, is the unfair use made of the text of Exhibit B and as that text is not protected under the Statute, there is no infringement of the copyright.

I, therefore, concur in the order proposed by my Lord the Chief Justice.

Z. K.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 36-B OF 1918.

April 5, 1921.

Present:—Mr. Hallifax, A. J. C., and Mr. Prideaux, A. J. C.

Mir SUBHAN ALI—DEFENDANT No. 1—APPELLANT

versus

IMAMI BEGUM AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Construction of grant—Berar Inam Rules—Grant limited to male descendants—Females, whether can inherit—Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for declaration of share—Suit for possession, whether barred.

The only correct method for the judicial decision of matters affecting a Jagir is to ascertain the meaning and effect of the grant in each case from the circumstances and objects with which, and the rules under which, the Sanad for that Jagir was granted. [p. 198, col. 2; p. 199, col. 1.]

Krishnaji v. *Nilkanth*, 36 Ind. Cas. 518; 12 N. L. R. 150, referred to.

The terms of a Sanad are absolute. The rules are merely instructions to Revenue Officers for the original settlement of claim to Jagirs, and they lay down the conditions that shall ordinarily govern each grant. But there is nothing to prevent the authority, which says that certain conditions will be included in each grant it makes in the future, from altering any or all of the conditions in the case of a particular grant. Any such alterations are embodied in the Sanad, and every Inam estate in Berar is subject to the terms of the Sanad or Certificate in all matters mentioned in it and to the Berar Inam Rules in all matters not so mentioned. [p. 199, col. 1.]

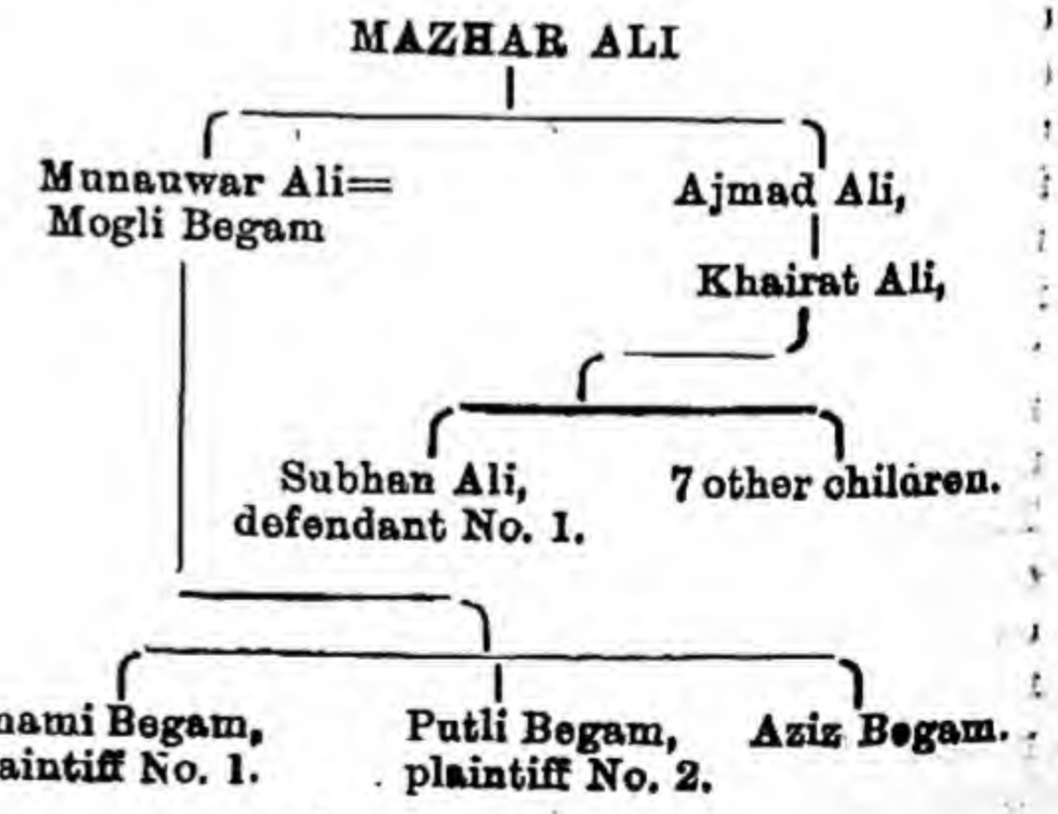
Bodhrao Hunmont v. *Nursing Rao*, 6 M. I. A. 426; 1 Sar. P. C. J. 560; 19 E. R. 160, referred to.

Appeal against a decree of the Additional District Judge, Akola, dated the 2nd April 1918, in Civil Suit No. 3 of 1916.

Sir *B. K. Bose*, and Mr. *M. Y. Shareef*, for the Appellant.

Messrs. *A. V. Khare* and *D. G. Deshpande*, for the Respondents.

JUDGMENT.—The parties to the suit, out of which the present appeal arises, are related in the manner shown in the following genealogical table :—



Aziz Begam was the second of the three wives of Khairat Ali. By her and his other two wives he had eight children, four sons and four daughters, but we are not concern-

ed with the names of any of them except the eldest Subhan Ali. All of them, with Khairat Ali's surviving widow Chunnabi, are the defendants. One of the daughters, Binabi, the second defendant and third respondent, died on the 16th of September 1920, during the pendency of this appeal, and her husband, Khwaja Burhan-ul-din, was brought on the record as a respondent in her place. Another of them, Fayazbi, the fifth defendant and sixth respondent, also died on the 7th of February 1921 and the appeal continued against the remaining respondents, her only legal representatives being her two full brothers, Quadrat Ali and Ronak Ali, who were already on the record. The plaintiffs are the two surviving daughters of Khairat Ali's uncle, Munauwar Ali, and they claim partition and separate possession of their shares in an Inam Estate or Jagir consisting of the whole of the two villages of Barmi and Dhotra and three fields in the village of Ganespur, all in the Murtizapur Taluq of the Akola District in Berar. They claim also their shares of the income of the estate for the three years immediately preceding the institution of the suit. A preliminary decree has been passed by the Court of the District Judge of Akola declaring the extent of their shares and ordering a partition thereof, and leaving the question of the amount of the mesne profits for later consideration. Against this decree the first defendant, Subhan Ali, alone has appealed.

The grant of the estate free of revenue is "for personal maintenance." It was held by the family of the present holders for this purpose from about 1796 A. D. under Sanads from the Nizam's Government, and the Extra Assistant Commissioner, who made the first enquiry in 1864 into the origin of the grant and the claims of the holder at that time, reported as follows on the 25th of October 1864: "The grant is valid and enjoyment long and uninterrupted. It is not hereditary according to the terms of the Sanads but practically the grant has been enjoyed by four successive incumbents during the space of more than 70 years and has assumed that right in a liberal point of view. I think the grant should be confirmed and continued to the present claimant and his descendants male." The claimant mentioned was Munauwar Ali, and he admitted before the Extra Assistant Commissioner that his half-brother, Ajmad Ali, who was living separate from him, was in receipt of half the income of the estate. The Deputy Commissioner and the Commissioner supported the proposals of the Extra Assistant Commissioner and the Resident recommended that the estate should "be continued to the present holder and his male descendants in perpetuity." This recommendation was sanctioned on the 3rd of December 1866 by the Government of India in letter No. 396 of that date. Subsequently, in 1871, Ajmad Ali was declared by the Government of India to be entitled to a half share in the Inam and his name was entered on the Certificate.

Ajmad Ali died in 1880 and his son, Khairat Ali, was shown in his place on the Certificate as a sharer along with Munauwar Ali. The latter died on the 24th of July 1895 leaving no son, and Khairat Ali became the sole Certificate Holder in respect of the whole estate. Munauwar Ali's widow and two daughters appealed to the Commissioner against the order that Khairat Ali was to be Certificate-Holder and Manager, but their appeal was dismissed on the ground that women could not succeed to the Inam, which was to be continued to male descendants only. Khairat Ali died on the 19th of August 1914 and the name of his eldest son, Subhan Ali, was entered in the registers as Certificate-Holder. The Extra Assistant Commissioner who made the enquiry into the matter recommended that the names of Subhan Ali's three brothers should also be shown on the Certificate as sharers in the Inam, but the Deputy Commissioner apparently overlooked this point and passed no order on it. Their names do not appear on the Certificate. The appointment of Subhan Ali as Certificate-Holder was unsuccessfully opposed by Imami Begam, the eldest daughter of Munauwar Ali, who claimed to be put in as a sharer along with him, on the ground that she had established her right to a share in the Civil Court. (A mistake made in the report of the Extra Assistant Commissioner has to be mentioned, as it may otherwise lead to confusion. He describes Imami Begam as "wife of Ajmad Ali who was step-brother of Munauwar Ali." Her husband's name is certainly Ajmad Ali, but he is, of course, not her father's half brother. This Ajmad Ali, her husband, is still alive

and has been appearing as her agent all through this case).

One of the main points for consideration in this suit is the bearing and effect on the plaintiffs' claim of the decisions in the previous suits filed by them in the Civil Court in assertion of the same right. They are four in number. The first was Civil Suit No. 137 of 1904 filed in the Court of the Civil Judge of Amraoti by the present plaintiffs against Khairat Ali and his three children by Aziz Begam. These three children were impleaded because Aziz Begam was entitled to inherit equally with the plaintiffs from their father Munawar Ali. The claim, as stated in the judgment, of which Exhibit P 1 is a copy, was for a share of the profits of the estate for 1903-04 and "a declaration that as heirs of Munawar and his widow Moghli Begam they got a half share in the Jagir and that they are entitled to the use of fruit and fodder from the villages." Two of the issues framed were as follows:—

"5. Does the original grant of the Jagir exclude the plaintiffs from inheriting property left by their parents?

"8. Are the plaintiffs entitled to injunction claimed about grass, fruit, etc.?"

On the first of these two issues it was held that as the Sanad had not been produced and no evidence had been given the finding must be against the defendants. On the second it was held that as the defendant Khairat Ali admitted the plaintiffs' right to forest produce and fodder and fuel there was no evidence of any obstruction by him of the exercise of that right, no injunction could be given. The judgment orders the issue of a decree for money and orders that it shall "also declare that the plaintiffs have 109/144 of the 1/2 share in the Jagir villages in dispute."

This decree was maintained in appeal and second appeal. A copy of the appellate judgment, dated the 24th of February 1906, in the Court of the District Judge, West Berar (Akola), in the Civil Appeal No. 21 of 1906 is filed as Exhibit P 7. It is to be noted that in that appeal, as well as in some later cases, the defendant urged that the grant was of the land revenue only and not of the land, to support his plea that the suit could not be maintained without a certificate under the Pensions Act. As the estate is in Berar, where proprietary rights were only conferred in very rare instances, nearly all of the cases of this kind, it is clear that the grant was of both the proprietary right in the land and also the freedom from the liability to pay the revenue. In the present appeal the learned Advocate for the appellant very wisely relies on this fact, which was denied in some of the previous cases, as one of the props of his case. In regard to the declaration claimed, which is wrongly called an injunction, the learned District Judge said: "As regards plaintiffs' right to an injunction that they own 1 9/144 share in the Jagir, they are amply entitled to it as appellant has denied their right and they have proved it."

The second appeal was decided in this Court on the 11th of December 1906 (Second Appeal No. 191 of 1906) and a copy of the judgment of Batten, A. J. C., is filed as Exhibit P-5. The portion of that judgment with which we are concerned is as follows: 'The last ground argued is that, under the terms of the Jagir Certificate, females cannot inherit. Column 20 of the Certificate is headed as follows: 'Tenure and condition attached to the continuance of the grant.' The entry under this heading is: 'To be continued rent-free in perpetuity to present holder and his male descendants.' The entry can in no way be distinguished from the terms of the grant in *Govind Narayan Deshpande* v. *Sitabai* (1) and *Vasudevanant* v. *Ramkrishna* (2). The entry regulates the duration of the grant but not the enjoyment of it as between the heirs of the grantee, and the inheritance devolves under the ordinary law in force in the family. No authorities to the contrary have been cited."

Exhibit P-2 is a copy of the judgment in the second suit of the four, Civil Suit No. 10 of 1907 in the Court of the District Judge, West Berar (Akola), decided on the 14th of October 1907. The parties were the same as those in the first suit and a decree for the payment of money was passed by consent. The claim was apparently for the plaintiff's

(1) 2 Bom. L. R. 28.
(2) 2 B. 529; 8 Ind. Jur. 31; 1 Ind. Dec. (N. S.) 775.

share of the profits of the estate for the three years 1904-05, 1905-06 and 1906-07. The third suit was Civil Suit No. 14 of 1910 in the Court of the District Judge, West Berar (Akola). A copy of the judgment, which was delivered on the 31st of August 1912, is filed as Exhibit P-3. The plaintiffs were again the two elder daughters of Munauwar Ali. The defendants were originally Khairat Ali and his four sons, but the latter were discharged as not necessary parties. The claim was apparently only for money, in payment of the plaintiff's share of the profits of the estate for the years 1907-08, 1908-09 and 1909-10. The same contentions in respect of a certificate under the Pensions Act and the exclusion of women from the inheritance by the terms of the grant were raised again, but were held untenable by reason of the previous decisions and a decree for money was given. The last of the previous suits was Civil Suit No. 26 of 1915 in the Court of the Subordinate Judge, Akola. It was against all the children and the widow of Khairat Ali as his legal representatives, as he died on the 19th of August 1914, and the claim was for a share of the income of the year 1911-12. The same contentions were once more raised and rejected and a preliminary decree for accounts was passed on the 30th of September 1916 [See Exhibit P-8]. This was followed on the 18th of August 1917 [see Exhibit P-9] by a final decree for the payment of money, for which the defendants were made liable as the legal representatives of Khairat Ali and to the extent of his assets in their hands.

The question of the mesne profits for the years 1912-13, 1913-14 and 1914-15, that is, both before and after the death of Khairat Ali, which were claimed in the present suit, has been treated as of very secondary importance and scarcely mentioned in argument. Nevertheless, it is there to be decided. For the appellant Subhan Ali it is admitted that the decision in Civil Suit No. 137 of 1904 is final between the parties to that suit and their representatives in-interest, at least to the extent that the plaintiffs are entitled to a certain defined share in the annual income, but it is pleaded that Subhan Ali does not claim through Khairat Ali. The learned Advocate for the appellant would not, however, go to the length of saying that each succession to the Inam was a re-grant by Government, and anything less than that is an admission that Subhan Ali is the representative-in-interest of his predecessor Khairat Ali. This is admitted even in the plea that, because Government might revoke the grant at any time on the opening out of the succession, and no successor comes in till Government has declared its intention of continuing the grant, therefore, each succession is no more than a continuance of the grant in accordance with the originally declared intention of the Government. It seems clear that the previous decisions bind Subhan Ali just as much as they bound Khairat Ali, and it must be held to have been finally decided at least that the plaintiffs are entitled to get from Subhan Ali the fixed portion of the annual income of the estate. Whether the decisions go further and entitle them to possession and partition of that portion of the estate itself is the question that is before us now. It is, at any rate, clear that we have to consider in this respect only the decision in Civil Suit No. 137 of 1904, as the other three were suits for money only.

When this appeal was first heard, before it had to be put back for a fresh hearing by reason of certain defects in the representation of some of the minor respondents, the learned Advocate who appeared for the plaintiffs admitted that the decision in Civil Suit No. 137 of 1904 left the question of partibility open, and that in that suit all that the Courts were asked to decide or intended to decide or did decide was that the maintenance allowance to which the plaintiffs were entitled was a certain fixed share of the income of the estate. The learned Pleader who argued the appeal for the plaintiffs at the last hearing was, however, unable to accept this position and again urged that the decision in that case meant no less than what it says, that the plaintiffs are co-sharers in the estate as heirs, arguing further that it follows as a necessary corrollary that they can claim partition of their shares by metes and bounds and can detach them, unless it can be proved that the estate is impartible in its nature or by the terms of the grant or by local or family custom.

Now, the plaintiffs have never had any constructive or actual possession of any share

in the property. In their plaint they say : "The plaintiffs did not get a single year's profits of their share between the years 1903 and 1911-12 without filing suits, and, thereafter also, defendants No. 1 and No. 3 were asked to pay the profits of the three years previous to this date (1912-13, 1913-14 and 1914-15) but they did not pay the same. Mir Khairat Ali harrassed the plaintiffs greatly by obstructing execution of all the decrees obtained by the plaintiffs up to this date against him, and now the defendants have also been harrassing plaintiffs by obstructing execution of the same decrees. For these reasons the plaintiffs have been compelled to sue for partition of their share. The plaintiffs frequently demanded their share and the profits of the previous years from the deceased Mir Khairat Ali and after him from defendants No. 1 and No. 3 but as they paid no heed to the requests and refused them, the cause of action for partition and possession of the lands accrued on 17th December 1915 on which date partition was finally demanded from defendants No. 1 and No. 3." The first relief claimed in the plaint is this: "The Jagir lands ...may be fairly divided according to quality and the plaintiffs may be put in possession of the share of both of them." It appears, further, from the pleadings that in 1914 the plaintiffs attached the estate in execution of one of their decrees against Khairat Ali and were put in possession as receivers and remained in possession in that capacity for the agricultural year 1914-15. It is also clear that as long ago as 1896 the plaintiffs and their mother claimed possession of a half share in the estate and failed to get it.

The plaintiffs have, therefore, never had any sort of possession of any share in the property. The possession of Khairat Ali and Subhan Ali can certainly not be called possession on their behalf as it was always in strenuous denial of their rights. They were bound, therefore, to pray for possession in addition to a declaration of their title in their suit of 1904. Their failure to do so and the failure of the Courts to notice the omission seem to indicate that they and the Courts as well regarded the declaration in question in that suit as a declaration of their right to a share in the income of the estate and not in the corpus of the estate. But if, as is urged and as we must assume, the declaration claimed by them and given to them was one of their right to a share in the estate itself, they were bound to sue also for possession in that suit, and their failure to do so clearly precludes them from asking for it now, under rule 2 of Order II of the Civil Procedure Code and makes the question of their right to that possession *res judicata* against them under Explanation IV of section 11 of the same Code.

It seems advisable, however, to examine also the position originally taken up for the plaintiffs in this Court, that is, that the question of their right to a share in the corpus of the estate was not decided in the suit of 1904, as the later plea that it was then decided has proved a boomerang to them. But the general question whether the estate is partible or impartible does not arise, though a certain amount of argument has been devoted to it. The only question in this suit is, whether the estate is partible at the instance of the daughters of Munauwar Ali or not, that is to say whether they own shares in it or not.

There appears to be a fairly general impression that every grant of this kind, whatever the circumstances under which it was made or the special conditions attached to it may be, is governed absolutely by what are called the Berar Inam Rules, which are published as Revenue Book Circular No. i of section V, Volume II of the Berar Revenue Manual. The proper interpretation of the words: "direct lineal heirs and undivided brothers" in rule V has been argued at some length and in paragraph 16 of his judgment the learned District Judge holds "that the Inam is governed by Rule V of the Revenue Book Circular" and that, therefore, "the succession is limited to direct lineal heirs and undivided brothers." This idea seems to be based on the judgment of Stanyon, A. J. C., in *Krishnaji* v. *Nilkanth* (3) where it was laid down that an Inam estate in Berar is governed by the Inam Rules of 1859 (which has wrongly been printed as 1879 all through the report). But the learned Additional Judicial Commissioner was particularly careful to say that the only correct method for the judicial decision of matters

(3) 36 Ind. Cas. 518; 12 N. L. R. 150.

affecting a Jagir "is to ascertain the meaning and effect of the grant in each case from the circumstances and objects with which and the rules under which the Sanad was granted" and he quoted the words of their Lordships of the Privy Council in *Bodhrao Hunmont* v. *Nursing Rao* (4) that "the terms of the Sanad are absolute." The rules are merely instructions to Revenue Officers for the original settlement of claim to Jagirs, and they lay down the conditions that shall ordinarily govern each grant. But there is nothing to prevent the authority, which says that certain conditions will be included in each grant it makes in the future, from altering any or all of the conditions in the case of a particular grant. Any such alterations are embodied in the Sanad, and every Inam Estate in Berar is subject to the terms of the Sanad or Certificate in all matters mentioned in it and to the Berar Inam Rules in all matters not so mentioned, which is exactly what Stanyon, A. J. C., laid down in the case that has been cited and misunderstood. The Jagir now under consideration is, therefore, subject to the rules of 1859 modified to the extent stated in the Certificate.

Rule V restricts succession to "lineal heirs and undivided brothers," which expression is explained as including daughters and their issue, but the Certificate supersedes this and lays down that the estate is "to be continued rent-free in perpetuity to the present holder and his male descendants for personal maintenance." The term "present holder" meant only Munawar Ali when the Certificate was first granted, but under the order made in 1871 it must be held to include his half-brother Ajmad Ali also. In the second appeal in the suit of 1904 Batten, A. J. C., held that the words "continued to male descendants" in the Sanad were only intended to regulate the duration of the grant following the interpretation put by Westropp, C. J., on exactly similar words in *Vasudevanant* v. *Ramkrishna* (2). We have here to decide the meaning of words used in the grant of the villages of Barmi and Dhotra and land in Ganeshpur, and a decision as to the meaning of even the same words used in the grant of another estate in another part of India under different rules and circumstances, which are not mentioned in the very short judgment of the learned Chief Justice, cannot be even of much assistance to us. There is, however, one obvious point of difference in the two grants. The Bombay case dealt with a remission of the revenue only. The proprietary right was already vested in the grantees who were merely declared not liable to pay land revenue, and clearly a remission of the revenue could not take away the vested rights of sharers in the proprietary interest in the estate or alter its devolution. Here we are dealing with a grant of the proprietary interest together with a remission of the revenue.

It is quite impossible to accede to the contention put forward for the plaintiffs, that an order that an estate shall "be continued to the male descendants" of a certain person means that it shall be continued to the male and female descendants of that person but shall be liable to resumption on the failure of male descendants. The words mean exactly what they say, and the word "to" has its ordinary meaning and cannot be expanded or restricted to mean "during the existence of" or "up to the failure of." The Bombay case mentioned in the preceding paragraph is no authority whatever for the proposition that the word "to" was used even in that case in anything but its ordinary plain meaning. Where, however, a grant is merely a remission of the revenue, it is impossible to restrict the actual benefit of the remission to some only of the already existing owners of the proprietary interest or to particular heirs, and for that reason such a grant works out in practice to a grant to all the existing sharers and all their heirs during the continuance of the particular persons or the particular heirs to whom the grant is made. But the word "to" still retains its ordinary meaning. The grant of the revenue is still made to certain people only, and it is liable to resumption on their failure. The grant to them they have, by force of circumstances, to share with others, but there remains the liability to resumption, so that, as Westropp, C. J., held in a case of that

(4) 6 M. I. A. 426; 1 Sar. P. C. J. 560; 19 E. R. 160.

kind the only practical effect of the words "continued to male heirs" is to regulate the duration of the grant. But in the case of a grant of the proprietary interest combined with a remission of the revenue there are no circumstances or vested interests which compel the grantee to share the benefit of the grant with others, and the terms of the grant can operate to regulate the devolution as well as the duration of the whole estate. It seems, then, beyond question that successions to the proprietary interest, in this particular Jagir are limited to the male descendants of Munauwar Ali and Ajmad Ali, and that no female can acquire a share in it by inheritance.

With the question whether the estate is partible at the instance of the male sharers or not we are not concerned in this case. We have to decide the claim of the plaintiffs only and our decisions are these. If the declaration in Civil Suit No. 157 of 1904 meant that they are entitled as heirs to a share in the corpus of the estate, they are now precluded from suing for possession of that share by their omission to do so in that suit. If it did not, they can now sue for possession after partition, but are not entitled to get it, as females are debarred from succeeding by the terms of the grant. The decree of the lower Court so far as it orders partition and delivery of possession must, therefore, be set aside. But the decree passed against Khairat Ali as representing the estate in the suit of 1904 still holds good against Subhan Ali and his brothers in so far as it declares the plaintiffs entitled to a certain share in the income of the estate, and their claim in this suit for that share of the income for the years 1912 13, 1913 14 and 1914-15 which has been decreed must stand, and the amount of the income for these years must be determined. The female defendants are found to have no interest in the matter and must, therefore, be discharged. Their joinder in this appeal was necessitated by their original misjoinder in the suit by the plaintiffs, who ought, therefore, to pay all the costs incurred by them in both Courts. Against the four male defendants, Subhan Ali and his three brothers, the plaintiffs have succeeded in respect of their share of the income of the estate for three years but have failed in their claim to a share in the estate itself. The values stated in the plaint are obviously no guide to the real relative values of the two claims, and it would certainly not be unfair to the plaintiffs to say that the value of the property is at least three times its income for three years. Of the total amount of the costs incurred in this Court and in the lower Court up to the passing of the preliminary decree, by the plaintiffs and by Subhan Ali and his three brothers, three-quarters ought, therefore, to be paid by the former party and one quarter by the latter. In accordance with all these decisions a decree will issue, in supersession of that of the lower Court, ordering that Subhan Ali and his three brothers Oudrat Ali, Ronak Ali and Fateh Ali shall pay to the plaintiffs a sum of money which is 109/288 of the income of the Jagir during the years 1912-13, 1913-14 and 1914-15, which income shall be determined in further proceedings in this suit and declared in a final decree, and that the costs of the suit up to the passing of the preliminary decree and of this appeal shall be paid as has been already indicated.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2417 OF 1919.

August 22, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Cuming.

PANNA LAL BISWAS—PLAINTIFF—APPELLANT)

versus

PANCHU RUIDAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 23, Sch. I, Arts. 120, 142—Criminal Procedure Code (Act V of 1898), s 146—Attachment of land—Dispossession—Continuing wrong—Suit for declaration—Limitation.

A land belonging to the plaintiff was taken possession of by the defendant in April 1904. In consequence of dispute between the parties the land was attached under section 146 of the Criminal Procedure Code on the 10th June 1904. On 2nd May 1916 the plaintiff brought this suit

PANNA LAL v. PANCHU RUIDAS.

for declaration of his title to and for recovery of possession of the land alleging that the cause of action arose on the 10th June 1904, the date of the attachment:

Held, (1) that the suit though framed as a suit for possession could not be treated as such, because the possession was not with the defendant but with the Magistrate who was not and could not be a party to the suit and that the suit was a suit for declaration governed by Article 120 of the Limitation Act; [p. 203, col. 1.]

(2) that as the possession of the Magistrate was in law the possession of the true owner, the defendant's possession was determined upon the Magistrate's taking possession under the attachment or in other words the plaintiffs must be taken to have been restored to possession constructively on the date of the attachment and that he, therefore, got a fresh starting point for limitation and that being so the case fell within the principle of *Brojendra Kishore Roy's case*, 31 Ind. Cas. 242; 20 C. W. N. 481; 22 C. L. J. 283, and that the case could be treated as one of continuing wrong under section 24 of the Limitation Act. [p. 204, col. 1.]

If a person enters upon the land of another, and holds possession for a time and then without having acquired title under the Statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. The same principle applies where possession is taken out of him by a Magistrate acting under section 146 of the Criminal Procedure Code. [p. 203, col. 2; p. 204, col. 1.]

Goswami Ranchor Lalji v. *Sri Girdhariji*, 20 A. 120; A. W. N. (1897) 214; 9 Ind. Dec. (N. S.) 437, *Rajah of Venkatagiri* v. *Isakapalli Subbiah*, 26 M. 410, *Khagendr Narain* v. *Matangini Debi*, 17 C. 814; 17 I. A. 62; 5 Sar. P. C. J. 528; 8 Ind. Dec (N. S.) 1087, *Beni Prasad* v. *Shahzada Ojha*, 32 C. 856, *Karan Singh* v. *Bakar Ali Khan*, 5 A. 1; 9 I. A. 99; 4 Sar. P. C. J. 384; 2 Ind Dec (N. S.) 044, *Ramaswamy Ayyar* v. *Muthusamy Ayyar*, 30 M. 12; 16 M. L. J. 541; 1 M. L. T. 397, *Trustees & Agency Company* v. *Short*, (1888) 13 App. Cas. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132, *Secretary of State* v. *Krishnamoni Gupta*, 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.), *Deo Narain Chowdhury* v. *Webb*, 28 C. 86; 5 C. W. N. 160, referred to.

Appeal against a decree of the Second Additional District Judge, 24 Pergunnahs dated the 9th of August 1919, affirming that of the Munsif, Second Court at Barasat, dated the 31st of July 1918.

FACTS appear from the judgment.

Dr. *Jadunath Kanjilal*, for the Appellant.—It has been found that the title was with me. The possession of the Magistrate is the possession of the man with the title. It is the constructive possession of the true owner. *Ramaswamy Aiyar* v. *Muthusamy Aiyar* (1), *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (2), *Brojendra Kishore Roy* v. *Bharat Chandra Roy* (3), *Beni Prasad* v *Shahzada Ojha* (4).

[N. R. CHATTERJEA, J.—But if the trespasser was in possession at the date of the attachment, would not limitation run from the date of dispossession by the trespasser?]

I was out of possession for only a month and a few days, and the possession of the Magistrate is on my behalf. The Magistrate's possession cannot enure to the benefit of the trespasser.

[N. R. CHATTERJEA, J.—If you are suing for possession, Article 142 applies and you have to show possession within 12 years.]

I would rather say that I ask for a declaration of title and for a direction that the Magistrate should make over possession to me. The Magistrate is a stakeholder: *Khagendra Narain* v. *Matangirni Debi* (5).

[N. R. CHATTERJEA, J.—How does the attachment by the Magistrate affect limitation, did dispossession cease then? Is there any direct authority on the point?]

Yes, *Ramaswamy Ayyar* v. *Muthusamy Ayyar* (1). It cannot be said that the wrong of the original dispossession continues when the Magistrate is in possession: the principle of *Secretary of State* v. *Krishnamoni Gupta* (6) applies.

The case of *Deo Narain Chowdhury* v. *Webb* (7) is wrong. I do not distinguish it. No reasons were given for that decision.

Article 142 does not apply to this case. Section 23 of the Limitation Act applies, and from this point of view no question of limitation arises.

Babu *Troylokhya Nath Ghose* (with him Babu *Jatindra Mohan Ghose*), for the Respondents.—He has to come within 12 years in order that he may prove his title.

[N. R. CHATTERJEA, J.—He had title before dispossession. He says he got back possession in June 1904 when the Magistrate attached the land. Can you show that that contention is wrong?]

(1) 30 M. 12; 16 M. L. J. 541; 1 M. L. T. 397.

(2) 26 M. 410.

(3) 31 Ind. Cas. 242; 20 C. W. N. 481; 22 C. L. J. 283.

(4) 32 C. 856.

(5) 17 C. 814; 17 I. A. 62; 5 Sar. P. C. J. 528; 8 Ind. Dec. (N. S.) 1087.

(6) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.).

(7) 28 C. 86; 5 C. W. N. 160.

Refers to *Karan Singh* v. *Bakar Ali Khan* (8). Possession in the hands of the Collector cannot enure to the benefit of any of the parties.

Limitation having once begun to run it does not stop by anything subsequent; Limitation Act, section 9. His cause of action arose on the date on which he was dispossessed by the defendant, which is more than 12 years ago. If the suit is merely for a declaration, even then the suit is barred.

[N. R. CHATTERJEA, J.—You have to show that the Magistrate's possession is not his.]

To hold that the Magistrate's possession was his would be to give to the order of the Magistrate the sanctity of a decree of the Civil Court.

Deo Narain Chowdhury v. *Webb* (7) is in his way.

[N. R. CHATTERJEA, J.—Was the point dis- in that case?]

Dr. *Jadunath Kanjilal*—No.

Possession by the Magistrate is not adverse to the true owner. It does not go further than that.

The case of *Brojendra Kishore Roy* v. *Bharat Chandra Roy* (3) is distinguishable because there the dispossession was by the Magistrate. Here the dispossession was by a private person.

The case of *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (2), is similarly distinguishable, because there also there was no previous dispossession, the cause of action having arisen on the attachment by the Magistrate.

In *Karan Singh* v. *Bakar Ali Khan* (8) the defendant was not allowed to take on the possession of the Magistrate to his own possession.

The finding on the question of title was superfluous. It was open to the learned Munsif to dismiss the suit as barred by limitation.

[N. R. CHATTERJEA, J.—Title has to be taken into consideration in deciding question of limitation, *e. g.*, in the case of co-owners, of jungle or waste land, etc.]

Yes, I am not laying down a general proposition. In this case, it was superfluous because there was dispossession previous to the attchment.

Dr. *Jadunath Kanjilal* in reply.—In *Deo Narain Chowdhury* v. *Webb* (7) the point now before your Lordships was not taken.

JUDGMENT.—This appeal arises out of a suit for declaration of the plaintiff's title to the land in dispute, and for recovery of possession of the same with mesne profits.

It appears that in consequence of disputes between the plaintiff's predecessor and the defendant the land was attached under the provisions of section 146, Criminal Procedure Code, on the 10th June 1904. The plaintiff's mother brought a suit in 1904 for declaration of title to the land, but that was dismissed on the ground that she was *benamdar* for her husband. The plaintiff's father subsequently brought a suit in 1907, but it was withdrawn with liberty to bring a fresh suit. The plaintiff then brought the present suit on the 2nd May 1916, alleging that the cause of action arose on the 10th June 1904, the date of the attachment.

It was found by the Court of first instance that the plaintiff had proved his title to the land, but that he was dispossessed in April 1904, *i. e.*, some time before the date of attachment by the Criminal Court under section 146, and that he could not get a fresh start for limitation from the date of attachment and accordingly dismissed the suit on the ground that it was barred by limitation. On appeal also the learned Subordinate Judge held that the suit was barred by limitation.

It is contended on behalf of the plaintiff-appellant that the plaintiff having been found to have title to the land, the legal possession of the land must be taken to have been with him during the time the land was in the possession of the Magistrate and that, therefore, the suit was not barred by limitation.

The suit as framed was one for recovery of possession. There is some divergence of opinion upon the question whether such a suit is one for possession, or for a mere declaration. The Allahabad High Court in *Goswami Ranchor Lalji* v. *Sri Girdharjiu* (9) held that it was the former and, therefore, governed by the 12 years' rule of limitation. In *Rajah of Venkatagiri* v. *Isakapalli Subbiah*

(8) 5 A. 1; 9 I. A. 99; 4 Sar. P. C. J. 382; 2 Ind. Dec. (N. S.) 1044.

(9) 20 A. 120; A. W. N. (1897) 214; 9 Ind. Dec. (N. S.) 437.

(2) it was held, dissenting from the above view, that the suit was one for declaration and governed by Article 120, and further that there was no continuing wrong. In our Court also, in the case of *Brojendra Kishore Roy* v. *Bharat Chandra Roy* (3), it was held that the actual possession being with the Magistrate and not with the defendant, the suit could not be treated as a suit for possession and was not governed by Article 142 of the Limitation Act, and must be treated as one for declaration of title under section 42 of the Specific Relief Act The learned Judges were of opinion that although the suit was brought more than six years after the attachment, the case could aptly be treated as one of continuing wrong within the meaning of section 23 of the Limitation Act, and was not, therefore, barred.

We agree with the view that the suit, though framed as a suit for possession, cannot be treated as such, because the possession is not with the defendant, but with the Magistrate who is not and cannot be a party to the suit. The Article, therefore, applicable to the suit is Article 120 of the Limitation Act. Then the question is whether the case can be treated as one of continuing wrong within the meaning of section 23. In *Brojendra Kishore Roy's case* (3) it was so treated, but there the plaintiff was deprived of the enjoyment of the property by the defendant's attempted interference with his possession in consequence of which the Magistrate intervened and attached it, and there was a continuing wrong from the date of the attachment. There was in that case no dispossession prior to the attachment by the Magistrate, and the cause of action might be said to have accrued from day to day, commencing from the date of the attachment. In the present case the plaintiff was dispossessed in April 1904, *i. e.*, about two months before the date of attachment, which took place on the 10th June 1904. The cause of action, therefore, arose in April 1904, and the suit was brought not only more than six years after but 12 years after that date. Unless, therefore, the plaintiff acquired a fresh starting point from the date of attachment, the suit would be barred under Article 120, and even under Article 142.

The position of the Magistrate no doubt was that of a stake holder [see *Khagendra Narain* v. *Matangini Debi* (5)], and during the continuance of the attachment the property was in legal custody, which must be held to be for the benefit of the true owner [See *Beni Prasad* v. *Shahzada Ojha* (4) and *Karan Singh* v. *Bakar Ali Khan* (8)]. The question, however, is what was the effect of the attachment so far as the possession of the land was concerned. In the case of *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (2) it was held that "for purposes of limitation the seizin or legal possession will during the attachment be in the true owner and the attachment by the Magistrate will not amount either to dispossession of the owner or to his discontinuing possession." In the present case, however, as stated above, the plaintiff, the true owner, was dispossessed of the land before the attachment. Limitation having commenced from the date of such dispossession, the fact of attachment would not give him a fresh start, unless it had the effect of determining the defendant's possession.

In the case of *Ramaswamy Aiyyar* v. *Muthusamy Aiyyar* (1) it was held that where property is seized by a Magistrate, the property passes into legal custody and such custody is for the benefit of the rightful owner. It was further held that time begins to run against such owner only when by an erroneous order of the Magistrate the property is delivered to some other person, and it is so even when such other person had been in wrongful possession previous to the seizure by the Magistrate. In that case the property seized was paddy, and the Magistrate made it over to the other party. We refer to the case for showing that notwithstanding the defendant's wrongful possession previous to the seizure of the Magistrate, it was held that the possession of the Magistrate was for the benefit of the rightful owner and that a fresh cause of action arose when the property was delivered to the defendant by an erroneous order of the Magistrate.

As pointed out in *Trustees and Agency Company* v. *Short* (10), if a person enters upon the land of another, and holds possession for

(10) (1888) 13 App. Cas. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

a time and then without having acquired title under the Statute, abandons possessior, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. Here there was no abandonment Possession was taken out of him by the Magistrate, who held it for the true owner. But at the date of the attachment, the plaintiff was out of possession only for about two months; he had, therefore, a subsisting title at that time, and if the Magistrate's possession was constructive possession of the true owner, the case might come within the principle of the case of *Secretary of State* v. *Krishnamoni Gupta* (6), where it was held that dispossession by the *vis major* of floods had the same effect as voluntary abandonment. If the possession of the Magistrate was in law the possession of the true owner, as we think it was, the defendant's possession was determined upon the Magistrate's taking possession under the attachment; in other words, the plaintiff must be taken to have been restored to possession constructively on the date of the attachment. He, therefore, got a fresh starting point, and that being so, the case would fall within the principle of *Brojendra Kishore Roy's case* (3) and the case can be treated as one of continuing wrong under section 23 of the Limitation Act.

In the case of *Deo Narain Chowdhury* v. *Webb* (7) it was no doubt held that limitation having already commenced to run from the date of actual dispossession, the plaintiff could not have a fresh start of limitation from the date of the subsequent attachment by the Criminal Court, but the effect of the attachment upon the question of possession so far as the true owner is concerned, which was dealt with in the cases cited above, does not appear to have been considered by the learned Judges.

The result is that the decrees of the Courts below are set aside, and the suit is decreed to this extent, that plaintiff's title to the land will be declared. Regard having had, however, to the frame of the plaint, we direct that each party bear its own costs throughout.

N. K.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1186 OF 1919.

August 19, 1921.

Present: —Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Suhrawardy.

DHIRO KOCH AND ANOTHER—DEFENDANTS —APPELLANTS

versus

GOBINDA DEV MISHRA BURA SATRIA—PLAINTIFF—RESPONDENT.

Defamation—Statements made in pleadings—Privilege.

Defamatory statements made by parties to a suit in pleadings are not absolutely privileged. [p. 209, col. 2.]

Augada Ram Shaha v. *Nemai Chand Shaha*, 23 C. 867; 12 Ind. Dec (N. S.) 576, followed.

Shibnath v *Sat Cowri Deb*, 3 W. R 198, *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 431; 61 L. J. Q B 404; 66 L. T 513; 40 W. R. 400; 56 J. P. 404, *Nathji Muleshvar* v. *Lalbhai Ravidat*, 14 B. 47; 7 Ind. Dec. (N. S.) 522, *Bhikumber Singh* v *Becharam Sircar*, 15 C. 264; 7 Ind. Dec (N. S.) 761, *Kali Nath Gupta* v. *Gobinda Chandra Basu*, 5 C. W. N. 293, *Sandyal* v. *Bhaba Sundari Debi*, 7 Ind. Cas. 803; 15 C. W. N. 995; 14 C L J. 31, *Golap Jan* v. *Bhola Nath*, 11 Ind Cas 311; 15 C. W. N. 917 at p 921; 38 C. 881, *Croudy* v. *L O'Reilly*, 18 Ind Cas. 737; 17 C. W. N. 554; 17 C. L. J. 105, *Cutler* v *Dixon*, (1585) 4 Coke 14b; 76 E. R 886, *Abdul Hakim* v *Tej Chandra*, 8 A. 515; A. W. N. (1881) 81; 6 Ind. Jur. 320; 2 Ind. Dec (N. S.) 521, *Munster* v *Lamb*, (1883) 11 Q. B D. 588 at p. 603; 52 L. J Q B. 726; 49 L. T. 252; 32 W. R 248; 47 J. P. 805, *Satis Chandra* v. *Ram Dayal*, 50 Ind. Cas. 143; 32 C. L J. 94 at p. 120; 24 C. W. N. 982 (S. B.); 22 Cr. L. J. 31; 48 C. 388, *Hinde* v *Baudry*, 3 M. 18; 1 Ind. Jur. 81; 1 Ind. Dec. (N. S.) 28, *Venkata Narasimha* v. *Kotayya*, 12 M. 374; 13 Ind. Jur. 334; 4 Ind. Dec. (N. S.) 610, *Baboo Gunnesh Dutt Singh* v. *Mugneeram*, 17 W. R. 283; 11 B. L R. 321; 2 Suth. P. C. J. 574; 3 Sar. P. C. J. 179 (P. C.), referred to.

Having regard to the fact that statements are made in pleadings in this country in a reckless manner in many cases, the salutary rules embodied in section 499 of the Indian Penal Code should not be departed from in this country in actions for damages for defamation. [p. 209, col. 1.]

Appeal against a decree of the District Judge, Assam Valley Districts at Gouhati, dated the 3rd of March 1919, affirming that of the Subordinate Judge, Gouhati, dated the 3rd of March 1919.

FACTS appear from the judgment.

Babu *Mohini Mohan Chackerbutty*, for the Appellants.—The defendants are the appellants. The appeal arises out of a suit for damages for defamatory statements against the plaintiffs by the defendants. The facts briefly are these. There was a suit between

the Pujaris of Satra and the defendant. The present plaintiff was no party to that suit. He is the high priest of the Barpeta Satra. The defendant in his written statement in that suit stated that the present plaintiff had misappropriated the funds and misused the seal of the Satra and that for a certain reason the Brahmans of Barpeta would not eat with him Hence for those statements which the plaintiff alleged to have defamed him, the present suit for damages has been brought In our defence we state that the statements were privileged and true and that they were necessary for the purposes of that suit in course of which they were made. Both Courts have decreed the suit, holding that the statements were defamatory, malicious, irrelevant and therefore not privileged in law. My submission is that the statements were privileged. The case of *Augada Ram Shaha* v. *Nemai Chand Shaha* (1) relied on by the lower Courts has been dissented from in several later cases. Refers to *Golap Jan* v. *Bhola Nath* (2). There it has been held that even if the complaint to a Magistrate was defamatory still it was entitled to protection from suit, being absolutely privileged inasmuch as it was made in the course of and in relation to judicial proceedings. Refers to *Satis Chandra* v. *Ram Dayal* (3). The decision in *Crowdy* v. *L. O'Reilly* (4) is against me, but the observations of Mookerjee, J., are in my favour. I submit Common Law should be applied where there is no statutory law. Refers to *Bhikumber Singh* v. *Becharam Sircar* (5), *Nathji Muleshvar* v. *Lalbhai Ravidat* (6), *Hinde* v. *Baudry* (7). In all these cases the Enligh Common Law principles were applied. I submit the Courts below have erred in holding that the statements were not privileged.

Babu *Prokash Chandra Mazumdar*, for the Respondent.—The decision in *Augada Ram Shaha* v. *Nemai Chand Shaha* (1) covers the present case, inasmuch as the facts of that case are almost similar to those of the present case. There it was held that a defamatory statement made in the pleadings in an action is not absolutely privileged. The case of *Nathji Muleshver* v. *Lalbhai Ravidat* (6) was dissented from. That case of *Augada Ram Shaha* v. *Nemai Chand Shaha* (1) has been followed in a series of later cases. Refers to *Kali Nath Gupta* v. *Gobinda Chandra Basu* (8), *Sandyal* v. *Bhaba Sundari Debi* (9), *Crowdy* v. *L O'Reilly* (4). In the last case, however, the question as to whether absolute privilege can be claimed in respect of statements in the pleadings in a civil suit did not arise. In the Special Bench case of *Satis Chandra* v. *Ram Dayal* (3) also the question did not arise for consideration. It has been laid down there that the liability, in the absence of statutory rules, must be determined with reference to the principles of justice, equity and good conscience. Refers to Ratan Lal on Torts (6th Edition) 226; *Golap Jan* v. *Bhola Nath* (2), *Kari Singh* v. *Emperor* (10). The Allahabad High Court also follows the Calcutta decision in *Augada Ram Shaha* v *Nemai Chand Shaha* (1) Refers to *Emperor* v. *Ganga Prasad* (11), *Chunni Lal* v. *Narsingh Das* (12). The Bombay cases are against me. The decision in *Potaraju Venkata Reddy* v. *Emperor* (13) is in my favour. The majority of the decisions of this Court are in my favour and they have not been expressly overruled by the Special Bench case of *Satis Chandra* v. *Ram Dayal* (3) I submit in view of the findings of the Courts below in the present case, the rule of the English Law ought not to be extended.

(1) 28 C. 867; 12 Ind. Dec. (N. S.) 576.
(2) 11 Ind. Cas. 811; 15 C. W. N. 917 at p. 920; 38 C. 880.
(3) 59 Ind. Cas. 143; 32 C. L. J. 94 at p. 120; 24 C. W. N. 982 (S. B.); 22 Cr. L. J. 31; 48 C 388.
(4) 18 Ind. Cas. 787; 17 C. W. N, 554; 17 C. L. J. 105.
(5) 15 C. 264; 7 Ind. Dec. (N. S.) 761.
(6) 14 B. 97; 7 Ind. Dec. (N. S.) 522.
(7) 2 M. 13; 1 Ind. Jur. 81; 1 Ind. Dec. (N. S.) 281.
(8) 5 C. W. N. 293.
(9) 7 Ind. Cas. 803; 15 C. W. N. 995; 14 C. L. J. 31.
(10) 18 Ind. Cas. 630, 40 C. 433; 17 C. W. N. 297; 14 Cr. L. J. 100.
(11) 29 A. 635; 4 A. L J. 605; A. W. N. (1907) 235; 6 Cr. L J. 197.
(12) 45 Ind. Cas. 540; 40 A. 341; 16 A. L. J. 360 (F. B.).
(13) 14 Ind. Cas 659; 36 M. 216; (1912) M. W. N. 476; 13 Cr. L. J. 275; 11 M. L. T. 416; 23 M. L. J. 39.

DHIRO KOCH v. GOBINDA DEV.

Babu *Mohini Mohan Chackerbutty* replied briefly.

JUDGMENT.—This appeal arises out of a suit for damages for defamatory statements made against the plaintiff by the defendants in their written statement in a suit. The plaintiff is the high priest of the Barpeta Satra. Some Pujaris of the Satra were the plaintiffs in the suit in which the statements were made: the plaintiff was no party to that suit. In the written statement in that suit the defendants stated that the present plaintiff misappropriated the funds and misused the seal of the Satra, and also alleged that for a certain reason (which they did not specify) the Brahmans of Barpeta would not eat with him. The defence in the present suit was that the statements were privileged, that they were true and were necessary for the purposes of the previous suit. The Courts below did not attach any importance to the statements about misappropriation and misuse of seal, but they were of opinion that the last statement, *viz.*, that for a special reason the Brahmans of Barpeta will not eat with the plaintiff, the obvious meaning of which was that the plaintiff had been excommunicated for some scandal affecting him or members of his family, was defamatory. The Courts below held that the statements were not absolutely privileged, but would be protected if they were relevant to the suit and made in good faith, that the statements were not relevant to the suit and had no bearing upon the points at issue, that there was no good reason for mentioning the plaintiff at all in the written statement and the allegation was clearly the result of spite, and that the statement was untrue and malicious. Damages were accordingly awarded to the plaintiff. The defendants have appealed to this Court, and the only question for consideration is whether a defamatory statement in pleadings is absolutely privileged.

There is no doubt that in England the statements would be absolutely privileged. As observed by Lopes, J., in *Royal Aquarium* v. *Parkinson* (14), "the authorities establish beyond question that neither party, witness, Counsel, Jury, nor Judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against Judges, Counsel, witnesses or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed." The question is how far the principle applies in this country, so far as civil liability for damages for defamatory statements made by parties in pleadings is concerned. There is considerable divergence of judicial opinion upon the question how far defamatory statements made by parties or witnesses are privileged in this country. It is unnecessary to consider the question so far as it concerns defamatory statements made by witnesses, the only question for our consideration being whether defamatory statements made by parties in pleadings are absolutely privileged. So far as criminal liability for defamation is concerned, the law in this country is governed by the provisions of section 499 of the Indian Penal Code, and defamatory statements are punishable unless they fall within one of the exceptions to that section. In making it criminal to defame another, the Legislature has made it illegal so as to make it a cause of action if the person defamed was injured.

So far as defamatory statements in pleadings are concerned, the actual decisions in our Court (with the exception of only one case) are in favour of the view that they are not absolutely privileged, though there are *obiter dicta* in some cases to the contrary.

In *Shibnath* v. *Sat Cowri Deb* (15) the defendant in a petition to the District Judge for transfer of his case from a Munsif made some false charges against the plaintiff (who was the Munsif) and it was contended that the communication was privileged. The learned Judges held that in the absence of any proof of reasonable ground for believing the graver charges to be true, they were not privileged.

In *Augada Ram Shaha* v. *Newai Chand Shaha* (1), where the facts were somewhat similar to those of the present case, it was held that a defamatory statement made in the

(14) (1892) 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T. 513; 40 W. R. 450; 56 J. P. 404.

(15) 3 W. R. 198.

pleadings in an action is not absolutely privileged, dissenting from the case of *Nathi Muleshvar* v. *Lalbhai Ravidat* (6). The learned Judges (Petharam, C.J., and Rampini, J.) observed: "We do not think it possible that a statement may be the subject of a criminal prosecution for defamation, and at the same time may be absolutely privileged as far as the Civil Courts are concerned... by section 499 the publication of words which lower the character of a person in respect of his caste is defamation and subjects the publisher to punishment, unless it can be brought within one of the ten exceptions to the section." The earlier case, *Bhikumber Singh* v. *Becharam Sircar* (5), it is true, was not referred to, but that case related to immunity of witnesses. The case of *Augada Ram* (1) was followed in *Kali Nath Gupta* v. *Gobinda Chandra Basu* (3), where defamatory statements were made in a plaint. In *Sandyal* v. *Bhaba Sundari Debi* (9) the learned Judges, following the case of *Augada Ram Shaha* v. *Nemai Chand Shaha* (1), held that defamatory statements made in the written statement of a party in a judicial proceedings are not absolutely privileged in this country, and that a qualified privilege on the ground that the defendant had an interest in the subject-matter of the communication, and that the person to whom it was made had some duty to perform in the matter, cannot be claimed in respect of such statements unless they fall within the Exceptions to section 499 of the Indian Penal Code.

In the case of *Golap Jan* v. *Bholanath* (2) the main question considered was whether a suit for malicious prosecution could be maintained under the circumstances of that case. In the concluding portion of the judgment, however, Jenkins, C. J. (Woodroffe, J., agreeing) observed "but even if the complaint to the Magistrate was defamatory, still the complainant was entitled to protection from suit, and this protection was the absolute privilege accorded in the public interest to those who make statements to the Courts in the course of and in relation to judicial proceedings. I, therefore, hold that the plaint does not disclose facts entitling the plaintiff to relief." The opinions of Jenkins, C. J., and Woodroffe, J., are entitled to the highest respect, but the previous cases upon the point were not referred to either in argument or in the judgment of the Court.

The case of *Crowdy* v. *L. O'Reilly* (4) was also one for damages for malicious prosecution. In the course of the judgement, however, the cases on the present point were referred to by the learned Judges. Mookerjee, J., after referring to the divergence of opinion on the point, observed as follows:—"As at present advised, I am not prepared to dissent from the rule recognised in England, not only for the weighty reason assigned in *Outler* v. *Dixon* (16), but also for the additional reason that if suits of this description were allowed, it would be an encouragement to the institution of what must in many instances be mischievous and speculative litigation. It is not necessary, however, to decide the point finally for the purposes of the present litigation." Beachcroft, J., was of a contrary opinion. Referring to the cases on the point he observed: "No doubt the principle that the Courts should sanction no course which would have the effect of curtailing freedom of speech is one of general application, but freedom of speech must not be allowed to degenerate into license, and in the application of the prineiple we must, I think, look to the conditions obtaining in this country, so different from the those in England, and should not slavishly follow English precedents. I agree with the remarks of Straight, J., in *Abdul Hakim* v. *Tej Chandar* (17) in this connection."

"The strongest reason in favour of the English view appears to me to be that stated by Fry, L. J., in *Munster* v. *Lamb* (18), 'it is not intended to protect malicious and untruthful persons, but it is intended to protect persons acting *bona fide*, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions.' But when it is borne in mind in how large a proportion of the pleadings in cases in this country, state-

(16) (1585) 4 Coke 14*b*; 76 E. R. 886.
(17) 3 A. 815; A. W. N. (1881) 81; 6 Ind. Jur. 320; 2 Ind. Dec. (N. s.) 521.
(18) (1883) 11 Q. B. D. 588 at p. 603; 52 L. J. Q. B. 726; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805.

ments are made, which are not merely exaggerations, but deliberately false, I do not think that a rule should be laid down which would give currency to the idea that a party has *carte blanche* to make any statement he likes, however defamatory. I should be extremely sorry to favour any view which would encourage what my learned brother aptly terms mischievous and speculative litigation, but I am not aware that the decision in *Augada Ram Shaha* v. *Nemai Chand Shaha* (1), which has been the law in this Presidency for 16 years, has had that effect."

The observations of Beachcroft, J., as well as those of Mookerjee, J., were *obiter*. We may state, however, that we agree with the observations of Beachcroft, J. The present case illustrates how the privilege can be, and is, abused. The plaintiff was no party to the suit in which the defendants made the defamatory statement. The statement was absolutely irrelevant, and was made out of pure malice. Having regard to the fact that statements are made in pleadings in this country in a reckless manner in many cases, we think that the salutory rules embodied in section 499 of the Indian Penal Code should not be departed from in this country in actions for damages for defamation.

The learned Pleader for the appellant placed much reliance upon the case of *Satis Chandra* v. *Ram Dayal* (3). The reference to a Special Bench in that case arose out of a Rule for quashing a *criminal prosecution* for defamation, and the question for decision was whether the defamatory statements were privileged under section 499 of the Indian Penal Code. Mookorjee, A. C. J., in delivering the opinion of the Special Bench in that case, reviewed the decisions on the question of privilage of *witnesses* and *parties* in judicial proceedings, *civil and criminal*, and summarized the conclusions as follows:—

"(1) If a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise, his liability must be determined by reference to the provisions of section 499, Indian Penal Code. Under the Letters Patent, the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise; the Court cannot engraft thereupon exceptions derived from the Common Law of England or based on grounds of public policy. Consequently, a person in such a position is entitled only to the benefit of the qualified privilege mentioned in section 499, Indian Penal Code.

"(2) If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability, in the absence of statutory rules applicable to the subject, must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code."

The respondents rely upon the second paragraph quoted above. But it was a criminal case, and the question which we have to deal with, *viz*, whether a party to a judicial proceeding can be tried in a Civil Court for damages for defamation in respect of statements made in pleadings, or whether they are absolutely privileged, did not arise, nor was *decided*, in that case. The second conclusion, quoted above, purports to be a summary of decisions relating to immunity of *witnesses and parties generally*. The question of immunity of *parties* in respect of defamatory statements was not separately dealt with. Although, therefore, the opinion of the Special Bench is entitled to the highest respect, it is not a *decision* upon the point which arises in this case. So far as the *actual decisions of this Court* upon the question, whether for purposes of an action for damages, defamatory statements in pleadings of parties are absolutely privileged, are concerned, the majority of the decisions are in favour of the view of a qualified privilege. The only case in which a contrary opinion is expressed is *Galap Jan* v. *Bhola Nath* (2), where the previous decisions were not referred to, and the *obiter dictum* of Mookerjee, J., in *Crowdy* v. *L. O'Reilly* (4).

The decisions of the other High Courts are not uniform. In *Abdul Hakim* v. *Tej Chandar* (17) Straight, J. (and Tyrell, J.) were of

opinion that the law of defamation which should be applied to suits in India for defamation is that laid down in the Indian Penal Code, and not the English Law of libel and slander, and that defamatory statements are not privileged merely because they are used in a petition preferred in a judicial proceeding. The learned Judges observed:—"The state of society and the condition of things in the two countries is wholly dissimilar, and to lay down as an inflexible rule that any false and malicious statements, no matter how defamatory, may be made with impunity if only embodied in a petition filed in reference to some pending case, could not but entail the most mischievous consequences." The observations were *obiter*, as it was found that the defendant made the statements in good faith.

In the Bombay High Court a contrary view was taken in *Nathji Muleshvar* v. *Lalbhai Raeidat* (6), following the English rule. In the Madras High Court in *Hinde* v. *Baudry* (7) it was held that defamatory statements made in a petition by a person not a party to the suit are entitled to absolute protection (in an action for damages), at any rate entitled to the qualified privilege of persons acting in good faith for protection of their own interest. In *Venkata Narasimha* v. *Kotayya* (19) the defamatory statements made in a petition were found to have been made *bona fide* (there was also ground for some of the imputations) and were held to be privileged.

We have not referred to any cases of our Court nor of the other High Courts relating to defamatory statements made by *witnesses*, and our decision is confined to defamatory statements in pleadings of parties so far as civil actions for damages for such statements are concerned.

In *Baboo Gunnesh Dutt Singh* v. *Mugneeram* (20) the Judicial Committee observed that "witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this,—that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury." We think, however, that pleadings of parties stand on a different footing from statements made on oath by witnesses, and we agree with the observations of Beasheroft, J., in *Crowdy* v. *L. O'Reilly* (4), *viz*: "It is clear that witnesses and parties stand on a very different footing. This was recognized in the case of *Kali Nath Gupta* v. *Gobinda Chandra Basu* (8). A witness can be compelled to give evidence and to answer any question relevant to the subject matter of the suit but the statements of a party in his pleadings are entirely within his own discretion." It is unnecessary, however, to consider under what circumstances the privilege of witnesses is an absolute one.

We are of opinion that defamatory statements made by parties in pleadings are not absolutely privileged. The appeal is accordingly dismissed with costs.

Appeal dismissed.

(19) 12 M. 374; 13 Ind. Jur. 331; 4 Ind. Dec. (N. s.) 610.

(20) 17 W. R. 283; 11 B. L. R. 321; 2 Suth. P. C. J. 547; 3 Sar. P. C. J. 179 (P. C.).

CALCUTTA HIGH COURT.
CIVIL RULE No. 155 OF 1921.
August 18, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

LALIT MOHAN DEY—PETITIONER
versus
H. N. DUTTA AND CO. SOLICITORS, HIGH COURT, CALCUTTA—
OPPOSITE PARTY.

Land Acquisition Act (I of 1894), s. 32 (1)—Compensation awarded to lady having limited power of alienation—Land Acquisition Court, whether can apply portion of compensation money to meeting costs of proceedings—Solicitor, costs of—Costs, whether can be paid from deposit in Court.

Under the provisions of section 32 (1) of the Land Acquisition Act a Land Acquisition Court can apply a portion of the compensation money to meet the costs of the proceedings by which the money came to be awarded to an administratrix having a limited power of alienation. [p. 12, col. 1.]

Kamini Debi v. *Promotho Nath Mookerjee*, 10 Ind. Cas. 491; 13 C. L. J. 597; 39 C. 33, referred to.

LALIT MOHAN DEY v. H. N. DUTTA & CO.

A Solicitor who appears on behalf of an administratrix having limited powers, in a long acquisition proceeding before the Calcutta Improvement Tribunal is entitled to his costs in connection with that matter and can also move the Court to make the payment, out of the sum in deposit in Court for the administratrix, as the person from whom the sum is due. [p. 212, col. 1.]

Rule against an order of the Court of the President of the Calcutta Improvement Tribunal in (Valuation) Case No. 354 of 1919.

FACTS appear from the judgment.

Babu *Bepin Chandra Mallick* (with him Babu *Rabindra Nath Banerjee*), for the Petitioner.—The facts briefly are these. One Tulsi Das Dey died without issue, leaving behind him his widow Haridasi, who was appointed the administratrix to his estate. Certain premises belonging to the said Haridasi's husband were acquired under the Land Acquisition Act. Against the award by the Collector she made a reference to the Calcutta Improvement Tribunal and the award in consequence was enhanced. The sums awarded have been converted into war bonds, as provided under section 31 of the Land Acquisition Act. The opposite party, who were the Solicitors on behalf of the said administratrix and who conducted the land acquisition proceedings in her behalf, obtained a decree against her in the Calcutta Small Cause Court for Rs. 2,000 and odd for their costs for the work done by them. In execution of the said decree it has been ordered that a part of the Government securities be sold to satisfy the decree-holder opposite party. I am the reversioner to the estate of the late Tulsi Das Dey and as such I objected to the payment of the Solicitors' costs by sale of the Government securities. My objections were overruled by the President of the Calcutta Improvement Tribunal. Against that order the present Rule has been obtained by me. My submissions are, (1) that in India a Solicitor has no lien for costs in respect of any work done before any Court within Calcutta other than in the Original Side of the High Court, (2) that a Solicitor has no lien over immoveable property. In the present case the award for the acquisition of the immoveable property is to be treated as immoveable property, (3) and thirdly, I would contend that even if the Solicitors have any lien over immoveable property, they have lost it by reason of their obtaining a decree in the Small Cause Court. As soon as the money came in, they said that the money did not belong to the administratrix but to them. Once it is conceded that sections 31 and 32 of the Land Acquisition Act apply, what would be the position of the money? The administratrix does not come forward. The creditor simply asks for the sale of the Government securities. I submit the money after it is invested becomes real property. Refers to *Kamini Debi* v. *Pronotho Nath Mookerjee* (1). I submit section 90 of the Probate and Administration Act applies to the present case. The administratrix must have the permission of the Court before she can disburse the Solicitors' dues. English cases have no application to this case This is not a case of a Hindu widow alienating her property. No amount of necessity can enable her to sell the property without the permission of the Court. Refers to *Debendra Nath De* v. *Tulsimoni Dasi* (2).

Mr. *H. D. Bose* (with him Babu *Ajit Ghose*), for the Opposite Party.—As regards the powers of the Solicitors to have lien for work done, I submit Solicitors have lien over property for work done even within the town of Calcutta outside the Original Side of the High Court. Apart from that question an administratrix has all the powers of an executor excepting the limitations prescribed under section 90 of the Probate and Administration Act. Refers to section 4 of the Probate and Administration Act and sections 31 and 32 of the Land Acquisition Act. The estate vests in the Hindu widow in the same way as an administrator. Refers to *Shard, In the matter of* (3), *Bridge* v. *Madden* (4), Williams on Executors, Volume II, *Strickland* v. *Symons* (5). There is no distinction between executors and administrators in Equity and a third person is entitled to be indemnified in both cases if any act be done by him for the benefit and preservation of the estate. Here what have I done? I have done everything necessary in law to be done for the preservation of the

(1) 10 Ind. Cas. 491; 13 C. L. J. 597; 39 C. 33.
(2) 41 Ind. Cas. 810; 26 C. L. J. 123.
(3) 28 C. 574.
(4) 31 C. 1084; 9 C. W. N. 9.
(5) (1884) 26 Ch. D. 245 at p. 247; 53 L. J. Ch. 582; 51 L. T. 406; 32 W. R. 889

estate and as a matter of fact by reason of the reference to the Calcutta Improvement Tribunal the award has been increased by Rs. 27,000. It is consistent with the principles of justice, equity and good conscience that I should get my costs by selling a portion of the securities in execution of a lawful and valid decree against the administratrix.

Babu *Bepin Chandra Mullick* replied briefly.

JUDGMENT.—The facts connected with this Rule are as follows:—One Hari Dasi is the administratrix of the estate of her husband Tulsidas Dey. Certain premises forming part of the estate having been acquired under the Land Acquisition Act, one lac and forty-eight thousand rupees was awarded as compensation. She was not satisfied with the award, and caused a reference to be made to the Calcutta Improvement Tribunal for the determination of the proper amount of compensation payable for the premises, and the Tribunal enhanced the award by Rs. 27,000. Both the said sum and the amount of the original award have been invested in War bonds under section 31 of the Land Acquisition Act. The opposite party, Messrs. H. N. Dutta & Co., acted as Solicitors on her behalf in the proceedings before the Land Acquisition Collector, as well as before the Improvement Tribunal. They obtained a decree against her in the Calcutta Small Cause Court for Rs. 2,018 and odd for their bill of costs for the work done in connection with the said proceedings, and that Court requested the Improvement Tribunal to realize the sum by the sale of part of the Government securities and to send it to the Small Cause Court for satisfaction of the decree. The petitioner, who is the reversioner expectant on the death of the widow, objected to the payment of the costs by sale of the Government Promissory Notes, but his objections were overruled by the President of the Tribunal, who directed the sale of the requisite number of the Government Promissory Notes, and the amount to be sent to the Small Cause Court for satisfaction of the decree obtained by the opposite party. This Rule was thereupon obtained by the petitioner.

Several questions were raised in the case, *viz.*, whether in this country a Solicitor has a lien for costs in respect of any work done before any Court within Calcutta other than on the Original Side of the High Court, whether a Solicitor has a lien over immoveable property, the compensation money awarded being regarded as immoveable property, and lastly even if a Solicitor has any lien whether the opposite party has not lost it by obtaining a decree in the Small Cause Court. The Court below decided these questions in favour of the Solicitor, and the same questions have been raised in this Court.

We think it unnecessary to consider the question of Solicitor's lien raised in this case, as the case may be disposed of with reference to the provisions of section 32 (1) of the Land Acquisition Act. That section provides for investment of money awarded as compensation for land belonging to persons incompetent to alienate it, in Government or other approved securities and payment of interest to the person or persons who would for the time being have been entitled to the possession of the land, until such money so invested shall be applied in the purchase of such other lands or in payment to any person or persons becoming absolutely entitled to the same.

The section has been given a liberal interpretation in the case of *Kamini Debi* v. *Promotho Nath Mookerjee* (1). The property acquired under the Land Acquisition Act was *debutter* property; and it was held that where a portion of *debutter* property was acquired under the Act, and the compensation money was invested in approved securities, the *shebait* is entitled to withdraw a portion of the invested funds and apply it to effect necessary repairs to the remainder of the property. The learned Judge observed that the fiction of the money being impressed with the character of real estate, "if maintained for the protection of beneficiaries, ought not also to be applied to fetter the trustee needlessly." Now if the money can be applied to the protection of the trust property from physical damage, there seems no good reason why it should not be applied for its protection against diminution resulting from undervaluation in land acquisition proceedings.

The additional amount of compensation money secured by the proceedings in

respect of which the costs were incurred, is an addition to the corpus of the estate the benefit of which will ultimately be received by the reversioners. The costs of the proceedings, therefore, should legitimately come out of the fund which is the result of the proceedinge.

It is true that the lady is administratrix to the estate and so has only limited power of alienation. If, however, the Land Acquisition Court can direct a portion of the compensation money to be applied for payment of costs of repairs of a *debutter* property, we think the Court on the same prineiple can apply a portion of the money to meeting the costs of the proceedigs by which the money came to be awarded to the lady. We think that this view is consistent with the principles of justice, equity and good conscience and should be adopted.

It has been argued on behalf of the petitioner that whatever payment may be made out of the sum in deposit on the application of the administratrix herself, no such payment can be ordered on the application of the opposite party. We think, however, that, on the prineiple we have adopted, the creditor to whom a payment of this nature is legitimate may as well move the Court to make the payment as the person from whom the sum is due.

The Solicitor, however, is entitled only to the costs in connection with the valuation case before the Tribunal, including the costs of the reference.

The order of the Court below is modified and the case sent back to the lower Court in order that such amount may be ascertained. The Solicitor will be entitled to get the amount which may be ascertained by the Court below to be the costs incurred in the proceedings for enhancing the award of the Land Acquisition Collector, including the costs of the reference. He will not be entitled to any costs incurred in relation to the investment of the money and other matters. This order, however, will not prejudice the right of the opposite party to recover the balance of his costs by any other method which may be open to him.

The opposite party will get costs, two gold *mohurs*.

B. N. *Order modified.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 381 OF 1920.

November 5, 1921.

Present :—Sir Norman Macleod, KT., Chief Justice.

JAIRAM JADOWJI AND OTHERS—APPLICANTS—PLAINTIFFS

versus

NOWROJI JAMSHEDJI PLUMBER—DEFENDANT—OPPONENT.

Civil Procedure Code (Act V of 1908), O XXI, r. 99—Execution of decree—Obstruction—Sub-tenant of judgment-debtor.

A sub-tenant of a tenant judgment-debtor cannot claim to be in possession of the leased property on his own account or on account of some person other than the judgment-debtor, within the meaning of rule 99 of Order XXI of the Civil Procedure Code and an auction-purchaser of such property is entitled to get possession of it from the sub-tenant. [p. 21[illegible], col. 2.]

Ezra v. *Gubbay*, 60 Ind. Cas. 969; 47 C. 907, not followed.

Jafferji Ibrahimji v. *Miyadin Mangal*, 64 Ind. Cas. 692; 23 Bom. L. R. 125, referred to.

Application.

Mr. *B. J. Desai*, for the Applicants.

Mr. *Jinnah*, for the Opponent.

JUDGMENT.—The plaintiffs filed a suit against the defendant to recover possession of their property situated at Bhendy Bazaar which was in the defendant's occupation as a monthly tenant. A consent decree was passed on the 18th of August 1920, whereby it was ordered that the defendant should give to the plaintiffs possession of the whole of the house mentioned in the plaint, excepting the northern half of the ground floor of the said building then in the occupation of the defendant as a shop and the verandah occupied by a fruit seller, on or before the 1st September 1920. The defendant was also ordered to give vacant possession of the said verandah to the plaintiffs on or before the 15th September 1920. The defendant failed to give possession of the verandah occupied by the fruit seller, so that the plaintiffs applied for execution of the decree and prayed for delivery of possession

of the verandah, but the fruit-seller declined to vacate and consequently the plaintiffs were forced to take out this summons against the fruit-seller, asking for an order that he should vacate the premises and pay compensation of Rs 50 per month from the 15th September 1920 till possession was given.

The application is made by the plaintiffs in execution of their decree under Order XXI, rule 97 (Civil Procedure Code), which says:—

"Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction."

Rule 98 deals with the obstruction caused by the judgment-debtor or by some other person at his instigation. It is not suggested in this case that the fruit seller is refusing to vacate at the instigation of the judgment-debtor. Rule 99, therefore, applies, which says:—

"Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application."

It must follow that if the Court is not satisfied that the obstruction is being occasioned by a person claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor, the Court has the power to grant the application.

Now, the only justification for the fruit-seller being in occupation of the premises is the agreement of tenancy which originally existed between himself and the judgment-debtor. He does not claim to be in possession on his own account, or to be holding on account of some person other than the judgment debtor.

Under rule 100 where a person other than the judgment debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or where the property is sold in execution of a decree by the purchaser thereof, he may make an application to the Court complaining of such dispossession. So that if the fruit-seller had been dispossessed by the plaintiffs under their decree, he could make an application under rule 100. Then under rule 101 if the Court was satisfied that he was in possession of the property on his own account or on account of some person other than the judgment-debtor, it could direct that he should be put back in possession of the property. It is curious that the words "in good faith," which appear in rule 99, do not appear in rule 101. But if the Court was satisfied that the applicant was not acting in good faith, it would be most unlikely that the Court would make an order in his favour, for whether the applicant is the decree-holder or the person dispossessed, the same issues arise.

However that may be, it seems to me clear that a sub-tenant cannot claim to be in possession of property on his own account, and if admittedly his immediate landlord is the tenant and judgment-debtor, he cannot be in possession on account of some person other than the judgment-debtor. It is obvious, therefore, that the execution plaintiff is entitled to get possession of the premises from the sub tenant; and if any other construction were placed on rules 97 and 99, obstruction could be caused to an execution plaintiff in a suit for possession in a manner which was never contemplated by the Code.

Mr. Jinnah for the fruit-seller relies upon the decision in *Ezra* v. *Gubbay* (1). No doubt the learned Judge in dismissing the execution plaintiff's application held on his construction of rule 99 that the under-tenant could be said to claim to be in possession on his own account. That, with all due respect, appears to me to require explanation, for I cannot see how it can be said that an under-tenant is in possession of the premises on his own account. And, in my opinion, those words can only refer to a person who claims to be in possession on his own title. Otherwise it would not be necessary to add the words "on account of some person other than the judgment debtor." The person in possession may either claim to be in possession on his own title or as tenant of some person other than the judgment-debtor. But if he claims to be in possession as a tenant of the

(1) 60 Ind. Cas. 969; 47 C. 907.

judgment-debtor, then it seems to me that the Court is bound to make the order in favour of the execution plaintiff. Otherwise a landlord may get a decree for ejectment against his tenant but may find that decree an absolute nullity if his tenant had sublet the premises, as he may have to again file a suit against the sub tenant. I have already held that sub-tenants, though they may claim the benefit of the Bombay Rent Act against their immediate lessor, cannot claim it against the owner of the premises: see *Jafferji Ibrahimji* v. *Miyadin Mangal* (2). When a landlord gets a decree for possession against his tenant, and is resisted or obstructed in obtaining possession, then it is open to him to apply to the Court to get possession under Order XXI, rule 97, and if the person resisting or obstructing is in possession as a sub-tenant, that person cannot claim under rule 99 that the application should be dismissed.

The summons, therefore, will be made absolute with costs.

As regards the summons of 3rd October 1921, it will be discharged. The defendant to pay by way of compensation the rent payable by the fruit seller to him, until vacant possession is delivered to him. No order as to costs on this summons.

Z. K. *Summons made absolute.*

(2) 64 Ind. Cas. 692; 23 Bom. L. R. 1251.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1498 OF 1919.

August 18, 1921.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

MOBARAK MOLLA—PLAINTIFF—APPELLANT

versus

HECHAMUDDI MOLLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Amendment of plaint—Second appeal—Cause of action not arisen at filing of plaint—High Court, power of.

A High Court, in second appeal, will not allow an amendment of a plaint for the purpose of enabling the plaintiff to rely upon a cause of action against the defendant which had not arisen at the time the plaint was filed. [p. 215, col. 2]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Faridpur, dated the 25th of April 1919, reversing that of the Munsif, Third Court at Madaripur, dated the 14th of January 1918.

FACTS appear from the judgment.

Babu *Probodh Chandra Kar*, for the Appellant.—My humble submission to your Lordships is that the learned Subordinate Judge has erred in law in dismissing my suit which was decreed by the Primary Court. I cannot base my claim on the mortgage-bond, which is an unregistered document. So I was right in basing a claim on the settled accounts.

If your Lordships are of the same opinion as the lower Appellate Court, I beg to submit that I may be permitted to amend my plaint so as to base my claim against the defendant upon the covenant in the mortgage-bond. There is nothing in law which stands in the way of your Lordships granting me such permission. Leave to amend plaint is often granted by the Hon'ble Privy Council.

Babu *Jogesh Chandra Roy* (with him Babu *Rajendra Chandra Guha*), for the Respondents.—The appellant has misjudged his remedy and so he must suffer now for his own fault. The alleged settled accounts were superseded, it must be admitted by the other side also, by reason of the appellant's accepting the mortgage-bond from the respondents. So how can he now go back to the settled accounts and base his claim thereupon? He ought to have sued the respondents when the money became due under the covenant in the mortgage. There is nothing in law which can prevent appellant's suing the respondents for money under the terms of the mortgage-bond.

I oppose my friend's prayer for leave to amend his plaint at this final stage of the suit. Your Lordships are to consider the position of the parties and the liability of my clients at the date when the plaint was issued. My clients had no liability

when this suit was brought; the money did not became due by them.

Babu *Frobodh Chandra Kar* briefly replied.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of the learned Offisiating Subordinate Judge, First Court, of Faridpur; and the suit was brought to recover the sum of Rs. 780 on accounts which were alleged to have been settled between the plaintiff and the first defendant.

The first Court gave judgment in favour of the plaintiff. On appeal to the lower Appellate Court, that judgment was reversed and the suit was dismissed; and the plaintiff has appealed by way of second appeal to this Court.

It appears that accounts were settled between the parties sometime about August 1916, but in August 1916 the plaintiff agreed to take a mortgage-bond from the first defendant in his (plaintiff's) favour. That mortgage-bond is dated the 9th Bhadra 1323 B. S, which, I understand, corresponds with August 1916. The due date for payment of the money, which was mentioned as Rs. 750 in that mortgage, was the end of Pous 1323 B. S, which corresponded to the 13th of January 1917. Therefore, the money under the mortgage did not become due until the 13th January 1917. The learned Judge has found that the liability for the balance found to be due to the plaintiff on the settled accounts was superseded by reason of the plaintiff's accepting the mortgage-bond from the defendant, and I agree with him. Consequently, the plaintiff was in error in suing the defendant and basing his claim upon the alleged settled accounts. He ought to have waited until the money became due under the terms of the mortgage and then sued the defendant. The mortgage-bond is not registered and the learned Vakil for the appellant has argued that although the mortgage-bond by reason of its not being registered could not be used by the plaintiff for the purpose of getting a decree charging the land, still it would have been open to the plaintiff to sue for the money due under the covenant in the mortgage bond. This suit was brought on the 3rd of January 1917 and, as I have already stated, the money did not become due under the mortgage till the 13th of January 1917. Consequently, in my judgment, the learned Judge of the lower Appellate Court was right in holding in this suit, based as it is, not upon the covenant in the mortgage-bond, but upon the settled accounts, that the plaintiff could not recover.

The learned Vakil for the appellant asked leave to withdraw the suit with liberty to bring a fresh suit upon the mortgage-bond. The learned Vakil for the respondent had no objection to this being done, on condition that the plaintiff should pay the costs of the suit. Then the learned Vakil for the appellant discovered that if he withdrew the suit the plaintiff could not bring a suit upon the mortgage-bond because the plaintiff's suit would be out of time. Consequently he abandoned his application to withdraw the suit.

The learned Vakil for the appellant then urged that the plaintiff should have liberty to amend his plaint by basing his claim against the defendant upon the covenant in the mortgage-bond. The learned Vakil for the respondent has objected to this course being adopted, on the ground that this Court is bound to consider the position of the parties and the liability of the defendant at the date when the plaint was issued. In my judgment, at the time this suit was brought, *i. e.*, on the 3rd of January 1917, there was no liability upon the defendant under the terms of the mortgage-bond. Therefore, it seems to me that it is impossible for us now to allow the amendment of the plaint, for the purpose of enabling the plaintiff to rely upon a cause of action against the defendant which had not arisen at the time this plaint was issued. If the plaintiff had recognised the real position, he might have applied to the Trial Court for liberty to withdraw the suit and sue on the covenant in the mortgage-bond. Then he would have been able to substantiate any right which he might have against the defendant. Unfortunately the plaintiff has deferred taking that course till he finds himself in the High Court, in second appeal, when it is too late for him to withdraw the suit and start a new suit.

In my judgment this appeal must be dismissed with costs.

CHOTZNER, J.—I agree.

B. N.

Appeal dismissed.

BHARMAPPA v. UJJANGAUDA.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 804 OF 1920.
September 27, 1921.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.
BHARMAPPA BHARMAGAUDA—
APPELLANT
versus
UJJANGAUDA BHARMAGAUDA
—RESPONDENT.

Hindu Law—Bombay school—Exclusion from inheritance—Congenital and incurable dumbness—Obsolescence of disqualifications—Adoption—Person having dumb son or grandson, whether can adopt.

According to the Hindu Law prevailing in Bombay, a person suffering from congenital and incurable dumbness is incapable of inheriting. [p. 217, col. 1.]

It may be, as was pointed out in *Surayya* v. *Subbamma* (1), that some of the grounds of exclusion as mentioned in the texts are obsolete. All the disqualifications, however, cannot be treated on the same footing. Each defect must be considered on its merits, and if it could be fairly and safely stated that it is obsolete, it may be treated in that manner [p 217, col. 1.]

Vallabhram v. *Bai Hariganga*, 4 B. H. C. R (A. C. J.) 135, followed.

In the lifetime of a natural son or grandson or a great grandson no valid adoption can be made. [p. 217, col 1.]

A person having a grandson who is subject to the defect of dumbness from his birth cannot be described as sonless so as to make an adoption by him during the lifetime of the grandson valid. [p. 219, col. 1.]

Vallabhram v. *Bai Hariganga*, 4 B. H. C. R. (A. C. J.) 135, *Rungama* v. *Atchama*, 4 M. I. A. 1; 7 W. R. P. C. 57; 1 Suth. P. C. J. 197; 1 Sar. P. C. J. 313; 18 E. R. 600, referred to.

Second appeal from a decision of the District Judge, Dharwar, in Appeal No. 169 of 1918, confirming a decree passed by the Subordinate Judge at Haveri, in Civil Suit No. 504 of 1916.

Mr. *Coyajee* (with him Mr. *Nilkanth Atmaram*), for the Appellant.

Mr. *Tyabji* (with him Mr. *S. V. Palekar*), for Respondent No. 1.

JUDGMENT.

SHAH, J.—The facts, which have given rise to this appeal, are few and not now disputed. One Bharmagauda had a son of the same name. That son had two sons, Basangauda and Ujja. The son (Bharmagauda) and the grandson Basangauda predeceased the father Bharmagauda. This Bharmagauda adopted the present plaintiff during the lifetime of his grandson Ujja. This Ujja is found by the lower Courts to have been dumb from his birth. Bharmagauda died in 1915; and the present suit was filed in 1916 by the plaintiff as the adopted son of Bharmagauda to recover possession of the property from defendant No. 1 (the grandson of Bharmagauda), on the ground that owing to dumbness and insanity he was disqualified to inherit his grandfather's property. The defendant No. 1 repudiated the allegations, and contended that the plaintiff's adoption was invalid. The allegation as to the insanity of defendant No. 1 was not proved: but it is found that from the time of his birth the defendant No. 1 was dumb and that his dumbness was incurable. The lower Courts held that the adoption of the plaintiff by Bharmagauda, the grandfather of defendant No. 1, was proved and that it was valid and accordingly decreed the plaintiff's claim.

In support of the appeal to this Court it is urged on behalf of the legal representative of defendant No. 1, who died during the pendency of the appeal in the District Court, that the defendant No. 1 was not disqualified according to Hindu Law, and that even if he was disqualified, the adoption of the plaintiff by Bharmagauda during the lifetime of the grandson was invalid.

As regards the first contention it is clear on the finding of facts that defendant No. 1 (Ujja) was dumb from his birth and that his dumbness was incurable. According to the Mitakshara such a son or grandson would be excluded from inheritance. No doubt Yajnavalkya does not mention a dumb person among those who are excluded from inheritance. But Vijnaneswara includes him in the list under the word *adya* on the authority of Manu. In the Vyavahara Mayukha also, on the authority of the same text of Manu, a dumb man is referred to as excluded from inheritance. It is urged, however, that this ground of disqualification, like several other grounds, has become obsolete, and the observations in *Surayya* v. *Subbamma* (1) have been relied

(1) 53 Ind. Cas. 498; 43 M. 4; 26 M. L. T. 154; (1919) M. W. N. 580; 37 M. L. J. 405.

(1) 53 Ind. Cas. 498; 43 M. 4; 26 M. L.T. 154; (1919) M. W. N. 580; 37 M. L. J. 405.

upon in support of this argument. It also appears that in Steele's Hindu Law and Custom it is stated at page 224 that "Lame or deformed persons are not excluded, nor are the deaf and dumb." It may be that some of the grounds of exclusion from inheritance mentioned in the texts are obsolete. While I agree generally with the observations in the above case as to the hardship and obsolete nature of some of the grounds of exclusion from inheritance, I do not see how all of them could be treated on the same footing. Each defect must be considered on its merits, and if it could be fairly and safely stated that it is obsolete, it may be treated in that manner. But it would not be right, nor does it appear to me to be possible, in view of the decisions on the point, to treat all these grounds as obsolete.

In the present case we are concerned only with congenital and incurable dumbness. The effect of such a defect on the right to inherit was considered by this Court so far back as 1867 in *Vallabhram* v. *Bai Hariganga* (2) and it was held after full argument that, according to the Hindu Law prevailing on this side of India, a person born dumb was incapable of inheriting. That decision is binding upon us: and I see no good reason to refer this question to a Full Bench for reconsideration. It follows that Ujja was excluded from inheritance on account of his dumbness from birth.

The next question is whether the adoption of the plaintiff during Ujja's lifetime is valid? It may be stated that the subsequent death of Ujja during the pendency of this litigation without having a son does not affect the question as to the validity of the plaintiff's adoption. If it was invalid at the time, the subsequent event cannot validate it. This position has not been seriously questioned before us, and it seems to me to be clear that the validity of the plaintiff's adoption must be determined with reference to the facts as they existed at the date of the adoption.

It is not disputed, and in fact it is indisputable, that in the lifetime of a natural son, grandson or a great grandson no valid adoption could be made. This is clear from the Dattaka Mimansa, section 1, paragraphs 3, 6 and 13 (Stokes' Hindu Law Books, pp. 531, 532 and 533). But it is urged that the existence of a grandson, disqualified as in the present case, is no bar to an adoption by the grandfather. There is no decided case on this point: and so far as I have been able to see, there is nothing in the Mitakshara or the Vyavahara Mayukha to lend support to this view. The basic principle of adoption, as I understand it to have been laid down by the Smriti writers, does not support the contention. The opinions expressed by writers on Hindu Law are conflicting; and treating it as a point of first impression, at least so far as this Presidency is concerned, I have come to the conclusion that the fact of the grandson suffering from dumbness by birth does not render the adoption valid which would be otherwise invalid on account of its having been made during his lifetime.

I shall state my reasons briefly for this conclusion. In the first place, we have the texts of Atri, Manu and Saunaka which lay down that the adoption can be made only by a person who has no son, *i. e.*, who never had a son or whose son is dead. The Dattaka Mimansa begins with the text of Atri, and in the first section the author refers to the texts of Saunaka and Manu (see paragraphs 3, 4, 9 of section I in Stokes' Hindu Law Books at pp. 531, 532 and 533). The essential condition for a valid adoption, according to these texts, is that the adopter must be sonless at the time of the adoption. While speaking of an 'adoption' Yajnavalkya does not refer to this condition; nor does Vijnanesvara refer to it in his Commentary on Yajnavalkya's verse (see paragraphs 9 to 15 of Chapter I, section XI of the Mitakshara; Stokes' Hindu Law Books, pp. 415—418). It is significant, however, that while referring to the disqualifying circumstances in Chapter II, section X, Yajnavalkya provides that the sons (natural and Kshetraja) of those who would be excluded from inheritance are not subject to any disability, provided they are free from similar defect; and Vijnanesvara points out that natural and Kshetraja sons are mentioned with a view to exclude other sons mentioned before. (See Mitakshara, Chaper II, section X, paragraphs 10, 11 and 12; Stokes' Hindu Law Books, page 457). It is also further provided that the unmarried daughters of those who are excluded from inheritance and the sonless

(2) 4 B. H. C. R. (A. C. J.) 195.

wives of such persons are to be maintained. It is clear from these passages that neither Yajnavalkya nor Vijnaneswara would have favoured the view that a person having a son subject to any of the defects mentioned by them could be treated as *sonless*. Indeed it also appears from Viswarupa's Commentary on these verses of Yajnavalkya that those who are excluded from inheritance are not necessarily incompetent to perform sacrifice, etc. This passage is translated at page 16 of the report in *Surayya* v. *Subbamma* (1) and the original passage in Sanskrit may be found in Setlur's Mitakshara at page 838. I also find in Apararka's Commentary on the same Smriti that there is no such general disqualification to perform religious functions. [See Yajnavalkya's Smriti with Apararka's Commentary—Anandasram Series, Vol. 46 (Part II), p. 750.]

In the Vyavahara Mayukha there is no indication in the Chapter relating to adoptions that a son subject to any defect which would exclude him from inheritance was no son at all. On the contrary the text of Saunaka has been referred to and *aputrena* has been translated 'as one having no male issue or one whose male issue has died' (see Mandlik's Hindu Law, page 52, or Stokes' Hindu Law Books, page 60, paragraph 10 of Vyavahara Mayukha, Chapter IV, section V): and I may here refer to the observations in Mandlik's Hindu Law, Appendix IV, at page 456, that 'a sonless man alone at present adopts a son.' In the Chapter relating to persons excluded from inheritance there is nothing to indicate that a person having a dumb son was to be treated as sonless.

The Dattaka Mimansa does not, in my opinion, afford any indication to the contrary. The passage in section II, paragraph 62 (Stokes' Hindu Law Books at page 561) has been relied upon as showing that persons subject to disqualifying defects are no sons at all. In the first place, the reference to persons excluded from inheritance is incidental; and if it is read in relation to the context and the argument in relation to which the reference is made, I am not clear that the passage means what it is argued before us it means. It has been interpreted, however, by some writers on Hindu Law, whose opinions are entitled to weight, as supporting the contention on behalf of the respondent. But apart from the difficulty of determining the true meaning of this reference to 'impotent persons and the rest,' this much is clear that there is no such opinion expressed by Nanda Pandita in the first section where he deals with the question as to who can adopt. Next he proceeds to deal with the question as to who is to be adopted. In that section several opinions expressed by the author have been treated as merely recommendatory and not obligatory. I am not, therefore, prepared to accept the contention that the opinion of Nanda Pandita is that a son subject to a disqualifying defect is no son at all as regards the power of the father to adopt, nor am I prepared to give effect to an opinion, not supported by any Smriti, expressed incidentally in the course of an argument on another point, and not stated at the place where he would be expected to state it if it were his opinion.

It is needless to refer to the opinions of writers on Hindu Law in detail. I may here mention that in spite of the respectable body of opinions in favour of the view that a second adoption in the lifetime of another adopted son was permissible, the Privy Council held in *Rungama* v. *Atchama* (3) that such an adoption was invalid. On the point now under consideration the weight of opinions in favour of the view that the adoption is valid is by no means so great as it was in favour of the view once held that a second adoption during the lifetime of the first adopted son was valid. The task of reconciling these opinions is difficult: and after all we have to consider whether the Hindu Law goes so far as to lay down that a son subject to a disqualifying defect is no son at all for the purpose of enabling the father to make a valid adoption during the lifetime of such a son. I may, however, refer to the inference drawn by Sutherland in his synopsis of the Dattaka Mimansa and Dattaka Chandrika (Stokes' Hindu Law Books at page 604) and to the opinion expressed in Strange's Hindu Law at page 77 (Volume I) in favour of the view that an adoption in the lifetime of a disqualified son is valid. This opinion is accepted in

(3) 4 M. I. A. 1; 7 W. R. P. C. 57; 1 Suth. P. C. J. 197; 1 Sar. P. C. J. 318; 18 E. R. 600.

Sarkar's treatise on Adoption, page 196 (2nd Edition) and Ghose's Hindu Law, Volume I at page 669 (3rd Edition). In Steele's Hindu Law and Custom at page 42 it is stated that "insanity of a begotten son is no legal cause of adoption. An adoption can take place only where no begotten son or grandson exists, or where the begotten son has lost caste." This remark was quoted apparently with approval in *Rungama's case* (3). It is true that at page 181 of the same book it is stated as follows:—"It is allowed in case of a begotten son becoming outcaste or insane, or otherwise becoming incapable of conducting the family affairs; such adoption is in the name of the son. A mad man is, however, seldom married and an outcaste is often re-admitted. No son can be adopted during the life of a begotten son (not disqualified as above)." As already pointed out, the same author has stated that a dumb person is not excluded from inheritance. But this Court has not accepted that opinion, and the statement of the custom on the present point, which even if strictly taken may not cover the case of a dumb person without proof of his being "incapable of conducting the family affairs," could hardly be preferred to his statement of the law on the same point at page 44.

On the best consideration that I can give to the point, I do not think that a person having a grandson who is subject to the defect of dumbness from his birth, as in the present case, can be correctly described as sonless so as to make an adoption by him during the lifetime of the grandson valid. I base this conclusion upon the Mitakshara and the Vyavahara Mayukha and next upon the Dattaka Mimansa and the Dattaka Chandrika as I understand them. I hold, therefore, that the adoption of the plaintiff was invalid. I would allow this appeal and dismiss the plaintiff's suit with costs throughout.

MACLEOD, C. J.—I concur.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1396 OF 1919.
November 23, 1921.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

Srimati SARASHIBALA DASSI, ADMINISTRATRIX TO THE ESTATE OF HER HUSBAND JATINDRA MOHAN KUMAR, DECEASED—PLAINTIFF—APPELLANT

versus

CHOONI LAL GHOSE—DEFENDANT—RESPONDENT.

Accounts, suit for, against agent—Claim for period before death of principal—Limitation—Contract Act (IX of 1872), s. 201—Limitation Act (IX of 1908), Sch. I, Art. 89.

An agency is terminated by either the principal or agent dying, and a suit for accounts against the agent for the period during which he acted as agent under his deceased principal must be brought within three years of the death, as laid down in Article 89 of the Limitation Act. [p. 220, col. 1.]

Madhusudan Sen v. *Rakhal Chandra Das Basak*, 30 Ind. Cas. 697; 43 C. 248, 22 C. L. J. 552; 19 C. W. N. 1070 and *Chandra Madhab Barua* v. *Nabin Chandra Barua*, 18 Ind. Cas. 735; 40 C. 108; 17 C. L. J. 103, relied upon.

Appeal against a decree of the Additional Subordinate Judge, Howrah, dated the 5th April 1919, modifying that of the Munsif, Second Court at Howrah, dated the 19th February 1918.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Kshitish Chandra Chakrabutty*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for accounts. The defendant was the *gomasta* of the plaintiff's husband till 25th July 1912 when he died. After that he acted as the plaintiff's agent. We ask for accounts from 1301 to 1319 (Sraban). The Court below has dismissed the suit on the ground of limitation. I submit the case is governed by section 209 of the Indian Contract Act. The defendant was in the position of a trustee so far as the interest of the deceased was concerned. Therefore, under Article 120 of the Indian Limitation Act, which covers the present case, the suit would not be barred, it having been brought within six years from the death of the plaintiff's husband. The learned Judge has wrongly applied Article 89.

BHURIA v. BALIRAM.

Babu *Monmathanath Ganguli*, for the Respondent.—I submit section 201 of the Indian Contract Act would apply. An agency would terminate on the death of the principal and a suit of the present nature must, under Article 89 of the Limitation Act, be brought within three years from the principal's death. Refers to *Madhusudan Sen* v. *Rakhal Chandra Das Basak* (1).

Dr. *Basak* replied in brief.

JUDGMENT.—This appeal arises out of a suit for accounts against an agent, and the question involved in the appeal is whether the claim for accounts from 1301 to 9th Sraban 1319 corresponding to 25th July 1912 is barred by limitation.

The defendant acted as *gomasta* under the plaintiff's husband Jotindra until his death, which took place on the 25th July 1912. He then acted as the plaintiff's agent. The suit having been brought more than three years after the death of Jotindra, the claim for accounts for the period before the death of Jotindra has been held to be barred under Article 89 of the Limitation Act. As provided by section 201 of the Contract Act, an agency is terminated by either the principal or agent dying, and a suit against the agent for the period during which he acted as agent under the deceased must, therefore, be brought within three years of the death, as laid down in Article 89 of the Limitation Act. See *Madhusudan Sen* v. *Rakhal Chandra Das Basak* (1) and *Chandra Madhab Barua* v. *Nabin Chandra Barua* (2).

It is, however, contended on behalf of the appellant that the case comes under section 209 of the Contract Act. That section lays down that when an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him. It is contended that the defendant was in the position of a trustee so far as the interest of the deceased was concerned and that the suit for accounts against him would be in time if instituted within six years from the death of the plaintiff's husband under Article 120 of the Limitation Act.

There is, however, no question here of suing the defendant for any act done by him after the death of his late principal, which he might have done as a trustee. The suit is for accounts on the ground that he was bound to render accounts to his late principal during his lifetime, which he did not render. That would be a suit for accounts under Article 89 of the Limitation Act.

We think the Court below is right in holding that the claim for the period prior to the death of Jotindra was barred by limitation.

The appeal accordingly fails and is dismissed with costs.

B. N.

Appeal dismissed.

(1) 30 Ind. Cas. 697; 48 C. 248; 22 C. L. J. 552; 19 C. W. N. 1070.

(2) 18 Ind. Cas. 785; 40 C. 108; 17 C. L. J. 103.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 119 OF 1919.

March 3, 1921.

Present:—Sir Henry Drake Brookman, KT., J. C.

Musammat BHURIA—DEFENDANT—APPELLANT

versus

BALIRAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 64—Attachment—Objections—Attachment raised—Transfer—Subsequent attachment—Revival.

Where an attachment is raised in consequence of a claim suit being decreed but the suit is finally dismissed in appeal, a subsequent application for execution would operate to revive the previous attachment and a transfer made even during the period the attachment was raised is void as against all claims enforceable under the attachment. [p. 223, col. 2.]

Anund Loll Doss v. *Jullodhur Shaw*, 14 M. I. A. 543; 17 W. R. 313; 10 B. L. R. 134; 2 Suth. P. C. J. 552; 3 Sar P. C. J. 8; 20 E. R. 888, *Abdul Rashid* v. *Gappo Lal*, 20 A. 421; A. W. N. (1898) 98; 9 Ind. Dec. (N. S.) 630, *Khushalchand* v. *Nandram*, 12 Ind. Cas. 572; 35 B. 516; 13 Bom. L. R. 977, *Kunhi Moosa* v. *Makki*, 23 M. 478; 10 M. L. J. 98; 8 Ind. Dec. (N. S.) 735, *Durga Churn Rai* v. *Monmohini Dasi*, 15 C. 771; 7 Ind. Dec. (N. S.) 1038, *Manohar Das* v. *Ram Autar*, 25 A. 431; A. W.

BHURIA v. BALIRAM.

N. (1903) 92, *Sorabji Edulji* v. *Govind Ramji*, 16 B. 91; 8 Ind. Dec. (N. s.) 537, *Suppa Reddiar* v. *Avudai Ammal*, 28 M. 50 (F. B.), *Madhab Moni Dasi* v. *Pamela Lambert*, 6 Ind. Cas. 537; 37 C. 796: 12 C. L. J. 328; 15 C. W. N. 337, *Qamr-ud-din Ahmad* v. *Jawahir Lal*, 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102: 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P C.) and *Damdilal* v. *Davlatram*, 1 C. P. L. R. 19, referred to.

Appeal against a decree of the District Judge, Nimar, dated the 28th January 1919, in Civil Appeal No. 83 of 1918.

Messrs. *V. R. Pandit* and *A. N. Chorghade*, for the Appellant.

Messrs. *S. K. Gokhale* and *W. R. Puranik*, for the Respondent.

JUDGMENT.—The facts of this case may be briefly stated as follows.

The present respondent Baliram is the son and successor-in title of one Shri Narain, who on the 18th December 1906 obtained a decree for money against his relative Ram Ratan, son of Mukundram. In execution of this decree Shri Narain attached the village of Mahal Kalan on the 25th July 1909. Form C was sent to the Collector on the 25th August following. Mukundram, father of Ram Ratan, objected to the attachment on the ground that Ram Ratan had no interest in the village beyond a right to receive maintenance therefrom, which could not be sold. This objection was dismissed on the 29th July 1910 and before the close of the same month Mukundram filed a suit (No. 12 of 1910) in the District Court, Hoshangabad, against Shri Narain, claiming a declaration that the village aforesaid was not liable for attachment and sale in execution of the defendant's decree and alternatively for a declaration that nothing but Ram Ratan's right to maintenance from the village during his lifetime could be sold.

Immediately after the institution of this suit the District Judge issued an injunction directing the Revenue Officer before whom the sale proceedings were pending to stay them. Mukundram's suit was decided on the 13th May 1911, the first declaration asked for being granted, and on the 31st July following the District Judge, after noting that the proceedings sent to the Collector had been filed by that officer, directed release of the village from attachment.

Shri Narain appealed on the 5th August 1911 to this Court and on the 18th March following obtained a decree reversing that of the District Court and dismissing Mukundram's suit: see First Appeal No. 42 of 1911.

In August 1912 Shri Narain again applied for execution of his money-decree by attachment of Mahal Kalan and attachment was effected on the 7th October following. The village was put up to sale in due course and on the 30th June 1913 the sale was confirmed, the auction-purchaser being Baliram, the present respondent, who took possession on the 29th September following. On the 21st December in the same year the execution proceedings were closed as the decree had been fully satisfied.

The suit out of which the present appeal arises was filed by Baliram on the 4th October 1917, the object being to oust the defendant Bhuria Dhimarin, a resident of Mahal Kalan, from 137·95 acres of grass land and 77·78 acres of *khudkasht*, of which she was said to have been in unlawful possession since the 22nd May 1911.

The defendant filed a written statement, in which she claimed to be the ordinary tenant of the land in suit by virtue of a written lease which she had obtained from Ram Ratan on the 22nd May 1911 for one year, and it is now common ground that this letting actually took place.

The plaintiff's Pleader replied that the lease was void because it was given while the attachment effected in 1909 was still subsisting. To this the defendant's Pleader rejoined that the said attachment was not subsisting on the 22nd May 1911 and that if it was then subsisting, the lease ceased to be void when the attachment was withdrawn on the 31st July 1911

Certain other pleas were advanced with which we have now no concern and the issues to be noticed are the following:—

"3. Whether the property was not under attachment when the lease was given?

4. Whether the attachment was withdrawn after the release?

5. Whether the lease is, therefore, valid?

8. Whether the defendant is an ordinary tenant of the land?

9. Whether the plaintiff is entitled to possession?"

The Trial Judge held that inasmuch as the attachment of 1909 was removed, as already stated, the lease could not now be impeached, inasmuch as it affected no claim which is

still in force under that particular attachment. This view was based on the terms of section 64, Civil Procedure Code, which runs as follows:—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

The following cases were cited as supporting this view:—

Anund Loll Doss v. *Jullodhur Shaw* (1), *Abdul Rashid* v. *Gappo Lal* (2), *Khushalchand* v. *Nandram* (3).

The defendant was, therefore, held to be an ordinary tenant who could not be ejected otherwise than in accordance with the procedure laid down in the Tenancy Act, and the plaintiff's claim was dismissed.

Baliram appealed to the District Court, contending that the attachment of 1909 was not raised in 1911 and that the proceedings begun in the former year should be regarded as only coming to an end on his auction purchase, so that the lease to the defendant was void under section 64, Civil Procedure Code.

The lower Appellate Court held that the order of July 1911 raising the attachment was the outcome of the declaratory decree obtained by Mukundram and that, as that decree was set aside by this Court in appeal, the second attachment should be regarded as in continuation of the attachment of 1909. Being unable to find any precedent for treating as valid a conveyance effected during the continuance of an attachment which was subsequently raised and then again enforced in circumstances like those of the present case, the District Judge declared the defendant-respondent's lease to be void and setting aside the decree of the lower Court, gave the plaintiff a decree for possession. The defendant has now preferred this second appeal.

The first ground of appeal merely points to an error in the lower Appellate Court's judgment. The District Judge referred to Suit No. 12 of 1910 as brought by Ram Ratan: the real plaintiff in that suit was Mukundram, but it is not suggested that the error has in any way vitiated the District Judge's reasoning.

The principal point urged is that the attachment of 1909 having been actually raised in 1911 and the plaintiff not having pleaded that this was done in pursuance of the decree given to Mukundram in Suit No. 12 of 1910, the attachment should be attributed to failure on Shri Narain's part to press the proceedings before the Collector, the result being that rule 57 of Order XXI, First Schedule, Civil Procedure Code, operated to bring about a cessation of the attachment and so prevent any revival. In this connection *Kunhi Moosa* v. *Makki* (4) is cited. That case, however, does not appear to be at all in point. What was decided there was that a claim for rateable distribution of assets under section 295 of the Code of Civil Procedure, 1882, was not a claim "enforceable under the attachment" within the meaning of section 276, *ibidem*. A similar view had been taken in *Durga Churn Rai* v. *Monmohini Dasi* (5) and was later adopted in *Manohar Das* v. *Ram Autar* (6), but this view is no longer law, the explanation to section 64 of the present Code having given effect to the opposite view taken in *Sorabji Edulji* v. *Govind Ramji* (7).

For the respondent it is urged that the attachment was evidently raised in 1911 because of the decree granted to Mukundram in Suit No. 12 of 1910. Reliance is placed on *Suppa Reddiar* v. *Avudai Ammal* (8) and *Madhab Moni Dasi* v. *Pamela Lambert* (9) as indicating that when an application for execution of a decree has been interrupted by the intervention of objections and claims subsequently proved to be groundless, a later application should be treated as in

(1) 14 M. I. A. 543; 17 W. R. 313; 10 B. L. R. 134; 2 Suth. P. C. J. 559; 3 Sar. P. C. J. 81; 20 E. R. 888.

(2) 20 A. 421; A. W. N. (1898) 98; 9 Ind. Dec. (N. S.) 630.

(3) 12 Ind. Cas. 572; 35 B. 516; 13 Bom. L. R. 977.

(4) 23 M. 478; 10 M. L. J. 98; 8 Ind. Dec. (N. S.) 735.

(5) 15 C. 771; 7 Ind. Dec. (N. S.) 1098.

(6) 25 A. 431; A. W. N. (1903) 92.

(7) 16 B. 91; 8 Ind. Dec. (N. S.) 537.

(8) 28 M. 50 (F. B.).

(9) 6 Ind. Cas. 537; 37 C. 796; 12 C. L. J. 328; 15 C. W. N. 337.

continuation or revival of the earlier one. It was also pointed out that the defendant did not in her pleadings allege that the raising of the attachment was due to any laches on the part of the decree-holder Shri Narain.

The appellant in reply urged that Shri Narain might have continued his execution by proceeding against property other than the village which he had unsuccessfully attached or have moved the Collector to give a lease of that village instead of selling it. The cases cited for the respondent are said to be without appositeness, inasmuch as they are all concerned with the saving of the right to execute the decree which would *prima facie* be barred by limitation.

I have read the numerous Exhibits filed by the parties and I am satisfied from them that the raising of the attachment was due to the passing of the decree in Mukundram's favour. That decision was reached immediately before the District Court closed for the usual vacation, and it was the same Court which, less than seven weeks later and after the Collector had filed the proceedings for sale, ordered the village to be released from attachment. Had there been any foundation for the appellant's present allegation that some neglect on the part of Shri Narain accounts for the interruption of the Collector's proceedings, she should have obtained, during the two years which have elapsed since the date of the decision now appealed from, some paper to indicate that it had some substance. It is a fair and indeed, in the circumstances, the only reasonable inference that Mukundram, having obtained the declaration he sought for, took the next obvious step for stopping the sale to which he had already unsuccessfully objected. Once a decree was passed, Shri Narain was powerless to oppose such action on Mukundram's part. He took the only course from which any useful result could be expected, namely to appeal to this Court from the decree, and in this he was successful. Nor did he delay, after obtaining this Court's decision in his favour, to renew his efforts to bring the village to the hammer.

It has from the first been part of the plaintiff's claim that his second application for execution was merely a continuation of his earlier one and it is not suggested that its terms were in any way inconsistent with this position. In *Qamar-ud-din Ahmad* v. *Jawahir Lal* (10) their Lordships of the Privy Council were of opinion that execution proceedings which were interrupted in circumstances somewhat similar to those of the present case, were not finally disposed of by the interruption and that the subsequent application was in substance an application to revive and carry through a pending execution, suspended by no act or default of the decree-holder, and not an application to initiate a new one. A somewhat analogous view was taken by this Court in *Damdilal* v. *Davlatram* (11), where after a foreclosure suit was dismissed, part of the mortgaged property was let and subsequently the mortgagee filed an appeal which was successful: Crosthwaite, J. C., held that the lease was obnoxious to the rule of *lis pendens* in section 52 of the Transfer of Property Act, inasmuch as the mortgagee did what he could be reasonably expected to do to obtain the redress he asked for and that he did not cease to actively prosecute the suit until he obtained his decree in the Appellate Court.

The present litigation has been in progress for over three years and, if the respondent's contention was not allowed, it would be necessary to order a remand in order that the records of the Collector and the District Court might be further searched in order to ascertain with more certainty what the basis for the raising of the attachment in July 1911 was. This, for reasons already stated, I am not prepared to do. Accepting the respondent's contention that the application of August 1912 should be treated as in continuation of the application of 1909, I confirm the decree of the lower Appellate Court and dismiss this appeal with costs. In the lower Courts costs will be paid as already ordered.

Z. K. *Appeal dismissed.*

(10) 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C).

(11) 1 C. P. L. R. 19.

BHUJAWAN PRASAD SINGH *v.* RAM NARAYAN.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 171 OF 1920.

May 6, 1921.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Ross.

Babu BUJHAWAN PRASAD SINGH—JULGMENT-DEBTOR—APPELLANT

versus

Babu RAM NARAYAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Hindu Law—Debt of father—Son sued in representative capacity—Decree, personal—Separate property of son not liable—Civil Procedure Code (Act V of 1908), s. 52.

A son sued for the debt of his deceased father in his representative capacity is liable only to the extent of the assets of the co-parcenary property held by him, and a decree, though passed as a personal decree against the son must be construed in the light of section 52 of the Civil Procedure Code and the decree-holder is not entitled to proceed against the separate property of the son.

Nathuni Sahu v. *Baijnath Prasad*, 39 Ind. Cas. 352; 2 P. L. J. 212; 1 P. L. W. 300, followed.

Appeal from a decision of the District Judge, Patna.

Mr. *Bimala Charan Sinha*, for the Appellant.

Mr. *Sundar Lal*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—The appeal, in my opinion, should be allowed.

The appellant is the son of the executant of the *hundi* on the basis of which the decree in question was passed. At the time when the suit was instituted, the father of the appellant was dead and consequently he was sued in the representative capacity. He is evidently liable only to the extent of the assets of the co-parcenary property held by him. No doubt the decree is a personal decree against him, yet the decree must be construed in the light of section 52 of the Civil Procedure Code, which says that "where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property." This view is in accordance with the decision in the case of *Nathuni Sahu* v. *Baijnath Prasad* (1). The contention of the respondent that the money in question may have been borrowed for the benefit of the son and consequently the son is personally liable, does not seem to be in accordance with the accepted authorities on the point. In the last case referred to above, Mullick, J., observed: "All the authorities are unanimous that the co-parcenary property alone is liable for the payment of the debts of the father," and he overruled the contention urged on behalf of the appellant that the claim and the decree should not be restricted to co-parcenary property alone and the decree-holder should be entitled to proceed against the separate property of his son.

The appeal is accordingly decreed with costs.

Ross, J.—I agree.

J. P. *Appeal allowed.*

(1) 39 Ind. Cas. 252; 2 P. L. J. 212; 1 P. L. W. 300.

ABDUL RAHMAN *v.* WALI MUHAMMAD.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 260 OF 1920.

December 14, 1921.

Present:—Mr. Justice Bucknill.

Shiekh ABDUL RAHMAN—DEFENDANT—APPELLANT

versus

Sheikh WALI MUHAMAD—PLAINTIFF—RESPONDENT.

Muhammadan Law—Dower—Widow's right to remain in possession until dower paid off—Right to transfer dower-debt—Transferee's right to remain in possession of property until dower-debt paid—Accounts, right to, when accrues—Limitation—Construction of document—Appeal, second—Mixed question of fact and law—Limitation Act (IX of 908), Sch. I, Art. 91, applicability of—Document invalid.

ABDUL RAHMAN v. WALI MUHAMMAD.

When a Muhammadan has promised a woman whom he marries a dower but that dower has not been paid, she, when he dies, can lawfully remain in possession of his property until her dower is paid by her husband's heirs or until she has succeeded in realising it out of the usufruct which she enjoys by reason of her being in possession, but she has to render to the heirs an account. [p. 227, col. 2.]

Ameer-oon-nissa v. *Moorad-oon-nissa*, 6 M. I. A. 211 at p. 212; 1 Sar. P. C. J. 533; 19 E. R. 79, *Mahomed Ussud-ool-lah Khan* v. *Musammat Ghasheea Beebee*, 1 Agra H. C. R. 150, *Wahid-oon-nissa* v. *Musammat Subrattun*, 14 W. R. 239; 6 B. L. R. 54, *Bebee Bachun* v. *Hamid Hossein*, 14 M. I. A. 377 at p. 383; 17 W. R. 113; 10 B. L. R. 45; 2 Suth P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 828, *Azizullah Khan* v. *Ahmad Ali Khan*, 7 A. 354; A. W. N. 1885) 54; 4 Ind Dec. (N. S.) 574, *Ali Muhammad Khan* v. *Azizullah Khan*, 6 A. 50; A. W. N. 1883) 204; 3 Ind Dec. (N. S.) 617, *Hadi Ali* v *Akbar Ali*, 20 A. 262; A. W. N. (1898) 32; 9 Ind. Dec. (N. S.) 529, *Muzaffar Ali Khan* v. *Parbati*, 29 A. 640; 4 A. L. J. 521; A. W. N. 1907 221, *Ali Bakhsh* v. *Allah Dad Khan*, 6 Ind. Cas 376; 32 A. 551; 7 A. L. J. 567, *Majidmian* v. *Bibi Saheb Jan*, 30 Ind Cas. 870; 40 B. 34; 17 Bom. L. R. 770 and *Beeju Bee* v. *Moorthiya Saheb*, 53 Ind. Cas. 905; 43 M. 214; 37 M. L. J. 627; 26 M. L. T. 419; 11 L. W. 150 (F. B.), referred to.

The dower-debt is a definite portion of the widow's estate and her heirs are entitled to hold the possession of her deceased husband's property with the same legal incidences as were possessed by the widow herself. If the widow transfers her dower-debt and its security to a stranger, such a conveyance may also include in law the right to possession of her husband's property until the dower-debt is in some way liquidated. [p. 228, col. 1.]

Beeja Bee v. *Moorthiya Saheb*, 53 Ind. Cas. 905; 43 M. 214; 37 M. L. J. 627; 26 M. L. T. 419; 11 L. W. 150 F. B.), referred to.

In order to effect the transfer of a widow's dower-debt with its security, express words so doing must be proved [p. 228, col. 2.]

Quære—Why if express words of transfer are sufficient, a clearly implied covenant should not be effective? [p. 228, col. 2.]

Ameer-oon-nissa v. *Moorad-oon-nissa*, 6 M. I. A. 211 at p. 212; Sar P. C. J. 544; 19 E. R. 79 and *Ahmed Hossein* v. *Khadija*, 10 W. R. 368 at p. 369; 3 B. L. R. 2-n, referred to.

The consideration of the proper construction of a document is often a mixed question of fact and of law [p. 229, col. 1.]

A Muhammadan widow, holding her husband's property in lieu of dower, executed a document in favour of a son of her late husband's brother providing "I do hereby willingly sell and absolutely vend without reserving the right of cancellation to ..the whole and entire one-third share of mine .....owned and possessed by me together with all rights and appurtenances, for a consideration of a monthly allowance of ..till my death and I have put .....him in possession of the vended property as absolute proprietor in my place..... In short the proprietary interest and all rights, title and interest which I had in the vended properties have, under this sale-deed, been transferred (from me) and (become) extinct and have devolved on and vested in the said purchaser and his heirs and representatives.....After my death my heirs and representatives shall not have any right of interference in or objection or claim to the vended properties." On a suit by the heir of the deceased husband of the widow for possession claiming the deed to be inoperative:

Held, on construction of the document,

(1) that this instrument did not transfer the widow's dower-debt and its security; [p. 229, col. 2.]

(2) that the general trend of the deed indicated an out-and-out sale of the whole estate; [p. 229, col. 2.]

(3) that it was only upon the widow's death that the plaintiff's cause of action really arose. [p. 230, col. 1.]

Article 91 of the Limitation Act has no application in regard to a document which is altogether invalid and void. [p. 230, col. 2.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 26th August 1919, reversing a decision of the Munsif, Sasaram, dated the 13th January 1919.

Mr. *Muhammad Ishfaq*, for the Appellant.

Saiyid *Muhammad Tahir*, K. B., for the Respondent.

JUDGMENT.—This is a second appeal made by the defendant (appellant) from a decision of the Subordinate Judge of Shahabad, dated the 26th August 1919, reversing a decision of the Munsif of Sasaram, dated the 13th January of the same year. The facts in this case are of a simple character, but they raise somewhat difficult questions of law which have been extremely well argued at great length before me by the learned Vakils for both parties. The circumstances which gave rise to this litigation may be very shortly explained as follows:—

A Muhammadan gentleman, named Sajjad Husain, married a lady *Musammat* Kabiran. A marriage dower of Rs. 4,000 was fixed, but, as a matter of fact, was never actually paid. In 1899 Sajjad Husain died leaving surviving him his widow. Sajjad Husain also left surviving him two brothers, one Sheikh Wali Muhammad, who is the present plaintiff, and the other Sheikh Ezid Baksh, who is the first defendant. The second defendant is the minor son of the first defendant. On the death of Sajjad Husain his widow *Musammat* Kabiran came, with the permission of the plaintiff and of the first defendant, into possession and occupa-

tion of the whole of her husband's property, in view of the fact that her dower had not been paid or, as it is put in legal language, "holding in lieu of dower." In 1900, however, *Musammat* Kabiran executed a document as to the true construction of which the main arguments in the present litigation arise. Although the construction of this document necessarily formed the subject matter of most of the argument which had to be placed before me by the learned Vakil for the appellant, no translation of it was produced by him nor did it appear as part of the record. I felt considerable difficulty in coming to a conclusion as to whether or not I should allow it, under these circumstances, to form the subject-matter of an enquiry as to its construction; but, as it was so obviously vital to a proper consideration of the case, I eventually had it translated officially and have utilised this translation in dealing with the matter throughout. t is necessary to refer to this document in some detail. The material parts read as follows:—

"I am *Musammat* Bibi Kabirán, daughter of Bikan Khan and widow of Sheikh Sajjad Hussain, deceased, a Sheikh resident of *Mohalla* Shah Juma in the town of Sasaram, Thana Sasaram, Sub registry office at Sasaram, District Registry, Shahabad, by occupation a Zamindar."

"Out of the shares in the *mauzas* and properties specified below, one third belonged to my husband Sheikh Sajjad Hussain Since the death of my husband, I have been in possession of his estate—the shares in the said *mauzas*—by virtue of inheritance and in lieu of dower-debt. I cannot manage and look after the properties on account of my being a female. I am alone and a widow and have neither a male nor a female issue. In the family of my husband, too, there is only one male child, Sheikh Abdur Rahman by name, a minor son of Sheikh Ezid Bakhsh, the elder brother of my husband, Sheikh Sajjad Hussain. That boy is loved by all the members of my husband's family. I also fully desire that he should be comfortably maintained and delicately brought up. For myself I do not require anything other than maintenance till my death. Therefore, I wish to give away all my properties, in my lifetime, to the said dear child, subject to my right of maintenance. Sheikh Ezid Bakhsh, the father and guardian of the said minor child Abdur Rahman, has agreed to pay me till my death Rs. 5 per month or Rs. 60 per year, which amount is quite sufficient for me, in lieu of the said properties. I fully trust his words. Besides, the liability for the payment of the said allowance shall rest on the said properties." (Then comes an immaterial portion). "Therefore, I, of my own free-will and accord in a sound state of body and mind, in the exercise of all legal rights, in good faith, without undue pressure or fraud from any quarter, do hereby willingly sell and absolutely vend without reserving the right of cancellation to Sheikh Abdur Rahman, minor son of Sheikh Ezid Bakhsh, under the guardianship of the said Sheikh Ezid Bakhsh, resident of *Mohalla* Shah Juma, in the town of Sasaram, Thana Sasaram, by occupation a Zamindar, the whole and entire one-third share of mine, namely 10 pies 13 *karats* 6 *masants* 10 *decinue* out of 16 annas (then follows a long description of the property which is given in much detail)

* * owned and possessed by me, together with all rights and appurtenances, for a consideration of a monthly allowance of Rs. 5, amounting to Rs. 60 per annum, with effect from to-day up till my death. I have, by making over this deed of sale to the vendee, put him in possession of the vended property as absolute proprietor in my place. * * * * I give up, forego and relinquish all claims, disputes and contentions which may be existing now or which may arise hereafter, for getting this sale-deed declared null and void. In short the proprietary interest and all rights, title and interest which I had in the vended properties have, under this sale-deed, been transferred (from me) and (become) extinct (in so far as I am concerned), and have devolved on and vested in the said purchaser and his heirs and representatives. Now, I have not and shall not have any claim for realization of (a word unfortunately undecipherable or torn) (claim?) or any dispute, contention or right in respect of the vended properties other than getting Rs 5 per mensem or Rs. 60 per annum till my death. After my death my heirs and representatives shall not have any right of interference in or objection or claim to the

vended properties. If they advance any claim in contravention to (the terms of) this deed, the same shall be deemed to be null and void, illegal and inoperative. The said vendee shall get his name recorded in the Collectorate Office in my place in respect of the vended properties, after getting the name of my husband expunged therefrom, and shall remain in possession and occupation of the vended properties."

Now it will be observed that by this document *Musammat* Kabiran certainly purported to convey a proprietary interest in the estate to the son of one of her late husband's brothers, and it is common ground that under the Muhammadan Law she had no right to do so. It is not argued that she had, but what *is* suggested is that by this deed she purported and intended to transfer her dower-debt to her assignee. The *Musammat* died in 1911 and after her death the plaintiff, who, I should add, incidentally was a witness (though not a party) to the deed, brought this suit against the defendants, claiming that the deed was inoperative and invalid and that the defendants had under it acquired no sort of title. He asked, therefore, that it should be adjudicated that the defendants' possession was that of a trespasser and that the heirs of the deceased Sajjad Hussain were entitled to be placed in possession of the property in their rightful proportions. To this main proposition the defendants *do* not now contend that there was any legal answer on the point of the invalidity of the deed; but, what they do contend and what has been argued most strenuously before me is, that the deed conveyed to them the dower-debt of *Musammat* Kabiran, that they are in her shoes with regard to the possession of the property and that, in consquence, until the amount of the dower-debt is paid off, they are entitled to remain in possession of the estate. There are other smaller legal questions which arise, with which I shall, however, deal later, with regard to limitation and estoppel. At present I will confine myself to dealing with the possession as it arises with regard to the questions, firstly, of what is the proper construction of the deed, and secondly, what is the true legal position with regard to dower-debt under Muhammadan Law. The law relating to the exact character of a dower-debt under Muhammadan Law appears in the last few years to have gone through considerable and interesting modifications by reason of case-law decisions. But after much argument and citation of a large number of authorities, the learned Vakils for both parties have agreed that the main position is fairly well covered and settled; a conclusion with which I, myself, quite concur. When a Muhammadan has promised a woman, whom he marries, a dower but that dower has not been paid, she, when he dies, can lawfully remain in possession of his property until her dower is paid by her husband's heirs or until she has succeeded in realising it out of the usufruct which she enjoys by reason of her being in possession; but she has to render to the heirs an account. Sometimes, of course, where the estate is large and the dower is small, her dower is quickly realised; in other cases, such as in this case, where the dower is comparatively large and the estate comparatively small, the dower may not be realised at all. As to the accounts we have no information. This curious right, which has been sometimes designated as "a widow's lien" and which has sometimes been defined as "putting her in the position of a mortgagee in possession," does not, it is admitted, give the widow any right to alienate any part of her deceased husband's property in order definitely to raise the amount of her dower from the proceeds of such sale: *Ameer oon nissa* v. *Mooradoon nissa* (1). It is not so long ago that this widow's right was regarded as a purely personal one, which died with the widow; but within the last few years, this former doctrine has been the subject of considerable expansion, and it is now thought and has been held that the right is heritable and, further than that, that she can assign her right to a stranger. *Vide* The Hedaya (Hamilton, Volume III, page 122, 1791), *Mahomed Ussud ool lah Khan* v. *Musammat Ghasheea Beebee* (2), *Wahidoonissa* v. *Musammat Subrattun* (3), *Bebee Bachun* v. *Hamid Hussein* (4),

(1) 6 M. I. A. 211 at p. 212; 1 Sar. P. C. J. 533; 19 E. R. 79.
(2) 1 Agra. H. C. R. 150.
(3) 14 W. R. 239; 6 B. L. R. 54.
(4) 14 M. I. A. 377 at p. 383; 17 W. R. 113; 10 B. L. R. 45; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 328.

Azizullah Khan v. *Ahmad Ali Khan* (5), *Ali Muhammad Khan* v. *Azizullah Khan* (6), *Hadi Ali* v. *Akbar Ali* (7), *Muzaffar Ali Khan* v. *Parbati* (8), *Ali Bakhsh* v. *Allah Dad Khan* (9), *Majidmian* v. *Bibi Saheb Jan* (10) and *Beeu Bee* v. *Moorthiya Saheb* (11). It is now—and I venture to think—the correct view that the dower-debt is a definite portion of the widow's estate and that her heirs entitled to hold the possession of her deceased husband's property with the same legal incidences as were possessed by the widow herself; that is to say, with a right to continue in possession until from the usufruct the dower is realised or until the heirs of the widow's deceased husband pay the amount of the dower. I take it, therefore, as a corollary of the most modern opinion that if a widow transfers her dower right and its security to a stranger, such a conveyance may also include in law the right to possession of her husband's property until the dower debt is in some way liquidated. It is, as a sequela, extremely difficult to see why, logically, the purchaser of the widow's right coupled with her security should not be in precisely the same legal status as is the widow's heir. *Vide Beeiu Bee* v. *Moorthiya Saheb*. (11).

With the above propositions neither of the learned Vakils who appeared before me are prepared to disagree; and it is, now, common ground that we are thrown back upon what is the proper construction of the deed in the present case. I should, however, here point out that the learned Vakil for the respondent shows quite clearly that the ingenious argument with regard to the construction of the document which has been so strongly pressed before me by the learned Vakil for the appellant, never seems to have been raised in the Courts below analytically in the way in which it has been so ably placed before me on this appeal. The point, as it is now presented to me by the learned Vakil for the appellant, is, that, although it is admitted that the deed (so far as it purported to convey to the assignee a proprietary estate in the property was invalid), did, in addition, contain an alienation or transfer of the widow's dower-debt and of its security; and, that, in consequence, as it is now common ground that the widow could have legally transferred her dower-debt and her security therefor (that is to say, the right, until the dower-debt was satisfied, to the possession of the property), the plaintiff's cause of action for recovery of possesion must fail, as, at the best, the sole cause of action which can accrue to him is merely a claim for proper accounts. See *Ameer oon nissa* v. *Moorad-oon-Nissa* (1), *Ahmed Hossein* v. *Khadija* (12). Now according to such authorities as I have been able to discover, it would appear that in order to effect the transfer of a widow's dower-debt with its security, express words so doing must be proved, but I am not at all sure that such a proposition concludes satisfactorily that question; as, in law, it is difficult for me to understand why if express words of transfer are sufficient, a clearly implied covenant should not be equally effective.

Now, in considering the nature of this deed, it is interesting to observe the conclusions to which the Munsif and the Subordinate Judge came as to what it really meant; the Munsif says that *Musammat* Kabiran was only in possession of the disputed properties as security for her dower, and that she had a right to transfer the dower-debt together with that security; but, apart from that right, she had no power to transfer the security alone; that in the deed in dispute the recital is, that the properties were given to her *not in satisfaction of her dower* but in lieu thereof, and that this interpretation is supported by a recital in a subsequent partition-deed dated 1912 (which I may say has not been placed before me) in which the plaintiff and the first defendant attempted to settle their dispute. He consequently considered that there was no doubt that the deed purported to

(5) 7 A. 353; A. W. N. (1885) 54; 4 Ind. Dec. (N. S.) 574.
(6) 6 A. 50; A. W. N. (1883) 204; 3 Ind. Dec. (N. S.) 617.
(7) 20 A. 262; A. W. N. (1898) 32; 9 Ind. Dec. (N. S.) 529.
(8) 29 A. 61; 4 A. L. J. 521; A. W. N. (1907) 221.
(9) 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567.
(10) 30 Ind. Cas. 870; 40 B. 34; 17 Bom. L. R. 770.
(11) 53 Ind. Cas. 935; 43 M. 214; 37 M. L. J. 627; 26 M. L. T. 419; 11 L. W. 150 (F. B.).
(12) 10 W. R. 368 at p. 369; 3 B. L. R. 28n.

convey a proprietary interest alone and not the dower-debt and its security and he, therefore, regards it as invalid. The Subordinate Judge came to the same conclusion. But it will be observed that the point which is raised before me, namely, that the wording of the deed should be construed as conveying the dower-debt and its security, was not so clearly raised (if indeed it was raised at all) as it has been raised in this appeal. The Munsif in his remarks suggests the useful idea that the widow, by executing this deed, disclaimed the security for her dower-debt; but this point, although it may be of importance should the widow's heirs maintain their right to recovery of the widow's dower-debt, does not directly arise in this case: and in any event, such a finding is directly against the contention of the present appellant.

It is suggested by the learned Vakil for the respondent that the findings of the Munsif and the Subordinate Judge are findings of fact and that, therefore, I should not consider them in any way. But with this broad proposition I am not altogether in accord, as the consideration of the proper construction of a document is very often a mixed question of fact and of law. Now if one peruses carefully this deed, one can, I think, but come to one conclusion; and that is that this lady assumed that she had a complete proprietary interest in the property and that she purported to convey the whole of that interest to the transferee. The dower-debt and its security were a separate and entirely different interest from the proprietary ownership; it may very well be that her intention really was to relinquish any claim she may herself have had in connection with her dower debt and, in view of the somewhat pathetic language which she utilises, it would almost seem as if she did wish so to do; but I can find nothing in the document itself which would justify me in any way in coming to the conclusion that she intended to *transfer* to the assignee her dower debt and its security. The learned Vakil for the respondent cleverly points out that the stamp fee which was paid on the deed is based upon 12 times the value of the annual subsidy secured by the deed to the widow, that is to say, on Rs: 720, whereas the dower-debt alone was Rs. 4,000. I have, therefore, come to the conclusion after very careful consideration that, agreeing with the decisions of both the Munsif and the Subordinate Judge, this instrument did not in fact transfer the widow's dower-debt and its security.

The learned Vakil for the appellant further argued with great ability that because the lady had recited in the preamble to the deed that she was in possession of the estate both by virtue of inheritance and in lieu of dower-debt and that because she had, in operative words of transfer, conveyed "the whole and entire one-third share of mine in the properties," and, later on, added "owned and possessed by me, together with all rights and appurtenances," that it was possible to divide the document into two parts: the first set of words of power conveying the estate and the second set conveying the dower-debt and its security. I am afraid that I am not impressed by this argument. The general trend of the deed indicates an out-and-out sale of the whole estate; the words of complete self-renunciation towards the conclusion of the deed only, in my opinion, indicate a possible renunciation on the widow's part of her dower-debt claim. I have mentioned above that, besides this point upon which I have already given my decision, other questions arose in this matter which have been argued before me. These points contain the suggestion that the plaintiff's claim is barred by limitation in some way. In the first place, I will settle at once the question of whether the plaintiff, because he was a witness to the deed now in question, is, by that fact, estopped from disputing, subsequently, its validity. There is no arguable proposition upon this question, and I do not think it is necessary to refer to any authority to reject it.

The question of the actual limitation barring the suit is, however, of more importance. It has to be decided when the plaintiff's right of action accrued to him and it is upon this point that the Munsif and the Subordinate Judge differed. The Munsif thought that as soon as the transferee obtained possession of the property, his possession became adverse to the plaintiff, who, consequently, at that date (that is to

say in 1900) became entitled to sue for recovery of possession; and, that, as he did not commence his action until 1918, he was barred in time in view of Article 144 of the Limitation Act, where the period of bar is 12 years. The Subordinate Judge, however, thought that this was not so; and that the date of the death of the widow was the crucial date. The Munsif dismissed the plaintiff's action on the ground of this limitation bar; but the Subordinate Judge, coming to a contrary decision as to the question of limitation, reversed the Munsif's decision. Before me, the learned Vakil for the appellant has very ingeniously put forward not only the suggestion that the action was barred by Article 144 of the Limitation Act but also by Article 91.

I think I had better deal with the consideration of the effect of Article 144 It is quite true that the plaintiff was well aware of the fact that the defendants had entered into possession of the property, but this possession, particularly in view of the fact that he signed as a witness to the deed, could not, in my opinion, be regarded as in any way the basis for an assertion of adverse possession. On the contrary it was a possession just as much permissive as was the possession of the widow herself; and whilst the widow was alive, the plaintiff could not have demanded recovery of possession of the property unless he had been in a position to pay off the widow's dower-debt. It may be said that on a true construction of this deed the widow renounced her claim to her dower-debt; and that the rights of the plaintiff and the heirs of the deceased Sajjad Husain arose when she did so and when the defendants entered into possession; but, as I have pointed out before, this question does not directly arise here. So far as this case is concerned, I have no hesitation in coming to the conclusion that the Subordinate Judge was right and that it was only upon the widow's death that the plaintiff's cause of action really arose. With regard to the skillful attempt to call in aid the provisions of section 91 of the Limitation Act, namely, that in order to rectify a document an action must be brought within three years from the time when the necessity for rectification comes to the knowledge of the party seeking to have it so rectified or set aside, I need only say that where the contention is that a document is altogether invalid, such considerations as section 91 of the Limitation Act do not arise: *vide Priyomukhi Debi* v. *Bireshwar Samanta* (13). I may mention that this point as to the possible operation of section 91 of the Limitation Act was not apparently brought forward before the lower Court, but I have dealt with it because I thought it advisable that I should do so. With regard to a document which is altogether invalid and void, the applicability of limitation under section 91 does not at all occur.

I must thank both the learned Vakils for the able arguments which they have placed before me. I have given to this case my best consideration and have come to the conclusion that the Subordinate Judge is correct in his decision and that the appeal must be dismissed with costs.

P. D. & J. P. *Appeal dismissed.*

(13) 37 Ind. Cas. 277; 21 C. W. N. 177; 44 C. 425; 27 C. L. J. 212.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 467 OF 1920.

July 27, 1921.

Present:—Sir Henry Drake-Brockman, KT., J. C.

LAKHMICHAND—DEFENDANT No. 1—APPELLANT

versus

CHATURBHUJ—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73 (2), O. XXI, rr. 91, 93—Execution of decree—Sale—Judgment-debtor having no saleable interest—Sale-money—Rateable distribution—Auction-purchaser—Suit to recover purchase-money, maintainability of.

Where a Statute creates an obligation and provides for enforcing its performance in a particular manner, performance must be obtained in that manner and in no other. [p. 234, col. 1.]

Lingappa Goundan v. *Esudasan*, 27 M. 13 at p. 15, followed.

Section 73 (2 of the Civil Procedure Code contains no indication that a sale by virtue of which assets have been made available for rateable distribution can be attacked under it. The cause of action recognised by that section arises out of a wrong distribution of assets and is entirely without relation to the manner in which those assets were obtained. [p. 233, col. 1.]

The right of an auction-purchaser to obtain a refund of the purchase-money when the judgment-debtor is found to be without a saleable interest, is entirely the creature of rules 91 and 93 of Order

XXI of the Civil Procedure Code the result being that without getting the sale set aside through the Court and by the method prescribed by the Code, the auction-purchaser has no remedy. The general principle of *caveat emptor* affects the purchaser unless he chooses to adopt the remedy given to him by the Statute. [p 234, col 1.]

Derab Ally Khan v. *Khajah Moheeooddeen*, 3 C. 806; 5 I. A 116; 2 C. L R 529; 3 Suth. P. C. J. 519; 3 Sar. P C. J. 8'8; 2 Ind. Jur. 426; 1 Ind Dec (N. s. 1097 (P. C.) and *Parvathi Ammal* v. *Govindasami Pillai*, 80 Ind. Cas. 827; 39 M 803 at p 80 ; 2 L. W. 861; 29 M. L. J. 467; (19 5) M. W. N 797, followed.

A suit by an auction-purchaser for recovery of the purchase-money from persons to whom it has been paid, on the ground that the judgment-debtor does not possess a saleable interest in the property sold, is not maintainable. [p. 234, col 1.]

Dewaji v *Amrita*, 52 Ind. Cas. 818; 15 N. L. R. 140, followed.

Malkarjun v. *Narhari*, 25 B. 337; 5 C. W N. 10; 2 Bom. L. R. 927; 27 I. A 218; 10 M L. J 368; 7 Sar. P. C J. 739 (P. C.), *Gopal Saran Narain Singh* v. *Mahomed Sheikh Ashham*, 6 Ind. Cas 804; 14 C. W. N 1096, *Juranu Mahamad* v. *Jathi Mahamed*, 46 Ind. Cas. 783; 22 C. W. N. 760, *Nannu Lal* v. *Bhagwan Das*, 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216, *Muhammad Najib Ullah* v. *Jai Narain*, 28 Ind. Cas. 59; 36 A. 529; 12 A L J. 908, *Ram Kumar Shaha* v. *Ram Gour Shaha*, 2 Ind. Cas. 559; 37 C 67; 13 C. W. N 1040; 10 C. L J 558, *Rustamji* v. *Vinayak Gangadhar*, 7 Ind Cas. 955; 35 B 29; 12 Bom L. R. 723, *Munna Singh* v. *Gajadhar Singh*, 5 A. 577; A W. N. (1883) 130; 3 Ind. Dec (N. s. 191), *Tirumalai-sami Naidu* v. *Subramaniam Chettiar*, 45 Ind. Cas. 103; 40 M. 1009, referred to.

Appeal against an order of the District Judge, Nimar, in Civil Appeal No. 32 of 1920, dated 2nd August 1920.

Mr. *M. Gupta*, for the Appellant.

Mr. *G. L. Subhedar*, for the Respondent.

JUDGMENT.—The facts of the case out of which this second appeal arises may be briefly stated as follows:—

One Lakhmichand, who is the appellant in this Court, obtained two decrees against a widow named Nanhi Bai for debts due by Bahadur Singh, the deceased father of her husband. The first decree, of which a copy is Exhibit P-1, was obtained on the 11th October 1912 against both Nanhi Bai and Chandar Singh, the brother of Bahadur Singh. The decretal amount including costs was Rs. 897-8-0, for which Nanhi Bai was made personally liable, Chandar Singh being responsible only to the extent of Bahadur Singh's assets in his hands. The second decree, Exhibit P-5, was passed on the 17th September 1912, and directed both Nanhi Bai and one Parbati Bai to pay Rs. 971 14-0 as representatives of Bahadur Singh, their liability being limited to Bahadur Singh's assets in their hands.

Two other persons named Ganga Bishan and Nandlal obtained each one decree against Nanhi Bai for debts due by Bahadur Singh. Ganga Bishan's decree was directed against Nanhi Bai in her capacity as Bahadur Singh's representative.

Ganga Bishan in execution of his decree attached an 8-annas share of Mauza Dhur-gada as appertaining to Bahadur Singh's estate and form C was sent to the Collector in due course. A similar step was subse-quently taken by way of executing the two decrees obtained by Lakhmichand The share was sold on the 16 h May 1913 and purchased for Rs. 6,000 by Chatarbhuj, the present respondent. Rateable distribution was made in due course and Lakhmichand eventually obtained Rs. 1,783-1-2 on the 23rd August 1913.

Chatarbhuj was obstructed by Chandar Singh when he endeavoured to obtain pos-session of the share and, therefore brought Suit No. 5 of 1914 against Chandar Singh in the District Court, Hoshangabad, joining Ganga Bishan and Nandlal as defendants. Against Chandar Singh the claim was for possession, but this relief was refused on the ground that Bahadur Singh and Chandar Singh had constituted a joint family, so that Nanhi Bai had no saleable interest in the share, while the share in Chandar Singh's hands was not liable for Bahadur Singh's debt as it had not been attached in that person's lifetime. A money decree was, however, given against Ganga Bishan and Nandlal, directing each of them to refund to the plaintiff the amount drawn at the rate-able distribution. The date of this decree is the 19th September 1915 and it was con-firmed by this Court in First Appeals Nos. 75 and 78 of 1915 on the 28th April 1917.

Chatarbhuj on the 25th April 1919 filed the suit out of which the present appeal arises, again claiming possession as against the defendant Chandar Singh and further seeking in the alternative refund with interest of the sum obtained by the defendant Lakhmichand at the rateable distribution. The claim for possession was disallowed by the Trial Judge, who also dismissed the claim for money on the ground that according to the decision in *Dewaji* v. *Amrita* (1) no

(1) 52 Ind. Cas. 818; 15 N. L. R. 140,

suit for such relief is maintainable.

The plaintiff appealed to the District Court, which allowed the claim for refund. The District Judge referred to the decisions of Batten, A. J. C., and Prideaux, A. J. C., in *Beharilal* v. *Ramesar* (Second Appeal No. 839 of 1914, decided on the 9th May 1916) and *Gadhari Rao* v. *Duyanoba* (Miscellaneous Appeal No. 7 B of 1916, decided on the 31st January 1917) and distinguished *Dewani* v. *Amrita* (1) on the ground that the suit of 1914 should be regarded as an application made under rule 91, Order XXI, First Schedule to the Civil Procedure Code, for setting aside the execution sale of the village share and that the orders for refund of a portion of the purchase money passed in the decree in that suit were tantamount to setting aside the sale. In order to meet the objection that the plaint in the suit of 1914 was time barred, if regarded as an application under rule 91 of Order XXI, Article 166 of the Limitation Schedule governing such applications, the Judge remarked as follows:—

"There was no doubt an objection available to the decree-holder, Ganga Bishan, on the ground of limitation, but as it was not taken, it must be deemed to have been decided adversely to the decree-holder on the principle that a Court having jurisdiction has power to decide rightly as well as wrongly [see *Malkarjun* v. *Narhari* (2)]. It has been held in *Gopal Saran Narain Singh* v. *Mahomed Sheikh Ashham* (3) that an application to set aside the sale and for refund of purchase money is governed by Article 181 and not by Article 166. As then the sale should be taken to have been set aside as a result of Suit No. 5 of 1914, the plaintiff is entitled to enforce a refund of the purchase money from the other decree-holders as well who participated in the sale proceeds."

The lower Appellate Court further held that the suit might be regarded as one for the recovery of the purchase money illegally paid to the defendant Lakhmichand, so that the present suit belongs to the class expressly authorised by section 73, Civil Procedure Code, to which Article 120 of the Limitation Schedule applies.

(2) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

(3) 6 Ind. Cas. 804; 14 C. W. N. 1096.

Lakhmichand has preferred this second appeal, and the main question for decision is whether the plaintiff as auction-purchaser can maintain a suit for refund of his purchase money in the circumstances which have been set out above.

With regard to the lower Appellate Court's view that the suit of 1914 can properly be regarded as an application under rule 91, Order XXI, it is unnecessary to say much, as the respondent's Counsel frankly admits that this position cannot possibly be maintained. Section 47, Civil Procedure Code, upon which the lower Appellate Court relied, can have no application to the proceedings in the suit of 1914, that suit having been finally decided before the present suit was instituted Ganga Bishan's decree was passed by the Munsif, Seoni Malwa, while Suit No. 5 of 914 was tried by the District Judge, Hoshangabad, and the present suit by the Subordinate Judge, Harda. The District Judge, Hoshangabad, could not, without transferring the decree of the Munsif, Seoni Malwa, to his own Court, execute that decree or treat the suit relating to the execution, discharge or satisfaction of Ganga Bishan's decree as a proceeding in Ganga Bishan's suit Farther, the decree (Exhibit P-8) in the suit of 1914 did not expressly set aside the execution sale, nor is there any principle of law on which the present appellant, who was not a party to the suit of 1914, would be held bound by any implied decision on the question whether the plaint in that suit, viewed as an application under rule 91 of Order XXI, was time-barred. Moreover, in the former suit none of the parties suggested that it might be regarded as an application to set aside the execution sale. Such an application is undoubtedly governed by Article 163 of the Limitation Schedule, which in terms applies to an application under the Code of Civil Procedure, 1908, and allows only 30 days from the date of the sale.

Lastly, it is plain from reading together rules 89 to 95, both inclusive, of Order XXI that once an execution sale has been confirmed, no room for applying under rule 91 remains. Under rule 92 (1), where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the

sale shall become absolute. Under rule 92 (2), where such application is made and allowed, the Court shall make an order setting aside the sale. The respondent's Counsel is also unable to support the lower Appellate Court's alternative view that the present suit may be treated as one expressly authorised by section 73 (2) of the Civil Procedure Code. That section contains no indication that a sale by virtue of which assets have been made available for rateable distribution can be attacked. The cause of action recognized appears to arise out of a wrong distribution of assets and to be entirely without relation to the manner in which those assets were obtained. This is apparent from the description of the assets in the sub rule itself as "liable to be rateably distributed under this section."

The view taken by Mittra, A. J C., in *Dewaji* v. *Amrita* (1) is in accordance with that held by Chatterjea, J., and Richardson, J., in *Juranu Mahamad* v. *Jathi Mahamed* (4), in which stress is laid upon the difference between the terms of rule 93, Order XXI, First Schedule to the present Civil Procedure Code, and those of section 315 in the Code of 1882, and the decision in *Nannu Lal* v. *Bhagwan Das* (5) is followed. I am asked to prefer the decision of Batten, A. J. C., in Second Appeal No. 839 of 1914 above-mentioned. Mr. Batten dealt very briefly with the question whether a separate suit will lie, remarking that there was very strong authority for the affirmative view which had been taken by the trial Judge. The learned A. J. C. then continued as follows:—

"I would cite *Muhammad Najib Ullah* v. *Jai Narain* (6), where the sale was under the Code of 1908, *Ram Kumar Shaha* v. *Ram Gour Shaha* (7) and the recent case of *Rustamji* v. *Vinayak Gangadhar* (8), a case under the Code of 1908."

In the Allahabad case (6) thus relied upon the learned Judges (Richards, C. J., and Tudball, J.) felt themselves bound by the decision of the Full Bench in *Munna Singh* v. *Gajadhar Singh* (9), which was decided as far back as 1883, remarking that the case before them could not be distinguished from the earlier one. With all respect it seems to me that the auction-sale having taken place in 1910 and the terms of the present Civil Procedure Code differing widely from those of the 1882 Code, the two cases are readily distinguishable. Moreover, in *Nannu Lal* v. *Bhagwan Das* (5) (above cited) the learned Judges (Richards and Muhammad Rafique) remarked on this case that the attention of the Court had evidently not been called to the change in the law. In the Calcutta case (7) the auction-sale took place in 1902 and the decision proceeded on the wording of section 315 in the Code of 1882. The Bombay decision certainly favours the appellant, but it likewise related to a sale which was effected before the Code of 1908 came into force and the result reached might be justified on the principle recognised in *Tirumalaisami Naidu* v. *Subramaniam Chettiar* (10), namely, that the plaintiff had a right of suit under the old Civil Procedure Code which accrued to him while that Code was in force and so could not be affected by the provisions of the new Code.

For the respondent it is strenuously urged that to treat an auction purchaser in circumstances like those of the present case as debarred from bringing a separate suit would be manifestly unjust. Until a purchaser endeavours to take actual possession of the property, he is not likely to become aware of claimants who have purposely refrained from raising objections in the course of execution proceedings. It may be added that property is often brought to sale during the pendency of a regular suit by a claimant who has unsuccessfully objected to the attachment, or before an appeal by him in such a suit has been decided. It has also to be borne in mind that while in a particular case the sufferer, according to the view contended for by the appellant, is principally the auction-purchaser, the real sufferers in the long run will be judgment-debtors as a class, the saleable value of whose property is likely to be seriously diminished by reason of the risk involved in this state of the law.

In view of the decision of the Privy

(4) 46 Ind. Cas. 783; 22 C. W. N. 760.
(5) 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216.
(6) 26 Ind. Cas. 59; 36 A. 529; 12 A. L. J. 908.
(7) 2 Ind. Cas. 559; 37 C. 47; 13 C. W. N. 1080; 10 C. L. J. 558.
(8) 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 723.
(9) 5 A. 577; A. W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491.
(10) 45 Ind. Cas. 109; 40 M. 1009.

Council in *Dorab Ally Khan* v. *Khajah Moheeoddeen* (11) that there is no warranty of title at a Court sale, it seems to me clear that the right to obtain a refund of the purchase money when the judgment-debtor is found to be without a saleable interest, must be regarded as entirely the creature of rules 91 and 93, Order XXI, First Schedule to the Civil Procedure Code, the result being that without getting the sale set aside through the Court and by the method prescribed by the Code, the purchaser has no remedy. As remarked in *Parvathi Ammal* v. *Govindasami Pillai* (12), the general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given to him by the Statute. Where, however, the fraud or carelessness of a party has led to the invalidity of the sale, which was the case in Miscellaneous Appeal No. 7-B of 1916, decided by Prideaux, A. J. C., the matter stands on a different footing. The difference between the terms of the relevant provisions in the Codes of 1882 and 1908 respectively is so wide that a deliberate intention to make a pronounced change in the law may readily be inferred. Moreover, it is difficult to understand on what principle of natural justice a person like the present appellant, who took no part in the sale proceedings but merely received a portion of the purchase money by way of rateable distribution, can be held responsible for what was done under the proclamation of sale. It must be remembered that the proclamation is prepared by the Court on information obtained from both parties and from any other person whom the Court may think it necessary to summon: see rule 66 (2) of Order XXI. A case like the present seems to be governed by the general rule that where a Statute creates an obligation and provides for enforcing its performance in a particular manner, performance must be obtained in that manner and in no other: see *Lingappa Goundan* v. *Esudasan* (13) and the authorities cited therein.

My conclusion is that the view taken in *Dewaji* v. *Amrita* (1) is correct. The decree of the lower Appellate Court is accordingly set aside and the decree of the Trial Judge is restored. The plaintiff-respondent will pay the defendant-appellant's costs throughout.

Z. K.

Appeal allowed.

(11) 3 C. 806; 5 I. A. 116; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind. Dec. (N S) 1097 (P. C.).

(12) 30 Ind. Cas. 827; 39 M. 803 at p. 806; 2 L. W. 861; 29 M L. J. 467; (1915) M. W. N. 797.

(13) 27 M. 13 at p 15

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1908 OF 1919.

July 1, 1921.

Present:—Justice Sir N. R Chatterjea, KT., and Mr Justice Pearson.

PRAFULLA NATH TAGORE—PLAINTIFF—APPELLANT

versus

T. C. TWEEDIE, RECEIVER, AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 104J, 192, *applicability of—Construction of* kabuliyat—Kabuliyat *executed before Act—Enhancement of rent.*

The predecessor-in-interest of plaintiffs created a permanent tenure at a fixed *jama* in favour of the predecessors-in-title of the defendants in the year 1860. The tenure comprised lands within the permanently settled Zemindari of the plaintiffs as well as some lands which formed the subject of diluvion and reformation. There was a provision in the *patta* that if any *chur* or any alluviated or *taufir* land was separately settled after "becoming Government *khas*," the *talukdar* shall not get any reduction of the *jama* mentioned in the *kabuliyat*. It was expressly stipulated in the *kabuliyat* that the rent was never to be increased or decreased. Some of the lands were resumed by Government and afterwards settled with the plaintiffs in 1900 as *dearah* lands The Government revenue was separately fixed for the lands and the rent payable by the tenants was also fixed. In 1914, there was a fresh Settlement by Government and the Settlement Authorities assessed higher revenue by the plaintiffs and higher rent payable by the tenure-holders under the plaintiffs. Plaintiffs brought a suit for recovery of the rent fixed in the Settlement proceedings. The defence was that the plaintiffs were not entitled to any additional rent over and above the rent payable under the *kabuliyat* of 1860:

Held, that the intention of the parties being that the lease should comprise all the lands within it and the rent having been settled at a lump sum for all the lands leased out, it could not be said that the tenants would have no right to the lands even if they were settled with the Zemindar after resumption by Government, and that, therefore, the tenants

were entitled to hold the lands as part of the *taluk* at the same rent under the original *kabuliyat*. [p. 236, col. 2; p. 238, col. 1.]

Pria Nath Das v. *Ramtaran Chatterjee*, 30 C. 811; 7 C. W. N. 601; 8 Sar. P. C. J. 497; 30 I. A. 159 (P. C.), *Muktakeshi Dasi* v. *Srinath Das*, 26 Ind. Cas. 215; 19 C. L. J. 614, *Baikuntha Nath Ghose* v. *Sodananda Mohapatra*, 46 Ind. Cas 287; 23 C. W. N. 5 6, *Prafulla Narain* v. *Palku Mahammad*, 53 Ind. Cas. 122; 23 C. W. N 860, referred to.

Section 192 of the Bengal Tenancy Act does not, either expressly or impliedly, give power to a Revenue Officer to fix a rent so as to affect contracts entered into before the passing of the Act The words "contract or lease" in the section do not include contracts entered into before the passing of the Act. [p. 237, col. 2.]

Section 104J of the Bengal Tenancy Act does not apply to a case where there is a *kabuliyat* executed before the passing of the Act. [p. 238, col. 1.]

Appeal against a decree of the Additional Subordinate Judge, Bakarganj, dated the 4th of August 1919, reversing that of the Munsif, Fifth Court at Barisal, dated the 29th of July 1918.

FACTS appear from the judgment.

Babu *Brojo Lal Chuckerbutty* (with him Babu *Satis Chandra Sinha*), for the Appellant,—The plaintiff is the appellant. The appeal arises out of a suit for rent. The predecessor of the plaintiff owned the estate half in Zemindari right and half in *patni* right. In 1860 a permanent tenure was created in favour of the predecessor-in-interest of the defendants. There was a stipulation amongst others in the *kabuliyat* that if the lands be resumed by Government and settled afresh, they should be treated as not belonging to the tenure and on that ground the lessees would not be entitled to claim any reduction of rents. Subsequently the lands were resumed by the Government and settled with the plaintiff in 1900 as *dearah* lands. The Government revenue was separately assessed as also the rent payable by the tenants was fixed. In 19 4 there was a fresh Settlement by the Government and the revenue payable by the plaintiff as well as the rent payable by the tenants were fixed at higher rates. The present suit is for recovery of rent at the rate assessed in the Settlement proceedings. The defence was that they were not liable to pay rent at a rate higher than that fixed in 1860 at the time of the creation of the tenure. The First Court gave a decree at the rate settled in 1914 On appeal the suit has been dismissed with costs. My contention is that under the contract and the Statute I am entitled to recover rent at the rate settled by the Revenue Authorities in the Settlement proceedings. The learned Judge has been misled by the case relied on by him, *Pria Nath Das* v. *Ramtaran Chatterjee* (1). That case, I submit, has no application to the present case. The case of *Muktakeshi Dasi* v. *Srinath Das* (2) merely follows the case of *Pria Nath Das* v. *Ramtaran Chatterjee* (1). Refers to sections 104 F, 191, 192 of the Bengal Tenancy Act; *Baikuntha Nath Ghose* v. *Sodananda* [*Prasanna Kumar*] *Mohapatra* (3) *Profulla Narain* v. *Palku Mahammed* (4). The Act has no retrospective effect unless expressly provided. The words of section 192 are absolutely clear. They include all kinds of leases either before or after the passing of the Bengal Tenancy Act. Therefore, the date of the passing of the Bengal Tenancy Act does not affect the operation of the lease. What affects the lease is the land revenue. The tenants can have no vested interest as they have reckoned without the Government. Assuming that section 192 does not apply, that would be a question to be decided by the Settlement Officer. The defendants cannot go behind the Settlement Officer's decision under section 104J, Bengal Tenancy Act. The case is now governed by section 104H (3) (*a*) of the Bengal Tenancy Act. Refers to *Ambica Charan* v. *Joy Chandra Ghosh* (5). Regulation VII of 1822 is a general law, whereas the Bengal Tenancy Act is a special law. Both are in operation. The fact that the former has not been repealed does not affect the case. Refers to section 101, Bengal Tenancy Act, section 14 of the Bengal Act VIII of 1879 Settlement Manual, paragraph 550.

Babu *Bepin Behari Ghose* (with him Babu *Ambica Pada Choudhury*), for the Respondents.—My submission is that the interpretation of the stipulation in the *kabuliyat* of 1860, as made by the lower Appellate Court, is right. The intention of the parties was that the lease should comprise all lands within it and a lump sum was fixed as rent for all lands. So the tenants must have a right to the lands even after settlement with the Zemindar on resumption by the Government.

(1) 30 C. 811; 7 C. W. N. 601; 8 Sar. P. C. J. 497; 30 I. A. 159 (P. C.).
(2) 26 Ind Cas. 215; 19 C. L. J. 614.
(3) 46 Ind. Cas. 287; 23 C. W. N. 516.
(4) 53 Ind. Cas. 122; 23 C. W. N. 860.
(5) 4 Ind. Cas. 470; 13 C. W. N. 210.

Refers to *Pria Nath Das* v. *Ramtaran Chatterjee* (1), *Muktakeshi Dasi* v. *Srinath Das* (2). Section 192 of the Bengal Tenancy Act does not empower a Revenue Officer to fix a rent so as to affect contracts made before the passing of the Bengal Tenancy Act. Refers to *Baikuntha Nath Ghose* v. *Sodananda* [*Prasanna Kumar*] *Mohapatra* (3), *Prafulla Narain* v. *Palku Mahammad* (4), where it has been laid down that the tenant cannot question the rents settled by the Settlement Officer. The defendants are not bound by the provisions of section 104J of the Bengal Tenancy Act. We are in possession of lands included in the *kabuliyat* and of no lands outside the *kabuliyat*. There was no issue on the point raised and at least the case may go back for a determination of the question.

Babu *Bro:o Lal Chuckerbutty* replied briefly.

JUDGMENT.—This appeal arises out of a suit for rent under the following circumstances.

The predecessor-in-interest of the plaintiffs created a permanent tenure at a *jama* of Rs. 5,452 in favour of the predecessors-in-title of the defendants in the year 1860. The tenure comprised lands within the permanently settled Zemindari of the plaintiffs as well as some lands which formed the subject of diluvion and reformation. There was a provision in the *patta* that if any *chur* or any alluviated or *taufir* land was separately settled after "becoming Government *khas*," the *talukdar* shall not get any reduction of the *jama* mentioned in the *kabuliyat*. It was expressly stipulated in the *kabuliyat* that the rent was never to be increased or decreased.

It appears that some of the lands were resumed by Government and afterwards settled with the plaintiffs in 1900 as *dearah* lands. The Government revenue was separately fixed for the lands and the rent payable by the tenants was also fixed. In 1914, there was a fresh Settlement by Government and the Settlement Authorities assessed higher revenue by the plaintiffs and higher rent payable by the tenure-holders under the plaintiffs. The plaintiffs have brought this suit for recovery of the rent fixed in the Settlement proceedings. The defence was that the plaintiffs were not entitled to any additional rent over and above the rent payable under the *kabuliyat* of 1860.

The Court of first instance gave a decree at the rate settled by the Revenue Authorities, but that decree was reversed by the lower Appellate Court and the plaintiffs have appealed to this Court.

The *kabuliyat* no doubt expressly provides that the tenants shall not be entitled to any reduction of rent in the event of any land being resumed by Government and settled. The question is whether such stipulation necessarily shows that if the lands are settled again with the plaintiffs, the Zamindars, the tenant would not be entitled to hold those lands as part of the *taluk* at the same rent under the original *kabuliyat*.

If the intention of the parties to the contract was that the lease should comprise all the lands within it and the rent was settled at a lump sum for all the lands leased out, we do not think that it can be said that the tenants would have no right to the lands even if they were settled with the Zemindar after resumption by Government. Upon a construction of the terms of the *kabuliyat*, we are disposed to agree with the construction put upon it by the lower Appellate Court.

The learned Pleader for the appellant, however, has contended that apart from the question of construction of the *kabuliyat*, the tenant is bound to pay the rent fixed by the Revenue Officer under the provisions of section 192 and section 104J of the Bengal Tenancy Act. It is urged that the Settlement proceedings under the Bengal Tenancy Act supersede the contract between the parties.

This question has been raised in some cases. In the case of *Pria Nath Das* v. *Ramtaran Chatterjee* (1) the Judicial Committee considered the effect of Settlement proceedings upon a contract between the landlord and the tenant. Their Lordships observe: "The Settlement proceedings of 1884 cannot be held to have abrogated the rights of that respondent under the *patta*, so long as Raja Baroda Kant Roy and his heirs were themselves in a position to let him have the lands. In fact, the resumption by Government did not disturb the possession either of the Raja's heirs or of Chatterji. The mere fact of resumption cannot be held to have brought to an end the rights of the res-

pondent...under the *patta*, for the *patta* itself recognises the precarious nature of the grantor's title, and provides against the loss of possession should that be the result....If it had seemed good to the Government to take the land into their own *khas* possession or to settle it on strangers to the contract with the respondent Chatterji, then the recorded rent would have been the rate of payment by that respondent. But the lands having been settled on the heirs of the Raja who granted the *patta*, the Act does not interfere with the contractual rights of the subordinate holder. Now the period of Settlement being still current, the *ganti* right still subsists, and the respondent is only liable for the rent payable under the *patta*."

In the case of *Muktakeshi Dasi* v. *Srinath Das* (2) the same principle was laid down, following the observation of the Judicial Committee in *Pria Nath Das* v. *Ramtaran Chatterjee* (1). The Settlement proceedings, however, were not taken under Chapter X of the Bengal Tenancy Act either in that case or in the case of *Muktakeshi Dasi* v. *Srinath Das* (2). So the question what effect sections 192 and 104 J have upon a contract between the parties was not considered in those cases.

The learned Pleader for the appellant, as already stated, has relied upon the provisions of section 192 of the Bengal Tenancy Act. That section says: "When a landlord grants a lease or makes any other contract, purporting to entitle the tenant of land not included in an area permanently settled to hold that land free of rent or at a particular rent, and while the lease or contract is in force—

(*a*) land revenue is for the first time made payable in respect of the land, or

(*b*) land revenue having been previously payable in respect of it, a fresh settlement of land revenue is made,

a Revenue Officer may, notwithstanding anything in the contract between the parties, by order, on the application of the landlord or of the tenant, fix a fair and equitable rent for the land in accordance with the provisions of this Act."

The question, however, arises whether the "lease or contract" referred to in the section would include a lease or contract executed before the passing of the Bengal Tenancy Act.

It is contended on behalf of the appellant that that question is not very material, provided the lease or contract is in force when the land revenue is for the first time made payable in respect of the land, or a fresh settlement of land revenue is made. We think, however, that the words "lease or contract" have reference to the words "lease" or "contract" in the opening lines of the section and it was not intended to affect contracts entered into before the passing of the Act. Section 178 provides for contracts between the landlord and the tenant made before or after the passing of the Act. Of course that section expressly gives retrospective effect; there may be such an operation by implication also. But we do not think that section 192, either expressly or impliedly, gives power to a Revenue Officer to fix a rent so as to affect contracts entered into before the passing of the Bengal Tenancy Act.

The question, how far the provisions of section 104J would affect such contracts, is not free from difficulty. That section says: "Subject to the provisions of section 104H, all rents settled under sections 104A to 104 F and entered in a Record of Rights finally published under section 103A, or settled under section 104G, shall be deemed to have been correctly settled and to be fair and equitable rents within the meaning of this Act."

It has been held in two cases, *viz.*, *Baikuntha Nath Ghose* v. *Sodananda Prasanna Kumar Mohapatra* (3) and *Prafulla Narain* v. *Polku Mahammad* (4), that the entry raises an irrebuttable presumption. So far as the settlement of the rent is concerned, the tenant cannot question the rents settled by the Settlement Authorities under the provision of Chapter X in cases where the settlement of land revenue is made or is about to be made. But the learned Judges in the case of *Baikuntha Nath Ghose* v. *Sodananda (Prasanna Kumar) Mohapatra* (3) were of opinion that the conclusiveness attached not only to the question of rent settled but it also attached to other matters recorded by the Settlement Officer.

In the case of *Ambica Charan* v. *Joy Chandra Ghosh* (5) Stephen and Doss, JJ., although of opinion that the entry as to rent is conclusive, pointed out the distinction between section 103B and 104J thus:—

"Section 103B makes the Record of Rights conclusive and makes it correct until the contrary is proved. It does not, however, apply to the rent roll which is the subject-matter of the next part of Chapter X. Section 104J applies to the rent roll alone and to no other part of the Record of Rights and section 104J enacts that the settlement of rents contained in the rent roll shall be deemed to be conclusive and the rents fair and equitable, no provision being made for the admission of any evidence to the contrary. The two sections, therefore, 103B and 104J refer to different subject-matters and, therefore, the earlier can have no application on the effect of the latter."

If, as pointed out by the learned Judges, section 104J does not affect other entries in the Record of Rights except as to the rent settled, we do not think that the contention of the learned Pleader for the appellant, namely, that the defendants are bound by the provisions of section 104J, is correct. But as stated above a different view was taken in *Baikuntha Nath Ghose* v. *Sodananda* [*Prasanna Kumar*] *Mohapatra* (3). The present case, however, may be distinguished on the ground, namely, that there was a *kabuliyat* executed in the present case before the Bengal Tenancy Act came into force, whereas there was no such contract in either of the two cases in 23 Calcutta Weekly Notes [*Baikuntha Nath Ghose* v. *Sodananda*[*Prasanna Kumar*] *Mohapatra* (3), *Prafulla Narain* v. *Palku Mahammad* (4) . The same observations apply to the case of Second Appeal No. 2517 of 1917 decided by Teunon and Chaudhury, JJ., reported in 60 Indian Cases 391 [*Kumar Arun Chandra Sinha Bahadur* v. *Jogendra Lal Roy* (6)]. In these circumstances, we are not inclined to interfere with the decision of the lower Court in so far as the lands are included within the *kabuliyat*.

It is contended on behalf of the appellant that the lands in the possession of the defendant in respect of which there was a settlement by Government with the Zemindar and in respect of which rent has been claimed in the present suit include not only lands covered by the *kabuliyat* but also lands outside the *kabuliyat*. This is denied on behalf of the respondent.

It appears, however, from paragraph No. 6 of the written statement of the defendants that, at any rate, there was a question as to some lands having been held by the defendants outside the *kabuliyat*. Paragraph No. 6 runs as follows:—"An allegation has been made to the effect that 39·95 acres of land of the defendant's *taluk* have been included in the *dearah*. This defendant has learnt from the plaintiffs' side that out of the same, 9·37 acres of land are within the boundary line of lands of *taluk* which had been ascertained in the suit of the year 1876 and the remaining 30·58 acres of land lie outside the said boundary line. Even if that be correct, the plaintiffs can get no separate rent from the *taluk* in a separate manner save and except that an only 30·58 acres of land."

There was no issue raised on the point but the learned Munsif says: "After the resumption of a part of the *kabuliyat* lands and other land, the Government created a separate estate in respect of the same and settled periodically with the plaintiffs."

The question does not appear to have been gone into by the lower Appellate Court. But from what we have said, it will appear that there was a question as to some of the lands outside the *kabuliyat* having been settled with the plaintiffs and being in the possession of the defendants. We are unable to decide that matter here and accordingly direct that the case be sent back to the lower Appellate Court in order that the question may be enquired into. If the Court finds that any *portion* of the lands settled by Government with the plaintiffs is in the possession of the defendants and which is not covered by the *kabuliyat* and which falls outside the decree in the suit of 1876 between the parties, the Court will apportion the rent which has been settled by the Revenue Authorities in respect of such lands as between the lands included in, and those falling outside the *taluk*. In that event, the Court will consider the question of costs. If, however, the Court finds that all the lands in possession of the defendants for which rent is claimed in the suit were included in the *kabuliyat* and found to be within the *taluk* by the decree of 1876, the plaintiffs' suit would be wholly dismissed and with costs of all Courts: and if the whole of the lands falls outside the *kabuliyat*, the suit will have to be decreed and with costs in all Courts.

Z. K. *Case remanded.*

(6) 60 Ind. Cas. 391.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS No. 23 OF 1921.

March 11, 1921.

Present :—Mr. Justice Chevis and Mr. Justice Scott-Smith.

GHULAM RASUL KHAN—PLAINTIFF—PETITIONER

versus

THE SECRETARY OF STATE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Suit for declaration that plaintiff member of an agricultural tribe—Value of subject-matter—"Property."

The words "the decree must involve, directly or indirectly, some claim or question to or respecting property of like amount or value" in section 110 of the Civil Procedure Code refer to some specific property and do not contemplate property which a party may be desirous of acquiring. [p. 240, col. 1.]

The valuation for purposes of jurisdiction is not always the real value of the subject-matter of the suit for purposes of section 110 of the Civil Procedure Code. [p. 239, col. 2.]

Karm Singh v. *Khem Singh*, 60 P. R. 1905; 150 P. L. R. 1905; 86 P. W. R. 1905 and *Pichayee* v. *Sivagami*, 15 M. 237; 5 Ind. Dec. (N. S.) 516 (F. B.), followed.

Plaintiff brought a suit for a declaration that he was a Rajput by caste and valued the suit for purposes of jurisdiction at Rs. 11,000. The defendant accepted that valuation. The suit was dismissed by the High Court. Plaintiff applied for leave to appeal to the Privy Council. It was objected that the value of the subject-matter of the suit was not Rs. 10,000 or above. The plaintiff replied that his object in bringing the suit was to establish that he was a member of an agricultural tribe entitled to acquire land under the provisions of the Punjab Land Alienation Act, and that he intended to purchase a large quantity of land:

Held, that it could not be said that the value of the subject-matter of the suit amounted to Rs. 10,000 or that the decree involved any claim or question to or respecting property of like amount or value. [p. 240, col. 1.]

Mowla Newaz v. *Sajidunnissa Bibi*, 18 C. 378; 9 Ind. Dec. (N. S.) 253 and *Charan Das* v. *Amir Khan*, 57 Ind. Cas. 606; 25 C. W. N. 289; 39 M. L. J. 195; 28 M. L. T. 149; 2 U. P. L. R. (P. C.) 124; 18 A. L. J. 1095; 22 Bom. L. R. 1370; 47 I A 255; 13 L. W. 49; 3 P. W. R. 1921; 48 C. 110 (P. C.), referred to.

Application for leave to appeal to His Majesty in Council against a decree of Mr. Justice Chevis and Mr. Justice Scott-Smith, passed on 25th October 1920.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Petitioner.

Mr. *Herbert*, Government Advocate, for the Respondent.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. The plaintiff in this case sued for a declaration that he was a Rajput by caste. His suit was decreed by the learned Subordinate Judge, but dismissed by this Court on appeal. He valued his suit for purposes of jurisdiction at Rs. 11,000, and affixed a Court-fee stamp of Rs. 10 to the plaint. This valuation was accepted by Counsel for the defendant (Secretary of State for India in Council) and the defendant showed the same value when appealing to this Court. Plaintiff now claims an appeal as of right to His Majesty in Council, urging that the amount or value of the subject matter of the suit must be taken to be Rs. 11,000 and the decree involves a question respecting property over Rs. 10,000 in value. For the defendant it is pleaded that though the plaintiff had the right to put his own value for purposes of the Suits Valuation Act, that value is by no means to be accepted as the value of the subject-matter of the suit for purposes of section 110 of the Civil Procedure Code. This contention seems to us correct. The valuation for purposes of jurisdiction is not always the real value of the subject-matter of the suit. In *Karm Singh* v. *Khem Singh* (1) though the valuation for purposes of the Suits Valuation Act (thirty times the land revenue) was under Rs. 10,000 the market value of the land was over Rs. 10,000 and so it was held that the value of the subject-matter of the suit was over Rs. 10,000 and that appeal lay as of right to the Privy Council. *Pichayee* v. *Sivagami* (2) is to the same effect. For the defendant reliance is placed on *Mowla Newaz* v. *Sajidunnissa Bibi* (3). That was a suit for restitution of conjugal rights. The plaintiff valued his suit at Rs. 25,000 and the defendant valued her appeal to the High Court at the same amount. Leave to appeal to the Privy Council was refused to the plaintiff, it being held that such a suit was not one to which any special money value could be attached. Here too we are quite unable to say that the value of the subject matter of the suit amounts to Rs. 10,000 or upwards. Plaintiff's Counsel states that plaintiff's object in bringing the suit is not to improve his social status, but simply to enable him as a member of an

(1) 60 P. R. 1905; 150 P. L. R. 1905; 86 P. W. R. 1905

(2) 15 M. 237; 5 Ind. Dec. (N. S.) 516 (F. B.).

(3) 18 C. 378; 9 Ind. Dec. (N. S.) 253.

agricultural tribe to buy land, which otherwise he could not acquire being debarred under the provisions of the Punjab Land Alienation Act. Counsel tells us that plaintiff has already bought land (though he bought for only about Rs. 1,000) but could not get mutation attested in his favour, and that he wants to buy much more land. So it is urged that the decree involves a question to property exceeding Rs. 10,000 in value. But in our opinion the words in section 110, Civil Procedure Code, "The decree must involve, directly or indirectly, some claim or question to or respecting property of like amount or value," refer to some specific property. Here it is merely a matter of plaintiff desiring to buy land, no particular land being specified. There is merely a general statement that plaintiff wishes to acquire land. Plaintiff might conceivably change his mind, and give up his intention of investing his money in land. We are unable to hold that the value of the subject matter of the suit amounts to Rs. 10,000 or that the decree involves any claim or question to or respecting property of like amount or value.

Mr. Sheo Narain has referred us to a recent case published as *Charan Das* v. *Amir Khan* (4), where their Lordships of the Privy Council say they will not interfere except for certain special reasons in matters of valuation; this, however, we understand to refer to valuation of certain specific pieces of property, and not to valuation of the subject-matter of the suit for purposes of section 110, and we do not see how the remarks of their Lordships relieve us from the necessity of determining whether the value of the subject-matter of the present suit amounts to Rs. 10,000. It is for the plaintiff to show that it amounts to Rs. 10,000 or upwards, and he has failed to show us that it does.

This disposes of the application; we have not been asked to certify that this is a fit case for appeal.

The application is refused with costs.

Z. K. *Application refused.*

(4) 57 Ind. Cas. 606; 25 C. W. N. 289; 39 M. L. J. 195; 28 M. L. T. 149; 2 U. P. L. R. (P. C.) 124; 18 A. L. J. 1095; 22 Bom. L. R. 1370; 47 I. A. 255; 13 L. W. 49; 3 P. W. R. 1921; 48 C. 110 (P. C.).

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 35 OF 1921.

October 27, 1921.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

PARMESHWAR SINGH AND OTHERS—

—APPELLANTS

versus

Musammat SUREBA KUER AND ANOTHER

—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (c)—Landlord and tenant—Suit for declaration and ejectment—Court-fee payable.

A suit for declaration that the plaintiff is an occupancy *raiyat* of the land and that the defendants are under-*raiyats* holding under him and also claiming ejectment and recovery of arrears of rent is a suit of the class which comes under section 7 (*iv*) (*c*) of the Court Fees Act.

ORDER.—It appears from this case that the plaintiff framed his suit in such a way that it was a suit for a declaration of his title with consequential relief. He claimed for a declaration that he was an occupancy *raiyat* of the land and that the defendants were under *raiyats* holding under him. He claimed to eject them and also some arrears of rent. If a suit is deliberately framed in that way, it is clearly a suit of the class which comes under section 7 (*iv*) (*c*) of the Court Fees Act. It may well be that in many cases it is unnecessary to ask for a declaration of title as in cases where merely rent is claimed and in various other classes of cases, but if your suit is framed so that you ask the Court to declare your title, it seems to me that the Court-fee must be paid as for a suit under section 7, sub-section 4 (*c*). The Registrar has already dealt with this question and decided that on the memorandum the fee paid must be a fee as for a declaratory suit with consequential relief. He has no jurisdiction to decide that the deficit in the lower Court should be paid and that matter has been referred to this Bench. We agree with the decision of the Registrar and think that before this case can proceed, the deficit Court-fee amounting to Rs. 99 6 0 must be paid. The appellant will have a fortnight in which to pay that sum.

J. P. *Order accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 184 OF 1920.

August 29, 1921.

Present:—Mr. Dhobley, A. J. C.

RAMPRASAD—DEFENDANT—APPELLANT

versus

CHANDULAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s. 41 (2)—Construction of document—Lease or mortgage—Test.

The test for determining whether a document is a lease or a mortgage for the purposes of section 4 (2) of the C. P. Tenancy Act is whether the transfer was made for the purpose of securing the debt or was for the purpose of discharging it [p. 242, col. 1.]

A document which purported to be a lease for a certain number of years in consideration of a lump sum, provided that in case the transferee was dispossessed from the land, he would be entitled to recover from the transferor the principal amount together with interest thereon at 2 per cent. per mensem from the date of the document:

Held, that the debt was intended to be subsisting throughout the whole of the term and was not meant by the parties as discharged when the document was executed, and that, therefore, the document was a mortgage for the purposes of section 41 (2) of the C. P. Tenancy Act [p. 242, col. 1.]

Appeal against a decree of the Additional District Judge, Raipur, dated the 6th January 1920, in Civil Appeal No. 172 of 1919.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *G. L. Subhedar*, for the Respondents.

JUDGMENT.—The defendant appellant is the Lambardar Malguzar of Mouza Janjra, District Raipur, in which the plaint land is situate. One Dhanna was an absolute occupancy tenant of the plaint land and on 3rd October 1905 he executed in favour of Gokuldhar two documents, one as a lease and the other as a mortgage. Gokuldhar was the original plaintiff in this litigation and he died after the institution of the present appeal, being now represented by the respondents, who are his sons. Gokuldhar's claim was for the possession of the land on the ground that while he was in possession of it on the strength of the lease, the defendant dispossessed him in 1912. The defence was that the two documents formed one transaction of mortgage and that they were invalid and inoperative against the landlord, being against the provisions of the Central Provinces Tenancy Act. The defendant in his turn claimed the land under a subsequent sale deed from the tenant. There was a previous suit—Suit No. 541 of 1907—between Gokuldhar and the defendant's brother Mohanlal in respect of the same land and it was then held that Gokuldhar was entitled to claim possession on the strength of the lease in question. It was, therefore, contended by Gokuldhar in the present litigation that the decision in the previous suit acted as *res judicata* and that the defendant was not now entitled to question the validity of the lease. It is also urged by him that the lease was not against any of the provisions of the Central Provinces Tenancy Act and was binding on the defendant.

The question of *res judicata* has been decided by both the Courts against the plaintiff on the ground that the present defendant was not a party to the previous suit and that he would not, therefore, be bound by anything decided in it. Both the Courts below held that the document on which the plaintiff relied was a lease and was a perfectly valid transaction, binding on the landlord. The plaintiff was, therefore, given a decree for the possession of the land.

In the present appeal the respondents contend that the plea of *res judicata* raised by the plaintiff Gokuldhar in the Courts below should have been allowed and that whatever may be the other merits of the case, the plaintiff was entitled to succeed on this ground alone. It is admitted that the defendant Ramprasad was not a party to the previous suit and it has not been shown that his brother Mohanlal, either expressly or impliedly, represented him. Hence anything decided in that suit would not be binding upon the defendant Ramprasad. Moreover, the present question about the legality of the lease was not raised in that suit. The defendant was, therefore, entitled to raise the defence he did.

The annual rent of the land was Rs. 9.8. and section 41 of the Central Provinces Tenancy Act, 1898, lays down the conditions under which an absolute occupancy holding can be transferred. The tenant executed two documents on the same day in respect of his holding, one was a mortgage, the principal amount secured by it being Rs. 24 13 0 carrying interest at 2 per cent. per mensem, and the second was a lease for 19

years for a consideration of Rs. 45. If both the documents were intended to be a mortgage, they offended the provisions of section 41 (2) and were inoperative against the landlord. The debt secured together with interest thereon payable during the five subsequent years exceeded eight times the annual rent of the holding. Therefore the question is whether the document styled as a lease was a mortgage. The distinction between a lease and a mortgage is in such cases very fine and it is often difficult to determine the nature of the document. The test is whether the transfer was made for the purpose of securing the debt or was for the purpose of discharging it. That the document was meant to secure the debt is clear from the express condition in it that in case the transferee was dispossessed from the land, he would be entitled to recover from the transferor the principal amount together with interest thereon at 2 per cent. per mensem from the date of the document. This will show that the debt was intended to be subsisting throughout the whole of the term and was not meant by the parties as discharged when the document was executed. For a usufructuary mortgage it is not necessary that there should be a condition for the rendition of any accounts or that there should be either an express or implied provision for redemption. A mortgage can be so devised that nothing remains to be paid at the end of the term. In such cases no accounting is necessary, as the whole debt is considered satisfied by the usufruct for a fixed term. In a very similar case between the same parties the interpretation of a document containing almost identical conditions came up before this Court and Skinner, A. J. C., in Second Appeal No. 323 of 1905 held the document to be a usufructuary mortgage. In the present case I also hold the document in question, though styled and written as a lease, to be a mortgage.

Differing from the Courts below I hold that the document on the strength of which the plaintiff's claim for possession was based was inoperative against the defendant and that he could not succeed against the defendant. The appeal is allowed and the plaintiff's suit is dismissed with all costs of the three Courts on him.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1171 OF 1919.

November 26, 1921.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

RAM GHARIB TEWARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHANKAR TEWARI—PLAINTIFF—RESPONDENT.

Pleadings—New and inconsistent plea—Pre-emption—Suit on basis of custom—Custom not proved—Plea of pre-emption on basis of contract—Wajib-ul-arz, *entry in, as to pre-emption—Custom, evidence of.*

A plaintiff pre-emptor having come into Court on the allegation of custom and having failed to prove it, his claim ought to be dismissed and should not be allowed on the ground of contract without the plaint being amended and an opportunity given to the defendant to meet the new case [p. 243, col 2.]

A village was settled with a single proprietor up to 1836. In 1836 the settlement was made with four persons. In the *wajib-ul-arz* of 1860 reference to pre-emption was made for the first time:

Held, that under the circumstances it could not be said that the custom of pre-emption had grown up in 24 years, and that the statement in the *wajib-ul-arz* of 1860 could only be taken to mean that the then co-sharers of the village had agreed to pre-emption among themselves. [p. 243, col. 1.]

Second appeal from a decree of the District Judge, Gorakhpur, dated the 13th August 1919.

Messrs. *Harnandan Prasad* and *Badri Narain*, for the Appellants.

Dr. *S. M. Sulaiman*, Messrs. *Nihal Chand* and *Iswar Saran*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by Shankar Tewari, the plaintiff-respondent, for the recovery of property conveyed by a sale deed, dated the 24th of August 1917, by defendants Nos. 5 to 7 to defendants Nos. 1 to 4, on the ground of pre emption. It was stated by the plaintiff in his plaint that the property conveyed by the said sale deed was of two kinds, namely, *khalsa* and *aradidari*; that there was a custom obtaining in the village of Chapra where the property sold is situate under which the co sharers in the order given in the *wajib-ul-arz* had a right of pre-emption over a stranger; that the defendants Nos. 1 to 4 were strangers, while the plaintiff was a cousin of the vendors and, therefore, entitled to pre-empt the property. The sale consideration entered in the deed was also challenged. The claim was resisted on various grounds.

It was urged on behalf of the defendants vendees that no custom of pre-emption prevailed in the village of Chapra; that the sale consideration given in the deed was accurate, and that in any case the sale of *arasidari* could not be a fit subject of pre-emption.

The Court of first instance decreed the claim with regard to both the items of property on the payment of Rs. 2,805, holding that the *wajib-ul-arz* filed on behalf of the plaintiff proved that a custom of pre-emption obtained in the village of Chapra.

On appeal by the vendees the learned Judge affirmed the decree of the First Court, though on another ground. He held that the terms of the *wajib-ul-arz* relied upon by the plaintiff showed a contract and not a custom of pre-emption and as the suit was filed by the plaintiff before the expiry of the settlement in which the *wajib ul-arz* relied upon was prepared, he had the right of action and should succeed.

In second appeal before us the vendees challenge the decree of the lower Court on three grounds: They contend that the lower Appellate Court was not justified in setting up a new case for the plaintiff. The latter had come into Court on one and one allegation only, namely, that the custom of pre-emption prevailed in the village of Chapra. He made no mention and did not rely on any contract between the co-sharers of the village of Chapra. If the learned Judge of the lower Appellate Court was of opinion that the terms of the *wajib-ul-arz* of the village showed the existence of a contract of pre-emption, he should have asked the plaintiff to amend his plaint or at least to give the defendants vendees a chance of meeting a case made out for the plaintiff by the learned Judge. The second objection on behalf of the appellants is that custom or contract, whichever the *wajib-ul-arz* might be taken to show, does not apply to *arasidari*. In the village of Chapra the two items of property are distinctly settled and separate papers are prepared in respect of them. There are also separate Lambardars. The third objection is that the defendants-vendees are also co sharers in the village and even on the terms of the *wajib ul arz*, if they are the terms of a contract, they have as much right to purchase the properties in suit as the plaintiff.

In our opinion this appeal must prevail. The objection on behalf of the appellants that the learned District Judge should not have allowed the claim of the opposite party on the ground of contract when they had come into Court on the allegation of custom, is correct. It appears from the papers on the record that the village in which the property in suit is situate was settled with a single proprietor up to 1836. In 1836 the settlement was made with four persons. The reference to pre-emption is made for the first time in the *wajib-ul-arz* of 1860 It cannot be said that the custom of pre-emption had grown up in 24 years, that is, between 1836 and 1860. The statement in the *wajib-ul-arz* of 1860 can, therefore, be only taken to mean that the then co sharers of the village had agreed to pre-emption among themselves. If the learned District Judge was of opinion that the *wajib ul arz* of 1800 and the *zamima khewat* prepared subsequently in 1883 proved the existence of a contract, he should have allowed the plaintiff to amend his plaint so as to enable the defendants to meet the case. The learned Counsel for the respondent has asked us to allow him at this stage to amend the plaint. We do not think that this is a fit case in which we shold accede to the request of the learned Counsel for the respondent. The latter having come into Court on the allegation of custom and having failed to prove it, his claim ought to have been dismissed. We, therefore, allow the appeal, reverse the decree of the Courts below and dismiss the claim of the plaintiff respondent Costs throughout are allowed to the defendants-appellants.

J. P. *Appeal allowed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 61 OF 1921.

November 23, 1921.

Present:—Sir W. S. Schwabe, KT., Chief Justice, and Mr. Justice Odgers.

DORAIAPPA IYER *alias* KRISHNASWAMY IYER—APPELLANT

versus

THE OFFICIAL ASSIGNEE OF MADRAS AND OTHERS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 7—Insolvency Court, jurisdiction of, to decide between parties · Security bond in favour of creditor as indemnity against future litigation by minor son of insolvent—Decision of Insolvency Court that security property passed free to Official Assignee— Res judicata—*Civil Procedure Code (Act V of 1908), s. 11.*

Under section 7 of the Presidency Towns Insolvency Act, an Insolvency Court has jurisdiction to decide matters *inter se* between the parties arising in the insolvency. [p 245, col 1.]

A Hindu father sold a portion of joint family property to a certain person, and also executed a security bond indemnifying the vendee against future litigation by his minor sons in respect of the property sold On the vendor's application in insolvency, the Official Assignee sought for a decision on the question whether the sale by the insolvent was binding on his minor sons and whether the other property which was given in security passed free to the Official Assignee:

Held, that it was competent to the Insolvency Court under section 7 of the Presidency Towns Insolvency Act to decide the question to enable the Official Assignee to make a complete distribution of assets and that the decision of the Insolvency Court as to the effect of the sale by the minor's father was binding on the minors [p. 245, col]

Ellis v *Silber*, (1872) 8 Ch. 81 at p 86; 42 L. J Ch. 666; 28 L. T. 154; 21 W. R. 443 and *Motion, In re, Maule* v *Davis*, (1873) 9 Ch. 192; 43 L. J. Ch. 294; 29 L. T. 757; 22 W R. 225, referred to

Per *Odgers, J.*—A decision under section of the Presidency Towns Insolvency Act operates as *res judicata*. [p 246, col. 2]

Appeal from an order of Mr. Justice Coutts Trotter, dated the 11th April 1921, passed in the exercise of the Ordinary Original Insolvency Jurisdiction in Insolvency Petition No. 129 of 1920.

Messrs. *K. V. Krishnaswamy Iyer* and *K. G. Srinivasa Iyer*, for the Appellant.

Mr. *S. G. Sadagopa Mudaliar*, for the Respondent.

JUDGMENT.

SCHWABE, C. J.—In this case the question for our determination is whether under section 7 of the Presidency Towns Insolvency Act there was jurisdiction in the Insolvency Court to decide between the parties. The matter arises in this way. The insolvent sold certain property—the property was family property—and the purchaser being doubtful as to whether the insolvent could give him a good or complete title to the whole property, required some further—also family property—to be given to him as security against the other minor members of the family raising the question thereafter that the sale of the first property was as against them bad. In the Insolvency Court the Official Assignee found himself confronted with a claim to the property covered by the security bond, and in order properly to administer the estate and distribute the property completely among the creditors of the insolvent, it was necessary for him to know whether or not the security, held by the purchaser the present appellant, was a good security or a bad security; for, if the necessary, for if the security was good, the Official Assignee could not deal with the property without providing in some way for the appellant; if, on the other hand, the security was bad, in the sense of being no longer required, then the Official Assignee could sell that property free from that encumbrance. It may be that he will have some day to meet the question whether the minors - infant children of the insolvent—have an interest in that security property. But that is not the matter which is before the Court at present. For the proper disposal of the property, as the minors are interested, an application was made and a proper guardian *ad litem* was appointed for them, and the matter came before the Insolvency Court, they being represented. The matter was heard and determined on the merits.

There is no appeal to us on the question of the fact whether or not there were debts which the managing member of the family properly paid out of the moneys he received from the sale. No question of that kind seems to have been raised in the Court below and no question is raised before us, but it is said that there is a danger that when these minors come of ages, they might come into Court and ask that the sale of the first property should be set aside and that if that happens, the purchaser would require or might require that security property to make good to him the loss which was thereby suffered. Whether

the minors would be able hereafter to come into Court and make such application successfully must depend, in my view, on the proper interpretation of section 7 of the Presidency Towns Insolvency Act of 1909. The words of that section are taken word for word from the Bankruptcy Acts of England. It was found necessary there—no doubt it is also found necessary here—that questions of that kind should be determined, for, otherwise, the insolvency would have to go on until such time as the infants chose to raise the question. In my view, it is to provide for this very kind of matter that that section was passed The words are: "Decide all questions of priorities, and all other questions whatsoever, whether of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." It is quite impossible for the Court to do complete justice or to make a complete distribution of assets in this case unless the Court can say whether the property in question is property which passed to the Official Assignee free from encumbrance. The Court cannot say that without hearing the matter and disposing of it. It has heard the matter and disposed of it, and in my view the decision of that Court is binding on the minor children of the bankrupt. That being so, the security is no longer required, because it has been decided, and, in my opinion, finally decided, that the sale by the minors' father is binding on them; and the order which has been made in the Court below setting aside this bond is, in my view, correct. I am confirmed in this view by a reference to the English cases of *Ellis* v. *Silber* (1) and *Motion, In re, Maule* v. *Davis* (2). Taking the case of *Ellis* v *Silber* (1), the words "assets which come to their hands and the mode of administering them are subject to that jurisdiction" are words which might aptly be used and applied to the facts of this case.

In these circumstances the appeal fails and is dismissed with costs.

ODGERS, J.—I am of the same opinion. I have elsewhere expressed my view that section 4 of the Provincial Insolvency Act, which corresponds in terms with section 7 of the Presidency Towns Insolvency Act, was inserted in the new Act in order to provide for a contest of the character that arises in the present appeal. It was long the subject of discussion as to whether and how far the decision of the Court of Insolvency acted as *res judicata* in other proceedings, and in my view it is quite clear that section 7 was inserted to make such decision binding as being *res judicata*. I, therefore, agree that the appeal should be dismissed with costs.

M. C. P.

J. P. *Appeal dismissed.*

(1) (1872) 8 Ch. 83 at p. 86; 42 L. J. Ch. 666; 28 L. T. 166; 21 W. R. 346.

(2) (1878) 9 Ch. 192; 43 L. J. Bk. 59; 29 L. T. 767; 22 W. R. 225.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1918 OF 1918.

August 19, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Cuming.

ANNADA MOHAN ROY CHOUDHURY —DEFENDANT No. 1—APPELLANT

versus

NILPHAMARI LOAN OFFICE, LIMITED—PLAINTIFF AND ANOTHER DEFENDANT No. 2 —RESPONDENT.

Estoppel—Benami—*Successor-in-interest of real owner, if can defeat right of mortgagee from ostensible owner—Notice*

Certain lands, which had been purchased by *K.* in the *benami* of his wife *A.*, were mortgaged by *A.* to the plaintiffs, who in execution of the mortgage decree purchased them in 1915. In 1905 these lands had been purchased and taken possession of by the defendants in execution of a money-decree obtained by a creditor against *K* To this execution proceeding *A* had preferred a claim on the ground that the lands were her *stridhan* property, but this claim had been disallowed by the Court. In a suit by the plaintiffs for a declaration that the lands belonged to *A.* and for possession thereof by right of their execution purchase:

Held, that the defendants, who were the successors-in-interest of *K*, should not be allowed to defeat the right of the plaintiffs, who were transferees in good faith from the ostensible owner *A.* without notice (actual or constructive of *K*'s title. [p 239, col. 1]

Luchmun Chunder Geer Gossain v. *Kalli Churn Singh*, 19 W. R. 292 at p. 296; 4 Sar. P. C. J. 802, (P. C.), followed.

Sarat Chunder Dey v. *Gopal Chunder Laha*, 20 C. 296; 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201, referred to.

Appeal against a decree of the Officiating District Judge, Rangpur, dated the 17th of August 1919, modifying that of the Subordinate Judge of that district, dated the 30th of June 1917.

FACTS appear from the judgment.

Babu *Gunada Charan Sen* (with him Babu *Jyotish Chandra Sarkar* for Babu *Bimal Chandra Das*), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for possession. The case came up to this Court twice previously On the first occasion on 6th August 1920 it was remanded for a finding, when no evidence was adduced by the parties. It was again sent back on the 29th January 1921. Evidence has been taken this time and the case has now come up finally for decision. The lands in suit belonged originally to two ladies, who executed a *kobala* in favour of one Anandamoyee in 1898. The plaintiffs took a mortgage of the lands from Anandamoyee and her daughter, Rohini, in 1902 and purchased the properties themselves in execution of the mortgage decree in 1913. In the meanwhile in execution of a money-decree against the husband of Anandamoyee the properties were attached. Anandamoyee preferred a claim against the attachment, but it was dismissed. At the sale held in execution of that decree defendant No. 1 purchased the lands in 1905. He obtained possession and continued in possession ever since and the plaintiffs having failed to get possession of the lands, brought a suit out of which the present appeal arises. Both the Courts have decreed the suit holding that Anandamoyee's purchase in 1898 was in the *benami* of her husband. The question was whether the mortgage was taken by the mortgagees *bona fide* and without notice. On that question the first remand was made. The finding on the evidence is in my favour, *viz.*, that the mortgage was with notice. The learned Judge is entirely wrong in holding that the defendant No. 1 is estopped from raising the point that the property belonged to Anandamoyee's husband and not to Anandamoyee herself. The mortgage was executed three years after Anandamoyee's husband's death. So no representation was made at the time of the mortgage. I submit the principle of section 41 of the Transfer of Property Act applies to the case. The principle of estoppel as laid down in section 115 of the Indian Evidence Act does apply.

[N. R. CHATTERJEA, J.—But the question of constructive notice would arise?]

The Courts below held that certain facts ought to have been enquired into and that the plaintiffs were guilty of wilful abstention from an enquiry of those facts. Refers to section 3 of the Transfer of Property Act. That, I submit, is a pure question of fact. Refers to *Ramcoomar Koondoo* v. *McQueen* (1), *Niras Purbe* v. *Tetri Pasin* (2), *Sarat Chunder Dey* v. *Gopal Chunder Laha* (3), *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh* (4). The mere fact that the property stood in the wife's name would not do. It must also be proved that there was representation. The other finding that the wife was the *benamidar* of the husband cannot be challenged now.

Babu *Mahendra Nath Roy* (with him Babu *Atul Chandra Gupta*), for the Respondents.—This is a case of estoppel under section 115 of the Indian Evidence Act. Whether the husband has by his act intentionally caused another to act or do a thing, that is the question. If it is shown that the party has relied on a representation, then it would be no representation. Refers to section 41 of the Transfer of Property Act. That section, I submit, does not do away with the rule of estoppel as laid down in section 115 of the Indian Evidence Act. The question as to how far the doctrine of estoppel is affected by constructive notice is dealt with in several cases. Refers to *Ramcoomar Koondoo* v. *McQueen* (1), *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh* (4). There it was held that a husband's conveying a property to his wife would mean a representation by him that the property

(1) 11 B. L. R. 46; 18 W. R. 166; I. A. Sup. Vol. 40; 3 Sar. P. C. J. 160; 2 Suth. P. C. J. 656 (P. C.).
(2) 32 Ind. Cas. 82; 20 C. W. N. 103.
(3) 20 C. 296; 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201.
(4) 19 W. R. 292 at p. 296; 4 Sar. P. C. J. 802 (P. C.).

was his wife's. Refers to *Redgrave* v. *Hurd* (5). Section 115 of the Indian Evidence Act does not contemplate that I must take every possible precaution to test the representation. The question of constructive notice has no bearing on the doctrine of estoppel. Refers to *Mahomed Mosuffer Hossein* v. *Kishori Mohun Roy* (6), *Jagannath Prashad Singh* v. *Abdullah* (7).

Babu *Gunada Charan Sen* replied briefly.

JUDGMENT.—The lands in dispute in this case originally belonged to two ladies. They executed a *kobala* in favour of one Anandamoyee, the wife of one Krishna Nath Ghose, in January, 1898. Shortly after Krishna Nath died leaving Anandamoyee his widow and a daughter Robini, who is no party to the suit.

The plaintiffs, who are the respondents before us, took a mortgage of the lands in dispute from Anandamoyee, the widow of Kristo Nath Ghose, and their daughter Robini Dassi, on the 23rd June 1902, and at a sale held in execution of the decree obtained upon the mortgage purchased them on the 6th November 1913. In the meantime the lands were attached in execution of a money-decree at the instance of a creditor of Kristo Nath. Anandamoyee preferred a claim on the ground that it was her *stridhan* property, which however, was disallowed. The lands were accordingly sold in execution of the money-decree and purchased by the defendant No. 1 on the 5th June 1905. He obtained possession of the lands and continued in possession. The plaintiffs having purchased the lands in execution of their mortgage decree, were resisted in taking possession by the defendant No. 1. This suit was accordingly brought by the plaintiffs for a declaration that the lands belonged to Anandamoyee, and for possession of the same. Subsequently the plaintiffs applied for amendment of the plaint to the effect that if the lands were found to belong to Kristo Nath and not to Anandamoyee, the latter had legal necessity to mortgage the lands.

The Court of first instance found that the lands were purchased by Kristo Nath with his own money in the *benami* of Anandamoyee, that the money was raised by her upon the mortgage for legal necessity, and as the defendant No. 1 was not made a party to the suit brought by the plaintiffs on the mortgage, that Court gave a decree to the plaintiffs for possession subject to the right of the defendant No 1 to redeem the mortgage.

On appeal the learned District Judge agreed with the Court of first instance in holding that the lands were purchased by Kristo Nath in the *benami* of his wife, Anandamoyee, but he was of opinion that the defendant No. 1 was estopped from denying that the lands belonged to Anandamoyee, and accordingly reversed the decree of the Court of first instance, and gave a decree to the plaintiffs for possession of the lands. The defendant No. 1 has appealed to this Court.

The first question for consideration is whether the defendant No. 1 was estopped from disputing the absolute title of Anandamoyee to the lands. The ground upon which the learned District Judge found the question of estoppel in favour of the plaintiffs was that Krishna Nath, by purchasing the property in the name of his wife, had put her forward as the ostensible owner with an intention to deceive any person who had a claim to his estate, and the plaintiff lent the money on mortgage on the strength of the *kobala* which stood in her name, the defendant No. 1 as the successor-in-interest of Kristo Nath was estopped from denying that the property was the *stridhan* property of Anandamoyee. The learned Judge relied upon the case of *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh* (4) in support of the view taken by him.

The question is whether the learned Judge was right in the view he took of the case.

We think that the case falls within the principle enunciated by the Judicial Committee in the case of *Luchmun Chunder Geer Gossain* v *Kalli Churn Singh* (4). There the property was purchased by the father in

(5) (1881) 20 Ch. D. 1 at p. 13; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251.

(6) 22 C. 909; 22 I. A. 129; 5 M. L. J. 101; 6 Sar. P. C. J. 583; 11 Ind. Dec. (N. S.) 602 (P. C.)

(7) 45 Ind. Cas. 774; 45 I. A. 97; 16 A. L. J. 576; 5 P. L. W. 88; (1918) M. W. N. 403; 22 C. W. N. 41; 8 L. W. 163; 24 M. L. T. 61; 23 C. L. J. 193; 20 Bom. L. R. 651; 35 M. L. J. 46; 45 C. 909 (P. C.).

the name of the mother and their Lordships observed:—

"That was a misrepresentation of the father by means of which the widow after his death was enabled to sell the property. It was said that the minor would not be bound by the acts of the father before his death. Suppose the father had actually sold this property to the mother, and had made a misrepresentation by a deed of sale, would not the minor son have been bound by that deed, although the father might have had some secret understanding with the mother that it was purchased in her name *benami* for the father? It appears to their Lordships that there was a misrepresentation by the father in allowing the property to be taken by the wife under a deed of sale, representing that the purchase money was her *stridhan*, and in all his acts, both public and private, during his lifetime, representing that the property was his wife's. After that representation on the part of the father, his heirs were no more entitled to recover than the father would have in his lifetime. The heirs were as much bound by the misrepresentation made by the father, as the father would have been if the wife in his lifetime had actually sold the property to a *bona fide* purchaser. In such case the father could not have recovered the property from the purchaser; and it appears to their Lordships that the minor claiming by descent from the father is equally bound by those misrepresentations, and that he cannot, as heir to the father, set up that that property belonged to the father, when the father could not in his own lifetime, under similar circumstances, have set up that the property belonged to him."

This case was considered in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha* (3). In that case, their Lordships observed at page 305: "In the case of *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh* (4) a similar state of facts occurred, for there, as here, the mortgage was granted by the widow after her husband's death. But in that case the husband, Ubotar Singh, had never himself held the title to the property there in question in his own name. The title was derivad from a third party and taken directly to his wife, and, according to the narrative of the conveyance, the price was paid from her *stridhan* fund. He was never in possession of it. His wife took possession and retained it, and, as stated by the High Court in their judgment in the present case, by a long series of public acts and declarations, he did all he could to cause his wife to bear towards the public the character of owner. There were thus continuous declarations and acts by the husband calculated to cause any person dealing with the widow to believe that she was and had been the proprietor in her own right and in possession of the property purchased."

In the present case, as in *Luchmun Chunder's case* (4), Krishna Nath, the husband of Anandamoyee, had never himself held title to the property in his own name. The title was derived from a third party and taken directly to his wife.

It was contended before us that in *Luchmun Chunder's case* (4) the Judicial Committee relied not only upon the fact that the *kobala* was taken in the name of the wife, but also upon the fact that there were continuous declarations by the husband that the property belonged to the wife. In the present case there was no mutation of names, but the property here was *lakheraj*, and there could be no mutation of names either in the Collectorate or in the Zamindar's Sherista. The *kabuliyats*, *toujis*, and counterfoil rent receipts stood in her name, and it does not appear that there was any occasion for Kristo Nath's making any other declarations that the property belonged to Anandamoyee. But the case does not rest merely upon the facts stated above.

The case was remanded for a finding upon the question whether the plaintiffs in this case, when they took the mortgage, did so in good faith without any notice (actual or constructive) of the title of Kristo Nath to the property. Actual notice the plaintiffs admittedly had not. The learned Judge has, no doubt, held that they had constructive notice; but in the first place, he has misconstrued the document upon which he relies in support of his finding; and secondly, the facts found do not justify the inference that there was constructive notice. He finds that an officer of the plaintiff Loan Office went to the village, looked at the *kabala* and other papers, namely, certain *kabuliyats*, *toujis* and rent receipt counterfoils and found that they were given in Anandamoyee's name. The learned Judge, however, was of opinion that

the *kobala* shows that Anandamoyee's husband paid part of the price of the property, about Rs. 250-7 which the vendor owed him at the time. That clearly is based upon a misconstruction of the *kobala*. The *kobala* states that the price of the property was fixed at Rs. 1,500 out of which Rs. 518 12 which was due to one Mahammad Nafatulla was to be paid by the vendee, that, out of the balance, *viz.*, Rs. 981-4, which was received through her husband, Kristo Nath, *Rs. 250-7 was paid to him* (Krishna Nath) in satisfaction of the debt due under his decree and that the balance Rs. 730 : 3 was received by the vendor in cash. This does not show that Anandamoyee's husband paid part of the consideration for the *kobala*.

Then, the learned Judge points out that Krishna Nath had previously purchased a share in the property, and the learned Judge says that the plaintiff Loan Office should have inquired into Krishna Nath's financial position at the time when the purchase was made in the name of his wife.

We do not see, however, why it was necessary for the mortgagees to inquire into the financial position of Krishna Nath. We do not think that the facts found lead to the inference that the plaintiffs had constructive notice of the title of Kristo Nath.

Kristo Nath purchased the property in the name of his wife directly from a third party, he himself acting as the agent of the wife in the transaction; and so far as there were occasions for doing so, he held her out as the real owner. The learned Judge finds that the plaintiffs made enquiries, though he was in error in holding that plaintiffs should have enquired into the financial position of Kristo Nath. We think that, in these circumstances, the defendant, who is the successor in interest of Kristo Nath, should not be allowed to defeat the right of the plaintiffs, who are transferees in good faith from the ostensible owner Anandamoyee without notice of Kristo Nath's title. As stated above, we are of opinion that upon the facts found the learned Judge is not right in holding that the plaintiff company had constructive notice of the title of Kristo Nath.

In the result, the appeal is dismissed with costs.

B.N. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 24 OF 1921.

November 25, 1921.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.,

Lala RAM DHAR AND OTHERS—APPLICANTS

versus

Babu PRAG NARAIN AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XLV, r. 7—Privy Council Appeal—Extension of time for security and deposit for translation—High Court, power of.

A High Court has no power to extend the time for furnishing security and making a deposit for translation and printing and other charges in Privy Council Appeals beyond those times which are now definitely and clearly set out in the amended Order XLV, rule 7 of the Civil Procedure Code. [p. 250, col. 1.]

Application under Order XLV, rule 6, clause (*a*), Civil Procedure Code, as amended by Act XXVI of 1920.

Mr. *Nehal Chand*, for the Applicants.

Messrs. *B. E O'Conor* and *G. Agarwala*, for the Opposite Parties.

JUDGMENT.—This is an application by the appellants who ask the Court to extend the time for furnishing security and making a deposit for translation and printing and other charges. The rule which prescribes the time within which an appellant should furnish security for the costs of the respondent and deposit the amount required to defray the expenses of translation and printing and other charges was until Act XXVI of 1920 in these terms:—"Where the certificate is granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date, furnish security," etc. By section 3 (1) of Act XXVI of 1920 the words "six months" have been cut down and in their place the following words are to be read: "90 days or such further period, not exceeding 60 days, as the Court may upon cause shown allow." As the appellant in this case is appealing against a decree of the 2nd of March 1921, he having on the 30th of July 1921 obtained a certificate, he is admittedly on any reckoning outside and beyond both periods of 90 days from the

date of the decree and six weeks from the date of the granting of the certificate. He is indeed also out of time as regards the longer possible period of 90 days *plus* 60 days. Therefore, the dates we have given show that on the facts of this case the question before us is whether, as the law now stands, we have got power to extend the time beyond the periods which are mentioned in the amendment. It is conceded in argument that the object of the amendment of 1920 is to try to effect a speeding up in appeals which proceed from this country to the Privy Council, and we think that is a matter which must be borne in mind by us in construing this section as amended. Under the old section to be found in Order XLV, rule 7 of the Code of Civil Procedure of 1908, the Courts had decided that the periods mentioned in rule 1 were directory only, and that though they were normally the proper periods which should be observed by appellants, they could nevertheless be extended in the discretion of the Court if there were circumstances which the Court thought weighty enough to make it proper for the period to be extended. There is no doubt that it was the uniform practice to extend the time upon cause shown. The question before us is whether having regard to the very careful drafting of the amendment, the discretion of the Court is not curtailed and limited as regards the period from the date of the decree to an extension of 60 days, beyond which under no circumstances the Court can go. We are of opinion that that is the real meaning and the intended effect of the section. It will be seen that the period of six weeks from the grant of the certificate has not got coupled with it any discretionary period. In practice an appellant secures not much less than 150 days from the decree appealed against under this provision. Our view is that we have no power to extend the period beyond those times which are now definitely and clearly set out in the amended Order XLV, rule 7. To decide otherwise and grant extension beyond the period of six weeks would, in our view, defeat the object and intention of the amendment. The application is, therefore, rejected and the certificate revoked.

J. P.

Application rejected.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 138 OF 1920

February 22, 1921.

Present:—Mr. Justice Chevis and Mr. Justice Scott-Smith.

KAPURIA MAL AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

WALI MUHAMMAD AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Pre-emption— Decree, compliance with — Payment short of decretal amount —Costs, deduction of—Intention.

Where a suit for pre-emption is decreed on payment of a certain sum and the plaintiff is also awarded his costs, he is entitled to deduct the amount of the costs from the sum to be deposited by him. The decree, in such a case, is sufficiently complied with if the amount deposited by the plaintiff is sufficient to cover the amount mentioned in the decree after deducting therefrom the amount of costs awarded to the plaintiff. [p. 250, col. 2.]

Bechai Singh v. *Shami Nath*, 10 Ind. Cas. 454, followed.

In such a case the intention of the plaintiff is immaterial, the real question is whether he has actually complied with the decree. [p. 251, col. 1.]

Appeal from an order passed by Mr. Justice Broadway on the 28th June 1920.

Mr. *Durga Das*, for the Appellants.

Mr. *Obedulla*, for the Respondents.

JUDGMENT.—The facts of this case are as follows:—The plaintiffs were given a decree for pre emption on payment of Rs. 99 on or before the 30th April 1918. They were also allowed Rs. 19-10-0 as costs of the suit. They were admittedly entitled to deduct this sum from the sum of Rs. 99 and they had already paid in Rs. 15 as deposit; so that all that they had still to pay in was Rs. 64-6-0. On the 23rd April 1918 they paid in a sum of Rs. 83, which was really in excess of what they had to pay. This sum, coupled with the sum of Rs. 15 already paid in, made a total of Rs. 98. What probably happened was that the plaintiffs intended to pay up the full sum of Rs. 99 and to recover their costs later on, but by a mistake they only paid in Rs. 98 The learned Judge in Chambers notes that they subsequently sued out execution for the sum of Rs. 19 10-0 and holds that as they never intended to deduct from the pre-emption price the amount of costs, their payment does not comply with the terms of the decree. The learned Judge, therefore, holds that the plaintiffs have forfeited their decree. With this view

we are unable to agree. In our opinion it is immaterial what the plaintiffs intended to do, and the only real test is whether they have sufficiently complied with the decree. They certainly, in our opinion, intended to pay in the whole of the sum mentioned in the decree and to deduct their costs afterwards, so that they intended to comply fully with the terms of the decree. But mere intention to comply is not sufficient, nor can we regard their intention as any test. The real question is whether, as a matter of fact, they actually complied with the decree. As already pointed out, they were entitled to deduct their costs, and payment of a further sum of Rs. 64 6 0 would have been sufficient compliance with the decree. They paid more than they were actually required to do, and we consider that the terms of the decree were fully satisfied. There is a case reported as *Bechai Singh* v. *Shami Nath* (1) which is exactly on all fours with the present case. There the suit was decreed on payment of Rs. 324-12-0 and the plaintiff was also awarded Rs. 9-11-0 as costs. The plaintiff paid Rs. 324 within the time fixed. This sum was annas 12 short of the amount named in the decree, but it was held that the payment was sufficient, because the plaintiff was entitled to set off the balance of annas 12 against the costs payable to him. Here the sum paid in is Re. 1 less than the amount named in the decree, but we hold that the plaintiff is entitled to set off the balance of Re. 1 against the costs payable to him.

We accept this appeal and setting aside the judgment of the learned Judge in Chambers, we dismiss the appeal to this Court and restore the decision of the lower Appellate Court. The plaintiff will recover his costs in this Court both in the Letters Patent Appeal and in the appeal before the learned Judge in Chambers.

K. Z. K.

Appeal accepted.

(1) 10 Ind. Cas. 454.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 145 OF 1921.

December 6, 1921.

Present:—Mr Justice Piggott and Mr. Justice Walsh.

Sheikh MUHAMMAD YAKUB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BECHU AHIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 202—*Ejectment, suit for—Defendants holding as tenants "of a person in possession of the holding from the plaintiff"—Procedure.*

In a suit for ejectment by the plaintiff as the proprietor of the plots in dispute it was pleaded that the defendants were only the sub-tenants of a third person who was the ex-proprietary tenant of the plots and that the plaintiff was entitled to get rent from that third person and had no right to eject the defendants:

Held, that inasmuch as the defendants pleaded that they held the plot in suit as tenants of a person in possession of the holding from the plaintiff the provisions of section 202 of the Agra Tenancy Act applied to the case and the procedure there laid down ought to be followed. [p. 252, col. 1.]

Sarju Misir v. *Bindesri Pershad*, 20 Ind. Cas. 917; 11 A. L. J. 691, distinguished.

Appeal from an order of the District Judge, Ghazipur, dated the 5th May 1921.

Dr. *M. L. Agarwala*, for the Appellants.

Messrs. *Janaki Prasad* and *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—In this suit the plaintiffs came into Court as the proprietors of certain land and sought possession by ejectment of a number of defendants, together with damages for their wrongful possession. Certain defendants in paragraph 9 of their written statement raised a plea in the following terms:—"These defendants are only in possession of the plots mentioned below as sub-tenants of Brij Ballabh Rai and others, the principal ex-proprietary tenants. The plaintiffs have no right to bring the suit as against the defendants. The plaintiffs are only entitled to get rent from Brij Ballabh Rai and others, the principal tenants." The same facts were repeated in the paragraph which followed and there the plea was expressly taken that, under section 202 of the Tenancy Act (Local Act II of 1901), the Civil Court was bound to require these contesting defendants to institute within three months a suit in the Revenue

Court for the determination of the question raised by the pleading. The Court of first instance held that the provisions of section 202 aforesaid did not apply, because there had already been a litigation in the Revenue Court as between the plaintiffs and Brij Ballabh Rai and others, the alleged ex-proprietary tenants. It proceeded to try the question in issue and gave the plaintiffs a decree for possession and Rs. 100 as damages. In appeal the learned District Judge has held that the provisions of section 202 aforesaid apply to the case and should have been complied with by the Trial Court. He has set aside the decree of that Court and remanded the suit to be dealt with in the manner laid down by section 202. The appeal before us is against the order of remand. On the facts which have already been set forth, it seems clear beyond question that these contesting defendants did plead that they held a portion of the land in suit as tenants of a person in possession of the holding from the plaintiffs. On the face of it the provisions of section 202 of the Tenancy Act apply to this pleading and the procedure there laid down ought to have been followed. Our attention has been drawn to one or two decisions of this Court, principally to that of *Sarju Missir* v. *Bindesri Pershad* (1), as authority for the proposition that the Civil Court is not bound to take action under section 202 aforesaid when the Revenue Court has already passed a decision on the question of tenancy as between the parties to the suit. The facts in this reported case were peculiar. The plaintiff came into Court alleging and admitting the previous litigation in the Revenue Court, but seeking to get rid of the decision of that Court on a plea of fraud. It was certainly difficult to see under those circumstances what there was for the Civil Court to remit to the Revenue Court for a second decision. In the present case the lower Appellate Court has given reasons for holding that the former litigation in the Revenue Court, to which these particular defendants were not parties, may not necessarily operate as *res judicata* against them, and indeed may quite conceivably be reconsidered by the Revenue Court itself, upon a suit so conducted as to necessitate a full inquiry into the facts. It does not seem to us that we are very greatly concerned with these matters, except in so far as they distinguish the present case from that of *Sarju Missir* v. *Bindesri Pershad* (1). We think the learned District Judge was right and we dismiss this appeal with costs.

J. P.

Appeal dismissed.

(1) 20 Ind. Cas; 917; 11 A. L. J. 691.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 821 OF 1919.

July 28, 1921.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Harrison.

SEWA RAM —PLAINTIFF—APPELLANT

versus

UDEGIR—DEFENDANT—RESPONDENT.

*Custom—Religious endowment—*Dohli *tenure—Alienation—Suit to challenge alienation.*

The *dohli* tenure is a peculiar kind of tenure to be found in the south-eastern districts of the Punjab. It is a rent-free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine, or to a person for a religious purpose. In the Revenue Records the proprietary body are recorded as the owners of the property, and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose, for which the grant is made, is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office, the proprietors can eject him and put in some one else under a like tenure. [p. 253, col. 1.]

A tenure of this kind cannot be alienated by sale, or mortgage and any alienation of that character, if made by the *dohlidar*, is absolutely void and can be challenged by his successor. [p. 253, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Gurgaon at Hissar, dated the 10th January 1919, affirming that of the Senior Subordinate Judge, Gurgaon, dated the 9th July 1918.

Messrs. *Shamair Chand* and *Sagar Chand*, for the Appellant.

JUDGMENT.—On the 24th January 1902 the defendant's father, Mangal, who was the *dohlidar* of the land in dispute, mortgaged it to the plaintiff for Rs. 1,000. The mortgage was a usufructuary one, but

it appears that subsequently it was discovered that the *dohlidar* had no right to alienate the property by sale or mortgage and the mortgage was, therefore, replaced by a lease for 17 years in lieu of the same consideration for which the mortgage was effected. The lease was granted on the 17th August 1906, but the transaction remained inoperative for nearly 12 years. It was not until the 24th April 1918 that the lessee brought the present action for possession of the property, and the question for determination is whether the *dohlidar* was entitled to make this alienation.

The learned District Judge holds that the transaction, though nominally a lease, was in essence a usufructuary mortgage, and we see no valid ground for dissenting from that conclusion. It is to be observed that the terms of this so called lease are almost identical with those of the usufructuary mortgage which it superseded because the *dohlidar* had no right to mortgage the property, and there can be no doubt that the mere fact that the present transaction is called a lease does not preclude the Court from determining that in reality it is a mortgage.

The *dohli* tenure is a peculiar kind of tenure to be found in the south-eastern districts of the Punjab. It is a rent-free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine, or to a person for a religious purpose. In the Revenue Records the proprietary body are recorded as the owners of the property, and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose, for which the grant is made, is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office, the proprietors can eject him and put in some one else under a like tenure.

It is beyond dispute that tenure of this kind cannot be alienated by sale or mortgage, and there can be little doubt that any alienation of that character, if made by the *dohlidar*, would be absolutely void. This being the case, we are not prepared to accept the contention that the present *dohlidar*, who is the son of the alienor, is precluded by any rule of law from impeaching the alienation made by his father. As the transaction was altogether void, we consider that even the alienor could have successfully pleaded in answer to the plaintiff's suit that the latter could not enforce it in a Court of law. There is, therefore, no reason why the defendant should not be able to impeach the alienation, more especially when we remember that the office of a *dohlidar* is similar to that of a trustee, and that it is open to one trustee to impeach the validity of an alienation made by his predecessor.

For the foregoing reasons we are of opinion that the *dohlidar* had no right to make the alienation relied upon by the plaintiff, and that the defendant is not precluded from impeaching its validity. We accordingly affirm the decree of the lower Appellate Court and dismiss the appeal.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 79 OF 1921.

December 2, 1921.

Present:—Justice Sir P. C. Banerji, KT.

MUHAMMAD HASHIM—

DEFENDANT—APPLICANT

versus

MISRI—PLAINTIFF—OPPOSITE PARTY.

Contract Act (IX of 1872), ss. 56, 65—Lessee of garden deprived of possession—Garden acquired under Land Acquisition Act—Compensation, award of.

Where a lessee of a garden is deprived of the garden by reason of the acquisition of the garden by Government under the Land Acquisition Act, the performance of the contract entered into with him by the owner of the garden becomes impossible, and he is, therefore, entitled to be recompensed for the loss he has sustained. [p. 254, col. 1]

Dhuramsey Soondersdas v. *Ahmedbhai Hubibbhoy*, 23 B. 15; 12 Ind. Dec. (N. S.) 10, applied.

Civil revision from an order of the Judge of the Court of Small Causes, Cawnpore, dated the 9th May 1921.

Mr. *S. P. Ghosh*, for the Applicant.

Mr. *S. N. Mukerji*, for the Opposite Party.

ATTRA v. MANGAL SINGH.

JUDGMENT.—The applicant, Muhammad Hashim, owned a flower garden in the city of Cawnpore, which he let to the plaintiff for one year from March 1920 to the following March on a rent of Rs. 230. On the 15th of November 1920 the garden was acquired under the Land Acquisition Act for improvements in Cawnpore, and the plaintiff was deprived of possession. He brought the present suit in the Court of Small Causes to recover Rs. 65 which, he said, was the loss incurred by him by reason of being deprived of possession of the garden in November 1920. He also claimed Rs. 26 as costs of repairs made by him. The claim has been decreed. This application for revision has been filed by the defendant in respect of both the items mentioned above.

As regards the sum of Rs. 65 claimed by the plaintiff, it is not disputed that if the plaintiff is entitled to recover it the amount would be unreasonable or excessive. But what is urged is that under section 65 of the Contract Act, which the Court below has applied, the plaintiff is not entitled to recover compensation. I do not agree with this contention. Under section 65 if a contract has become void, any person who has derived benefit under the contract is liable to compensate the other party to the extent of the benefit so received. In view of the provisions of section 56 the contract having become impossible of performance must be held to have become void. Therefore, according to the provisions of section 65 the plaintiff would be entitled to compensation. The principle of the ruling of the Bombay High Court in *Dhuramsey Soonderdas* v. *Ahmedbhai Hubibbhoy* (1) applies to the present case. As by reason of the acquisition of the garden by Government under the Land Acquisition Act the plaintiff was deprived of the garden and the performance of the contract entered into with him by the defendant became impossible, he is entitled to be recompensed for the loss he has sustained.

As to the sum of Rs. 26, the Court below has believed the evidence of the plaintiff that he spent Rs. 26 in repairs to the garden under the authority of the defendant. The fact that the garden had been let to the plaintiff for Rs. 230 and Rs. 200 only was realised from him, raises an inference in favour of the truth of the plaintiff's allegation that he had to incur some expenses for the repairs of the garden. Apparently Rs. 30 was withheld because the repairs had to be done. Reliance is placed upon the fact that before the Land Acquisition Officer mention of the repairs had not been made in the deposition recorded. In that deposition the total amount of the rent was put down as Rs. 250, whereas as a matter of fact the garden had been let for Rs. 230 only. There was no question as to what repairs the plaintiff had made and, therefore, the omission of the repairs in that deposition did not detract from the credibility of the plaintiff, whose deposition was accepted by the Court below. This application is without force. I accordingly dismiss it with costs.

J. P. *Application dismissed.*

(1) 23 B. 15; 12 Ind. Dec. (N. s) 10.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 84 OF 1921.

July 28, 1921.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Harrison.

ATTRA—DEFENDANT—APPELLANT

versus

MANGAL SINGH—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908) s. 17 (1) (d)—Construction of lease—Monthly rent payable—Lease, registration of, whether necessary—Evidence, admissibility in.

Section 17 of the Registration Act, being a disabling section, must be strictly construed and unless a document is clearly brought within the purview of that section, its non-registration is no bar to its being admitted in evidence. If there is any doubt on the subject, the benefit of the doubt must be given to the person who wants the Court to receive the document in evidence. [p. 255, col. 1.]

Plaintiff let a hut to the defendant who was required to pay 8 annas per mensem by way of rent. In the event of a default in the payment of the rent the defendant was liable to be ejected:

Held, that the lease reserved a monthly rent and was not a lease from year to year or a lease for a period exceeding one year and did not require registration. [p. 255, col. 1.]

Letters Patent Appeal from a judgment of Mr. Justice LeRossignol, dated the 11th January 1921, in Second Appeal No. 1396 of 1919, reported as 60 Ind. Cas. 226.

Mr. *Sundar Das*, for the Appellant.

Mr. *Kunwar Narain*, for the Respondent.

JUDGMENT.—The sole question for determination in this appeal under the Letters Patent is whether the entry in the plaintiff's book is a lease for a period exceeding one year and should have been registered, as required by section 17 of the Indian Registration Act.

Now, the terms of the entry show that the plaintiff let a hut to the defendant who was required to pay 8 annas per mensem by way of rent. n the event of a default in the payment of the rent the tenant was liable to be ejected. There was also a provision that Rs. 6 was to be paid by him at the time of *nimani*. This entry was made in January 1906, and it is not clear why Rs. 6 were agreed to be paid at the time of *nimani*, which corresponds to June 1906, when only six months from the date of the lease would have expired. Be that as it may, it is quite clear that the lease reserved a monthly rent, and that it was not a lease from year to year. The only question is whether it can be regarded as a lease for a term exceeding one year.

Now, it is a well-established rule of construction that section 17 of the Registration Act, being a disabling section, must be strictly construed and that unless a document is clearly brought within the purview of that section, its non-registration is no bar to its being admitted in evidence. If there is any doubt on the subject, the benefit of the doubt must be given to the person who wants the Court to receive the document in evidence. Bearing this principle in mind, we have carefully scrutinised the terms of the document and are unable to hold that it is a lease for a period exceeding one year. The learned Counsel for the appellant invites our attention to the clause providing for the ejectment of the tenant in the event of his failure to pay the rent and contends that it is tantamount to a provision that if the tenant pays the rent regularly, he is entitled to occupy the hut as long as he likes. We consider that there is no foundation for this contention, and that it must be rejected. The clause relied upon by the learned Counsel merely provides that the landlord can eject the tenant without giving any notice to quit, if the latter fails to perform his obligation as to the payment of the rent. This clause as to the forfeiture of the lease cannot be construed as meaning that in the event of performing his obligation, the tenant can remain in possession of the property for an indefinite period.

We accordingly confirm the judgment of learned Judge in Chambers and dismiss the appeal with costs.

Z K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 119 OF 1920.

December 14, 1921.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Rai MAHADEO SAHAI—APPLICANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115 O. XXXIII, r. 2—Application to sue in forma pauperis—Cause of action not disclosed—Rejection, order of—Revision, maintainability of.

An application for leave to sue *in forma pauperis* should be rejected if it discloses no cause of action against the principal defendant [p. 256, col. 1.]

Per *Piggott, J.*:—*Quære*—Whether an application for revision lies against an order rejecting an application for leave to sue *in forma pauperis*. [p. 256, col. 1.]

Per *Walsh, J.*—An order rejecting an application for leave to sue *in forma pauperis* is not a "case decided" within the meaning of the decision of the recent Full Bench* Court and no application for revision lies against such a decision. [p. 256, col. 2.]

Civil revision from an order of the Subordinate Judge, Jaunpur, dated the 14th August 1920.

Mr. *Harnandan Prasad*, for the Applicant.

Mr. *W. Wallach* and Dr. *S. M. Sulaiman*, for the Opposite Parties.

JUDGMENT.

PIGGOT, J.—This is an application in revision against an order rejecting an application for leave to sue *in forma pauperis*. So

*See *Buddhoo Lal* v. *Mewa Ram*, 63 Ind. Cas. 15; 19 A. L. J. 558.—[*Ed.*]

far as I am concerned, I reserve the question whether an application in revision lies against such an order. Personally I think the question is distinguishable from that decided recently by a Full Bench* of this Court, in that no suit was ever instituted in the Court below, as the suit would only have commenced if the application had been accepted and the petition registered as a plaint. Moreover, the effect of the order brought before us in revision was to dispose, for the time being, of the entire matter pending in that Court. However, reserving this point, I am clearly of opinion that the application before us must fail. The Court below has written a long order, certain portions of which do, in my opinion, go beyond the jurisdiction of the Court at the particular stage then reached, as limited by rule 5 of Order XXXIII of the Civil Procedure Code. Nevertheless the order before us does, in my opinion, give adequate reasons, proceeding upon materials then properly before the Court, for rejecting this application. In substance the Court below has held that the petition accompanying the application discloses no cause of action against the first defendant, namely, the Secretary of State for India in Council. In so holding I think the Court below was clearly right and the finding has not been seriously contested in argument before us. All that the Court below has done, after coming to that conclusion, is to say that the application as it stands, supported by the statement of particulars (*vide* Order XXXIII rule 2 of the Civil Procedure Code) which actually accompanied it, should be rejected on the ground that it discloses no cause of action against the principal defendant. The question whether an application, supported by a somewhat different set of particulars and alleging a cause of action against some only of the other defendants, would or would not have been maintainable, and would or would not have been accepted by the Court below, is a matter which that Court was not called upon to decide and has not decided. This application was, in my opinion, rightly rejected for the reasons already given. I would, therefore, dismiss this application with costs, including fees on the higher scale.

WALSH, J.—I agree on the merits and I merely wish to add that in my view we could not have entertained this application on any ground, it not being a "case decided" within the meaning of the decision of the recent Full Bench, and that any previous decisions of this Court which have admitted revisions in the case of the rejection of an application to be allowed to sue *in forma pauperis* must be treated as having been overruled.

J. P. *Application rejected.*

*See *Buddhoo Lal* v. *Mewa Ram*, 63 Ind. Cas. 161; 9 A. L. J. 558.—[*Ed.*]

LAHORE HIGH COURT.

CIVIL APPEAL No. 718 OF 1921.

July 28, 1921.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Harrison.

RAMJI LAL AND OTHERS—DEFENDANTS APPELLANTS

versus

MANGAL SINGH AND ANOTHER—PLAINTIFFS — RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), ss. 144, 158 (2) (xix)—Jurisdiction of Civil and Revenue Courts—Appraisement—Power of Revenue Officer—Question of title.

Where a defendant objects to the jurisdiction of the Civil Court, it is for him to satisfy the Court that the claim made by the plaintiff is not within the cognisance of a Civil Court. [p 257, cols 1 & 2]

It was never contemplated by the Legislature that complicated questions of title should be determined by a referee or a Revenue Officer acting under section 144 of the Punjab Land Revenue Act. The function assigned to such officer under that section is one of a simple nature, namely, to determine the value of the produce which is admittedly joint or to divide it between the share-holders in accordance with their respective shares. Neither the language of the Statute nor the general principles of law lend any support to the contention that the Revenue Officer, and not the Civil Court, should determine whether the produce belongs exclusively to one party or whether it is the joint property of both the parties. [p. 57, col 2]

A suit, therefore, for the recovery of the price of certain produce alleged to have been delivered by the referee to the defendant, on the ground that it belonged exclusively to the plaintiff, is cognisable by a Civil Court. [p. 257, col. 2.]

Miscellaneous appeal from an order of the District Judge, Gurgaon and Hissar, dated the 15th December 1921, reversing that of the Senior Subordinate Judge, Gurgaon, dated the 12th July 1920.

SYAMA CHORAN v. NARATTAM BORMAN.

Dr. *G. C. Narang*, for the Appellants.

Mr. *B. P. Khosla*, for the Respondents.

JUDGMENT.—The facts of the case, which are relevant to the question of jurisdiction arising in this appeal, are briefly as follows:—

On the 8th April 1918 the defendants made an application to the Revenue Officer for a division or appraisement of the produce of a holding in which they were co-sharers with the plaintiffs. The Revenue Officer appointed a referee to divide and appraise the produce. It appears that on the 30th April an appraisement of the produce was duly made; and that before the produce could be divided the plaintiffs removed it and stored it in a house. Thereupon the referee made over a whole *khatti* of barley to the defendants in lieu of their share of the produce.

The plaintiffs, after making an unsuccessful attempt to get redress through the Revenue Authorities, have brought the present action for the recovery of the price of the barley, alleging that it belonged to them exclusively and that the referee had no right to deliver it to the defendants. The question for consideration is whether the suit is or is not cognizable by a Civil Court. Now, section 158, sub section (2), of the Punjab Land Revenue Act enumerates the various matters which are not cognizable by a Civil Court, and one of the matters mentioned therein is—

"Any claim to set aside or disturb a division or appraisement of produce confirmed or varied by a Revenue Officer under this Act."

Now, it is clear that the dispute between the parties relates to the ownership of the barley delivered by the referee to the defendants, and we consider that the question whether the barley is joint property or belongs exclusively to the plaintiffs is a question of title which cannot be determined by a Revenue Officer, who is required only to divide the produce which is admittedly joint or to determine its value. The learned Counsel on both sides express their inability to cite any judgment which has a direct bearing upon the question before us, but in view of the wording of section 144 of the Land Revenue Act, which empowers a Revenue Officer to divide or appraise the produce in which two or more persons are jointly interested, and of clause (xix) of section 158, which excludes from the jurisdiction of the Civil Courts any claim to set aside or disturb a division or appraisement of the produce made by a Revenue Officer under the Act, we are of opinion that the question of title to the produce is not one which a Revenue Officer is empowered to determine.

The onus is on the defendants to satisfy the Court that the claim made by the plaintiffs is not within the cognizance of a Civil Court, and having regard to the provisions of the law indicated above, we hold that they have failed to discharge that onus We consider that it was never contemplated by the Legislature that complicated questions of title should be determined by a referee or a Revenue Officer, and that the function assigned to him under the Act is one of a simple nature, namely, to determine the value of the produce which is admittely joint or to divide it between the share holders in accordance with their respective shares. The present claim is certainly not one of that character. Neither the language of the Statute nor the general principles of law lend any support to the contention that the Revenue Officer, and not the Civil Court, should determine whether the produce belongs exclusively to one party or whether it is the joint property of both the parties.

We accordingly concur in the conclusion reached by the learned District Judge and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 375 OF 1921.

August 12, 1921.

Present:—Mr. Justice Pearson.

SYAMA CHORAN BORMAN—PLAINTIFF—PETITIONER

versus

NARATTAM BORMAN AND OTHERS—DEFENDANTS—OPPOSITE PARTIES

Limitation Act (IX of 1908), Sch I, Art. 75—Instalment bond—Default in payment of one instalment—Limitation.

SYAMA CHORAN v. NARATTAM BORMAN.

Plaintiff sued upon a bond under which payment was provided for in three annual instalments, and it was also provided that in case of default the creditor would have the option of suing for the entire amount. No instalment was paid. Plaintiff brought the present suit more than three years after the date of the first default but within three years from the date of the second default:

Held, that limitation began to run from the date of the first default in respect of the whole amount, and that, therefore, the whole suit was barred by limitation [p. 259, col. 1.]

Abinash Chandra Bose v. *Bama Bewa*, 4 Ind. Cas. 17; 13 C. W. N. 1010 and *Girindra Mohun Roy Chowdhury* v. *Bocha Das*, 1 Ind. Cas. 49; 36 C. 394; 9 C. L. J. 226; 13 C. W. N. 1004, followed.

Rup Narain Bhattacharya v. *Gopi Nath Mandol*, 11 C. W. N. 903 and *Chunder Komal Das* v. *Bisassurree Dassia*, 13 C. L. R. 243, referred to.

Rule against an order of the Court of the Sub-Judge, Rangpur, in Small Cause Suit No. 1090 of 1920.

FACTS appear from the judgment.

Babu *Girija Prosonna Sanyal*, for the Petitioner.—The plaintiff is the petitioner. The matter arises out of a suit for recovery of money lent on a bond. The bond provided for the payment of the money in three instalments of Rs. 31 in three years, 1323 to 25. It was further provided that on default the amount of the instalment in arrears should carry interest at the rate of one anna in the rupee per month and that I shall be able to sue for the entire amount lent with the stipulated interest on the amount in arrears. The default was made in the very first instalment. I thereupon brought the suit in 1920. The lower Court has dismissed my entire claim as being barred by limitation. I submit the suit is not barred by limitation. The lower Court was wrong in holding that the entire claim was barred. The sums which fell due in the second and third instalments should have been decreed. I am entitled to recover the instalments which have accrued due within three years from the date of suit. The suit was brought in Agrahayan 1327 B. S. It is open to a creditor to sue at once in case of default for the whole amount or to waive that benefit. Refers to *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1). I submit that case entirely covers the present case. I should get a decree on the basis of that decision.

(1) 11 C. W. N. 903.

Babu *Hemendra Chandra Sen*, for the Opposite Parties.—I submit that the entire claim is barred and that the view taken by the lower Court is right. Time began to run against the plaintiff from the date of the first instalment in default, *viz.*, 1st Agrahayan 1323 B. S. The suit was filed on the 2nd Agrahayan 1327 B. S. I submit the case, therefore, becomes clearly barred by limitation. The plaintiff's cause of action for the entire claim accrued due on the date of the first default and three years' rule of limitation began to run from that date. I submit the mere fact that the plaintiff did not institute suit on the date of the first default does not in law constitute waiver. I rely upon the decisions reported as *Abinash Chandra Bose* v. *Bama Bewa* (2), *Girindra Mohun Roy Chowdhury* v. *Bocha Das* (3), *Mon Mohun Roy* v. *Durga Churn* (4), *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (5) The decision in *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1), cited by the other side, has not been followed in the subsequent cases. That case has been considered in *Abinash Chandra Bose* v. *Bama Bewa* (2) and has been dissented from. The case of *Chunder Komal Das* v. *Bisassurree Dassia* (6), which was referred to in *Abinash Chandra Bose* v. *Bama Bewa* (2), was also dissented from in subsequent cases. Refers to *Mon Mohun Roy* v. *Durga Charn* (4), *Hurri Pershad Chowdhury* v. *Nasib Singh* (7), *Joynuddin Khan* v. *Jamiruddin Sarkar* (8). In the case in *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1), the previous decisions leading to opposite conclusions were not cited and the fact that the case of *Chunder Komal Das* v. *Bisassurree Dasia* (6) had been dissented from in subsequent cases was apparently not brought to the notice of the learned Judges deciding the case. There are a series of decisions in my favour. The case of *Rup Narain Bhattacharya* v. *Gopi Nath Mondal* (1) stands alone and has nowhere been

(2) 4 Ind. Cas. 17; 13 C. W. N. 1010.
(3) 1 Ind. Cas. 49; 36 C. 394; 9 C. L. J. 226; 13 C W. N. 1004.
(4) 15 C. 502; 7 Ind. Dec. (N. S.) 919.
(5) 31 C. 297.
(6) 13 C. L. R. 243.
(7) 21 C. 542; 10 Ind. Dec. (N. S.) 992.
(8) 37 Ind. Cas. 916; 21 C. W. N. 835.

followed. I would, therefore, submit that the decision of the lower Court was right and in accordance with law.

Babu *Girija Prosanna Sanyal*, in reply.—I submit the case involves a complicated question of law and is fit for a reference to the Full Bench.

JUDGMENT.—In this case the plaintiff sued upon a bond under which the payment was provided for in three instalments, namely, Rs. 31 in 1333, and two other instalments of the same amounts in 1324 and 1325, and it was also provided that in case of default the amount of the instalment in arrears should carry interest at the rate of one anna per rupee per mensem and that the creditor would have further the option of suing for the entire amount of the bond with the stipulated interest on the arrears.

The lower Court has dismissed the suit on the ground of limitation. It appears that the default was made in the first instalment and in so far as that is concerned, the claim is admittedly barred. The question arises as to the second and third instalments. I have been referred to a number of cases of this nature decided by this Court bearing on the point, and the learned Vakil has relied mainly on the case of *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1). That decision purports to be based upon other decisions of this Court, which outweigh what appears to have been the opinion of the learned Judges who heard that appeal, and the case itself has been referred to in other decisions of this Court, and in particular the case of *Abinash Chandra Bose* v. *Bama Bewa* (2) and the case of *Girindra Mohun Roy Chowdhury* v. *Bocha Das* (3). It is pointed out in the former of the last-mentioned cases that the decision in *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1) was arrived at without reference to many other cases decided by this Court leading to the opposite conclusion and that one of the cases relied upon by the learned Judges, namely the case of *Chunder Komal Das* v. *Bisassurree Dassia* (6), has been dissented from. In that state of affairs I think that in this case I ought to follow the cases mentioned in *Abinash Chandra Bose* v. *Bama Bewa* (2) and *Girindra Mohun Roy Chowdhury* v. *Bocha Das* (3), and in that view I uphold the decision arrived at by the lower Court and discharge this Rule with costs, the hearing fee being assessed at one gold *mohur*.

Z. K. *Rule discharged.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 408 OF 1902.

December 8, 1921.

Present:—Justice Sir P. C. Banerji, KT., Mr. Justice Piggott and Mr. Justice Walsh.

SHYAM LAL—DEFENDANT—APPELLANT

versus

Musammat LALLI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8—Leave to sue in representative character—Notice, necessity of—Court, duty of—Omission to issue notice—Irregularity—Remedy—Procedure.

The provisions of Order I, rule 8, of the Civil Procedure Code as to the issue of notice in a suit brought in a representative capacity are peremptory and a Court is bound to issue notice as required by the rule If it omits to issue notice, it commits an irregularity and a grave irregularity, and the proper course to follow for the Appellate Court in such a case is to send back the case to the Court of first instance, with directions to take up the case at the stage at which it ought to have issued notice and to issue notice and then proceed with the suit and re-try it. [p. 260, col. 2; p. 261, col. 1.]

Mukh Lal Singh v. *Jagdeo Tewari*, 35 C. 1021 followed,

Jawahra v. *Akbar Husain*, 7 A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. S.) 90 F. B.), *Gulba* v. *Basanta*, 5 Ind Cas. 647; 32 A. 284, 7 A. L. J. 238, *Dhunput Singh* v. *Paresh Nath Singh*, 21 C. 180 at p. 187; 10 Ind. Dec. (N. S.) 752, referred to.

No Court should overlook or omit to carry out what the law requires. [p. 261, col. 2.]

Per *Walsh, J.*—Permission in terms of rule 8 of Order I to a plaintiff to sue in a representative capacity is fundamental to representative procedure. A Court has no jurisdiction to ignore or to break its own rules or to grant the decree in the face of a breach of law. [p. 262, col. 1.]

Second appeal from a decree of the District Judge, Agra, dated the 26th of February 1919.

Mr. *Harnandan Prasada* for Mr. *Narain Prasad Asthana*, for the Appellant.

Mr. *Mangal Prasad Bhargawa*, for the Respondents.

JUDGMENT.

BANERJI, J.—In the City of Agra there is a Mohalla called Mohalla Poorabyan, in which there is a platform. To the west of that platform is the house of the defendant and between the house and the platform

there was a wall in which, according to the lower Appellate Court, there was a niche which was worshipped by some residents of the Mohalla. The present suit was instituted by two persons residing in that Mohalla, one of whom stated that her father, one Pooran, had made a dedication of the land on which the platform exists to a deity called Bhuinya and that the platform had been built on the land and had been used by all the residents of the Mohalla. The other plaintiff, who is a resident of the Mohalla, also made statements to the same effect. Their complaint is that the defendant has set up a door in his wall and has also opened out a portion of the wall which separated his house from the *chabutra* and has thereby opened a passage over the *chabutra*. They accordingly instituted the present suit for an injunction restraining the defendant from passing over the *chabutra*. They also claimed to have the wall alleged to have been pulled down by the defendant re built. The plaintiffs distinctly stated in their plaint that they instituted the suit under Order I, rule 8 of the Code of Civil Procedure, on behalf of all the residents of the Mohalla who are interested in the platform. With the plaint they filed an application asking for leave, under Order I, rule 8 of the Code of Civil Procedure, to bring the suit on behalf of all the residents of the Mohalla. The Court granted the leave asked for and made an order to the effect that an advertisement should be made giving notice of the suit apparently to all persons concerned. As a matter of fact no notice was issued and no advertisement was made as directed by the Court. The lower Appellate Court says that this omission was due to the negligence of the officials of the Court. In the Court of first instance, however, no question was raised by the defendant on the ground that no notice was issued. The defence was that the platform and the site of it belonged to the defendant as his own private property and that he was entitled to use it for passage into his own house. The first Court proceeded to try this point and finding for the plaintiffs, made a decree against the defendant. On appeal the question was raised whether the omission to issue a notice was fatal to the suit. That Court held against the defendant on the point, and on the merits agreed with the Court of first instance that the platform was used by the residents of the Mohalla as a shrine and was in fact a shrine to which the defendant had no title. On second appeal the question was again raised that inasmuch as notice was not actually issued as required by Order I, rule 8, the suit ought to have been dismissed. The case has been referred to a larger Bench by the learned Judge before whom the second appeal came on for hearing, and he apparently was of opinion that there was some conflict between the ruling of the Full Bench of this Court in *Jawahra* v. *Akbar Husain* (1) and *Gulba* v. *Basanta* (2). These two cases have also been referred to in the argument before us and, in my opinion, the question we have to decide in this appeal was not considered and decided in those two cases. In the Full Bench case the real point which was decided was whether the plaintiffs could maintain the suit, and it was held that they were competent to do so in their own individual right and the question of their representative capacity was not determined. The same was the case with the other ruling mentioned above. In that case also it was held that Order I, rule 8, which corresponds to section 30 of the former Code of Civil Procedure, did not apply to that case and that the plaintiffs were entitled to maintain this suit in their own right. There is, therefore, no conflict, in my opinion, between the two rulings to which I have referred. The real point to be considered is whether the omission of the Court to issue notice as required by Order I, rule 8, vitiates the whole suit and entails a dismissal of it. In my opinion the result of the omission to issue notice is not the dismissal of the suit. It is an irregularity committed by the Court which omitted to issue the notice. Order I, rule 8, requires that when a plaintiff brings a suit in his representative capacity, he must first obtain the leave of the Court to bring such a suit and when the leave is granted, the Court shall issue notice that the suit has been instituted. The provisions of the section as to the issue of notice are undoubtedly peremptory and the

(1) 7 A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. S.) 390 (F. B.).

(2) 32 A. 284; 5 Ind. Cas. 547; 7 A. L. J. 233.

Court was, therefore, bound to issue notice as required by the rule. If the Court omitted to issue notice, it committed an irregularity and a grave irregularity, which might be remedied by the Appellate Court sending back the case to the Court of first instance to comply with the requirements of the law. A number of rulings have been cited to us, but the only one which seems to me to approach the case most nearly is the decision of the Calcutta High Court in *Muth Lal Singh* v. *Jagdeo Tewari* (3). In that case the Appellate Court had dismissed the suit on the ground that notice had not been issued by the Court of first instance, as required by the section which governed the case. It was held that the suit ought not to have been dismissed, but the Court, remanded the case in order that the irregularity committed by the Court of first instance might be remedied by the issue of notice. It seems to me that this is the proper view to take of the matter now before us and as the Court of first instance omitted to issue notice, the right course would be to send back the case to the Court of first instance, with directions to take up the case at the stage at which it ought to have issued notice and to issue notice and then proceed with the suit and re-try it. I think this is what should be done in all cases in which an omission of this kind occurs. I had, however, considerable hesitation in sending back the case to the Court of first instance, inasmuch as it seems to me that this irregularity did not affect the case on the merits. It was not the defendant's contention that he had the permission of the other residents of the Mohalla to open a door; on the contrary, he was repudiating the rights of the residents of the Mohalla, who alleged that the platform in question was a shrine which was held by all of them for general worship. The defendant claimed to be the owner of the land and, therefore, the omission of the notice did not, in my opinion, prejudice him on the merits. I am also of opinion that no question of jurisdiction was involved in the case. The learned Munsif was competent to hear the suit, but he only committed an irregularity in the exercise of his jurisdiction. However, as my learned colleagues are of opinion that the case should go back to the Court of first instance in order that the provisions of law should be complied with and that no Court should overlook or omit to carry out what the law requires, I am prepared to agree to an order remanding the case to the Court of first instance for the purpose mentioned above.

PIGGOTT, J.—I concur generally in what has just been said. I felt impressed by the arguments based on the wording of section 99 of the Code of Civil Procedure, and undoubtedly one would hesitate about having a re-trial of a suit of this sort in view of the pleadings and of the case set up by the defendant in the Trial Court, if it were possible to do so. My real difficulty in this case is that I think that in a sense a question of jurisdiction is involved: that is to say, if the plaintiffs are to be allowed to sue in a representative capacity and if there is a decree in their favour at all on this claim, it must be a decree granted to them in a representative capacity. The Court below gave them the required permission, but neglected to comply with the mandatory provisions of the law as to the procedure to be followed in order to make such permission effective. I am much impressed by the view taken by the learned Judges in *Dhunput Singh* v. *Puresh Nath Singh* (4), where they suggest that any permission granted prior to the issue of notice required by what is now Order I, rule 8 of the Civil Procedure Code, is subject to the result of the issue of such notice. In effect I am inclined to doubt whether in the absence of such notice, the plaintiffs could hold anything more than a conditional permission to sue in a representative capacity, granted subject to necessary conditions which were never fulfilled. If so, it becomes doubtful whether the decree in their favour, as it stands, is really a decree granted to them according to the terms of their claim, that is to say, in a representative capacity. I feel clear in my own mind that, if I had been sitting in place of the learned District Judge of Agra as a Court of first appeal, I would have declined to bring this particular case within

(3) 35 C. 1021.

(4) 21 C. 180 at p. 187; 10 Ind. Dec. (N. S.) 752.

the scope of section 99 of the Civil Procedure Code and would have sent it back to the learned Munsif, with a direction to obey the clear provisions of the law. I prefer to do as a Court of second appeal what I think the lower Appellate Court should have done and for this reason, I think, the order which ought to be passed is as suggested at the close of the judgment of Mr. Justice Banerji.

WALSH, J.—I agree with the order proposed. My opinion is that negligence to comply with the provisions of Order I, rule 8, is fatal to the granting of a decree to a plaintiff as representing the inhabitants of a Mohalla, such as the plaintiffs seek and have obtained. With regard to the suggestion that this point does not affect the merits of this particular case or the jurisdiction of the Court under section 99 of the Civil Procedure Code, my view is that it does both. Permission in terms of the rule is fundamental to representative procedure. The Court has no jurisdiction to ignore or to break its own rules or to grant the decree in the face of a breach of law. No doubt in this case it was an oversight by the Court. That makes no difference. We do not know whether the plaintiffs' claim to represent the whole class is well-founded in fact, and the Court on hearing objections might refuse the permission sought to sue in a representative capacity. I am quite satisfied that the dismissal of this suit would have bound all the class whom the plaintiffs claim to represent. If the suit is either decreed or dismissed without notice to the class which is supposed to be represented, their mouth is closed. They might, no doubt, seek by application to set the decree aside. In my opinion we ought not to pass a decree which, we also think, ought to be set aside if it was objected to. The objection should precede and not follow the decree. I agree with Mr. Justice Banerji that there is no conflict between 32 Allahabad (2) and 7 Allahabad (1), but there is direct conflict between the head-notes. I am now satisfied that the head-note in 32 Allahabad (2) is wrong and misrepresents the decision. It says that the Court decided that where numerous persons are similarly interested in the subject matter of the suit a suit brought by one or more of the persons for the protection of the rights of all is not bad merely because the plaintiffs have not obtained permission. The insertion of the word 'all' in that head-note alters the entire decision. The word is not to be found in the judgment, and it is clear on examination that the Court was dealing with a suit by some members suing in their own right and not on behalf of all the members of the community. The case was relied in argument before me as binding upon me and I was misled by the head-note into thinking that the case conflicts with the principles laid down in 7 Allahabad (1). I merely mention this fact because the expression is repeated twice in the Calcutta decision (3). To say that Order 1, rule 8, is not peremptory is likely to create misunderstanding by persons who do not understand what is really meant by the decision. If there were no provision upon the subject in the new Code, the old Code, which compelled everybody who was interested in the subject-matter of the suit either to join as plaintiff or as defendant, would presumably be followed. It is the duty of the plaintiff who makes an application, unless he can come within such express provision to enable him to sue in his representative capacity, to join all persons as parties in his suit. Order I, rule 8, enables him with the permission of the Court to dispense with that which would otherwise be necessarily binding upon him, namely the joinder of other members and to confine the claim to himself. I agree that the case ought to go back to the Court of first instance.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decrees of the Courts below are set aside and the case is remanded to the Court of first instance through the lower Appellate Court, with directions to restore it to its original number in the register and to try it after issue of notice as required by Order I, rule 8 of the Code of Civil Procedure. The costs of this appeal will follow the event.

J. P.

Appeal allowed;
Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1550 OF 1919.

May 10, 1921.

Present :—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Richardson.

SHIB NARAIN PAL—PLAINTIFF—APPELLANT

versus

RAM BILASH MARWARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract—Sale of goods—Property in ascertained goods, when passes to buyer—Failure to pay purchase price, whether entitles seller to put an end to contract—Contract Act (IX of 1872), s. 107, when applicable—Notice of intention to re-sell—Profit upon re-sale, when cannot be recovered by buyer—Contract, construction of.

A contract between the plaintiff and the defendants contained in a letter written by the former to the latter provided as follows :—"I take a settlement on purchase of all burnt steam and new coke in your Chaptaria Colliery at the rate of rupee one annas seven per ton at the mouth of the pit..... I shall pay off your dues at the said rate, on account of the despatch of each successive waggon. I shall be entitled to keep in arrear the dues in respect of one waggon, I shall not be entitled to keep in arrear the dues in respect of the second waggon, If the dues on account of two waggons fall in arrear, you will be entitled to deduct the price of the two waggons out of the sum of Rs. 201 (which I have this day paid you as advance.....) and further to forfeit the balance and shall be entitled to sell the coal, etc., remaining in stock on my account, I shall be responsible for any profit or loss arising thereby." The plaintiff removed about 9 waggons of coke, but did not pay its price in accordance with the terms of the contract. The defendants thereupon deducted the price of the 9 waggons of coke from the advance of Rs. 201, re-sold the remainder of the coke to third persons and put an end to the contract. In a suit by the plaintiff for damages for breach of contract.

Held, (1) that under the contract, the subject-matter of the contract being ascertained goods, the property in the coke passed to the plaintiff and that after the purchase the coke in stock was the plaintiff's and that when he failed to pay the purchase price of the contents of the 9 waggons in accordance with the contract, that in itself, apart from the other provisions of the contract, was not sufficient to entitle the defendants to put an end to the contract, but that the plaintiff's failure to pay for the coke taken by him would give the defendants a right to put in force the other provisions of the contract, namely, to forfeit the balance of the deposit and to sell the remainder of the coke in stock on account of the plaintiff; [p. 265, col. 2.]

(2) that although the defendants could not rely upon section 107 of the Contract Act, because the provisions of that section could only be made applicable when notice had been given by the seller to the buyer of his intention to re-sell after the lapse of a reasonable time, yet having regard to the terms of the contract itself, the plaintiff was not to have the profit upon the re-sale and in the circumstances which had happened, it must go into the pocket of the defendants and could not be recovered by the plaintiff. [p. 266, cols. 1 & 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Burdwan, dated the 22nd April 1919, affirming that of the Munsif, Additional Court at Asansole, dated the 23rd April 1918.

FACTS appear from the judgment.

Babu *Bepin Behari Ghosh* (with him Babu *Gopendra Chunder Das*), for the Appellant.—The Court below dismissed my suit for damages on the ground that the suit is barred by limitation under the provisions of Article 115 of the Limitation Act and further on the ground that the plaintiff having broken the terms of the contract, he was not entitled to any damages. In this case the plaintiff gave a notice to the defendants on the 13th of August 1914 to the effect that the defendants had unlawfully prevented the plaintiff from taking any more coal, and in reply thereto the defendants on the 14th day of September 1914 wrote that the coal belonged to them and not to the plaintiff. Thus it is clear that on and from the 4th day of September 1914, the detention of the coal by the defendants becomes unlawful and my cause of action accrues from that date. The case would have been otherwise if the defendants had stated in their said letter of the 14th September that they were entitled to the detention of the coal as vendors and having their lien on it. The letter runs thus "..... my client refuses to give you any more coal....." This amounts to an appropriation of any goods by the defendants, and limitation runs from the date when the detention becomes unlawful. Hence Article 49 of the Limitation Act applies and the suit is not barred.

[RICHARDSON, J.—This Article applies to an action of detinue.

[SANDERSON, C. J.—My learned brother says where there is no contract and there is a wrongful detention.]

So long as there was no denial of my right to the property, I could not say that the detention was wrongful. It is not a case of a breach of contract because the defendants

had nothing to perform after the sale. They have performed their part of the contract. Refers to Article 120 of the Limitation Act. In any case the suit is not barred.

Here the property in the goods sold passed to my client, and the learned Subordinate Judge erred in law in holding that the defendants were not bound to fulfil their part of the contract. I submit that there is no part left for the defendants to perform.

Assuming that they had their part to perform, they were not entitled to repudiate the contract on the ground of default of payment. I would refer to your Lordships the opinion of Lord Buckmaster on this point in a case reported as *Rash Behary Shaha* v. *Nrittya Gopal Nundy* (1). On the basis of the contract the title passes to me. It may be conceded that the defendants had right of detention, but when they denied my title to the property, my cause of action accrued.

Now as the goods passed to me, there was nothing on the part of the defendants to be performed with reference to the contract. The remedy provided in the contract was that they would sell the property "on my account" and credit me for the profit and debit me for the loss.

(Refers to section 107 of the Contract Act.)

[RICHARDSON, J.—That section gives a power of re-sale where there is no contract. In this case there is a contract. Again to have the benefit of section 107 the defendant must give notice to the plaintiff (the buyer) of his intention to re-sell the goods after the lapse of a reasonable time to be given to the buyer for the payment of purchase-money.]

Moreover, this is an action of trover, if I may say so, not an action of detinue as suggested by your lordship. There is a conversion of my goods.

Babu *Mohendra Nath Roy* (with him Babus *Manmotho Nath Roy* and *Sisir Kumar Ganguly*), for the Respondents. The suit is one for damages for breach of contract. Paragraphs 6, 7, 8 and 9 of the plaint clearly show that. My learned friend now wants to convert his suit for damages into one for accounts.

[SANDERSON, C. J.—This suit is framed in inartistic language. There is an allegation in the plaint that there were 2,000 tons of plaintiff's coal. It is not an allegation of conversion, whether this suit is based on contract or on tort?]

The contract, when construed, shows that the rights and liabilities of the parties do not stand higher than those contemplated in section 107 of the Contract Act. The proper construction of the passage "I shall be responsible for profit and loss, etc.," is that the buyer shall remain responsible for any profit or loss to the seller. The buyer shall see that the seller is not put to any loss. It does not contemplate a case of re-sale, where if the re-sale results in profit, the profit is to go to the buyer.

[SANDERSON, C. J.—Your clients, if they wanted to act under section 107, Contract Act, ought to have given a notice to the plaintiff and reasonable time, or if they wanted to act under the contract, they could re-sell even without notice, but your clients did not do either.]

My clients re-sold the goods. The contract (Exhibit A), properly interpreted, would entitle my clients to refuse to deliver the coal to the plaintiff on his failure to pay the price under the terms of the contract, and to re-sell them and to make the plaintiff liable for any loss sustained by the defendants in case of such re-sale, but the said contract in no way entitles the plaintiff to take any profit if it turns out that the defendants get profit from such re-sale.

Babu *Bepin Behari Ghosh*, in reply.—The defendants did not act under the provision of section 107, Contract Act. In English law the seller acts as agent of the buyer and sells as such agent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of the learned Subordinate Judge of Burdwan, who decided in favour of the defendants that the plaintiff was not entitled to any damages in the suit which was instituted. In this matter the learned Judge held, first, that the suit was barred by limitation: and, secondly, he held that inasmuch as the plaintiff had broken the terms of the contract, the defendants were not bound to fulfil their part of the contract.

The matter arose out of a contract of which the learned Vakil, appearing for the appellant, has given us a translation, the accuracy of which is not disputed. It provides as follows: (this was a letter to the defendants) "I take a settlement on

(1) 33 C. 477 at p. 485; 3 C. L. J. 249.

purchase of all burnt steam and new coke in your Chaptaria Colliery at the rate of rupee one annas seven per ton at the mouth of the pit. I shall pay for loading and carting. I shall pay for winnowing the burnt coke and for burning new coke. You (*i. e.*, the defendants) will keep and pay a man for supervising the things in the pit. I shall pay my men for doing my work. I shall superintend so that no coal is destroyed or stolen at the mouth of the pit or on the roads or in the depôt. I shall be entitled to use all waggons that may be supplied by the Railway Company on your siding for the purpose of sending my coal. I shall report to you as waggons are despatched." Then come the important passages: "I shall pay off your dues at the said rate of Re. 1 annas seven only per ton, on account of the despatch of each successive waggon. I shall be entitled to keep in arrear the dues in respect of one waggon. I shall not be entitled to keep in arrear the dues in respect of the second waggon. I shall immediately pay you up. If the dues on account of two waggons fall in arrear you will be entitled to deduct the price of the two waggons out of the sum of Rs. 201 (which I have this day paid to you as advance and the receipt of which you have given this day to me, the said Sri Sibanarayan Pal) and further to forfeit the balance and shall be entitled to sell the coal, &c., remaining in stock on my account. I shall be responsible for any profit or loss arising thereby."

The facts which are necessary for me to mention for the purpose of my judgment are as follows: It appears that the plaintiff removed about 9 waggon loads of this coke; he paid Rs. 20 only which, we are informed, would not cover the price of more than one waggon; even if it covered the price of the contents of one waggon, it is not disputed that the plaintiff did not pay the price of the coke which he removed in accordance with the terms of the contract. That breach of the contract on the part of the plaintiff entitled the defendants to deduct the price of the contents of the 9 waggons from the deposit of Rs. 201, which in fact the defendants alleged that they did; and Mr. Roy who appeared before us for the respondents asserted that the price of the coke in the 9 waggons would amount to a sum which would nearly absorb the whole of the deposit; at all events, the balance of the deposit after deducting the price of the 9 waggon loads was a small amount. In consequence of the plaintiff's breach the defendants would, in my judgment, be entitled to sell the remainder of the coke in stock. I agree with the argument of the learned Vakil for the appellant, that under this contract, the subject-matter of the contract being ascertained goods, the property in the coke passed to the plaintiff and that after the purchase the coke in stock was the plaintiff's coal and that when he failed to pay the purchase price of the contents of 9 waggons in accordance with the contract, that in itself, apart from the other provisions of the contract, was not sufficient to entitle the defendants to put an end to the contract. The plaintiff's failure to pay for the coke taken by him would, in my judgment, give the defendants a right to put in force the other provisions of the contract. The other provisions of the contract were, first, to forfeit the balance of the deposit and to sell the remainder of the coke in stock on account of the plaintiff. The defendants did sell some of the coke, as they allege, amounting to about 9 waggon loads and the remainder, the defendants allege, was stolen by thieves: Whether those facts were true or not, I express no opinion, because there is no finding upon that point, and we are not in a position to express any opinion upon it, but for the purpose of my judgment it is not material to go into that part of the case. The question is what would be the result under the terms of the contract, if and when the defendants re sold the remainder of the coke in stock. In my judgment that depends upon two sentences: (1) "You (*i.e.*, the defendants) shall be entitled to sell the coal remaining in stock on my account;" and (2) "I (*i.e.*, the plaintiff) shall be responsible for any profit or loss arising thereby." The learned Vakil for the appellant, on the one hand, has argued that that means that the remainder of the stock should be sold on account of the plaintiff, by the defendants as agents for the plaintiff, and that the profit and loss arising upon such re-sale should be the plaintiff's, that is to say, if there were any loss the plaintiff should be liable for it; on the other hand, if there were any profit the plaintiff should be credited with the profit. On the other hand, the learned Vakil for the respondents has

argued that the words "I shall be responsible for any profit or loss arising thereby" really mean very much what is provided by section 107 of the Contract Act, namely that on the re sale the loss, if any, should be borne by the plaintiff; and that if there were any profit, it would go into the pocket of the sellers, *viz.*, the defendants.

I ought to have said that it is clear that the defendants cannot rely upon section 107 of the Contract Act, because the provisions of that section can only be made applicable when notice has been given by the seller to the buyer of his intention to re-sell after the lapse of a reasonable time. No such notice was given in this case, and, therefore, the defendants are relegated to the rights which they have under the contract.

In my judgment it is impossible to say, having regard to the terms of this contract, that the plaintiff is to have the profit upon re-sale. I think the words "I shall be responsible for any profit and loss arising thereby" are so inconsistent with the plaintiff being credited with the profit upon the re-sale that they counterbalance any argument which may be adduced in favour of the plaintiff by reason of the words "on my account." I agree, if I may say so, with the learned Vakil for the appellant that the words "on my account" tend in the plaintiff's favour; but we have to construe the contract as a whole, we have to give the best meaning we can to the different phrases in this contract, and I think it is possible to give a meaning to the words "on my account" in this sense, *viz.*, that it was intended that the defendants, in the circumstances that happened, should re sell the remainder of the stock "on account of the plaintiff" and that the defendants would be able to give a good title to the purchaser as if the plaintiff was himself selling it. The production of this document to a prospective purchaser from the defendants would satisfy him that the defendants had authority to sell the remainder of the stock and to give a good title to the stock on behalf of plaintiff. Then, with regard to the words "I shall be responsible for any profit or loss arising thereby," I am unable to say that these words mean that the plaintiff is to get credit for any profit which would arise from the re sale. The learned Vakil wanted to interpolate words there and read the sentences as follows: "I shall be entitled to any profit and responsible for any loss arising thereby." That is a construction which, I think, would be making a new contract for the parties instead of interpreting the contract which the parties made. If the above construction be the true construction of the contract, then it is unnecessary for us to enquire whether upon the re-sale the defendants made any profit, because it would go into the defendants' pocket, nor is it necessary for us to direct an enquiry as to how much stock was left in September 1914, or as to what was done with regard to the coke which was left, because, as I have pointed out, if there has been a resale any profit arising therefrom, in the circumstances which have happened, must go into the pocket of the defendants and cannot be recovered by the plaintiff.

Consequently, in my judgment, though I do not agree with the ground upon which the learned Subordinate Judge based his decision as regards this part of the case, in my opinion the conclusion, at which he arrived, was correct, *viz.*, that the plaintiff's suit must fail. That being my opinion, it is not necessary to consider which clause of the schedule to the Limitation Act should apply to this case.

For these reasons in my judgment the appeal should be dismissed with costs.

RICHARDSON, J.—I agree.

B N. *Appeal dismissed.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 104 OF 1920.

December 14, 1921.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

KALI DAYAL—PLAINTIFF—APPELLANT

versus

UMESH PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Evidence Act (I of 1872), s. 115—Res judicata and estoppel, difference between—Auction-purchaser in execution of money-decree, whether representative of judgment-debtor—"Person claiming through another," meaning of—Landlord and tenant, decision between, whether res judicata in suit between landlord and auction-purchaser of tenant's rights—Transferee, title of—Appellant, duty of—Translation of documents.

KALI DAYAL *v.* UMESH PRASAD.

There is a difference in the principle upon which the doctrines of *res judicata* and estoppel are based. *Res judicata* in this country is founded on the principle that there should be an end to litigation as to any issue between the parties when once that issue has been directly determined between them by a Court of competent jurisdiction, and it affects not only the original parties but all others afterwards claiming under them and litigating under the same title. It bars fresh litigation at the outset. Estoppel is a rule of evidence based on the principle that a man who by his acts or statements has induced another to believe a thing to be true, should not afterwards be heard to deny the truth of that thing to the prejudice of the other who acted upon the belief so induced. [p 268, col. 2.]

No man can transfer to another a better title than he himself possesses. [p 270, col. 2.]

An execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of *res judicata* [p. 271, col. 1.]

A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by Statute or common law he can have no better title than the person through or under whom he claims. [p. 271, cols. 1 & 2.]

Therefore a purchaser at an execution sale who purchases the right, title and interest of a tenant judgment-debtor is a person claiming under the latter and is bound by the rule of *res judicata* and cannot again in a suit between himself and the landlords re-open the matters already decided between his predecessor-in-title and the landlords. [p. 271, cols. 1 & 2.]

Lala Parbhu Lal v. *Mylne*, 14 C. 401; 7 Ind. Dec. (N. S.) 267 and *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji*, 1 Ind. Cas. 264; 10 C. L. J. 150, followed.

Imrit Kooer v. *Lala Debee Pershad Singh*, 18 W. R. 203 and *Anundoo Moyee Dossee* v. *Dhonendra Chunder Mookerjee*, 14 M. I. A. 101; 16 W. R. P. C. 19; 8 B. L. R. 122; 2 Suth. P. C. J. 457; 2 Sar P. C. J. 698; 20 E. R. 724, distinguished.

In an appeal whose value does not exceed Rs. 50 it is the duty of the appellant under the rules to provide translations of documents upon which he wishes to rely and if he does not provide he cannot refer to them. [p. 270, col. 1.]

Letters Patent Appeal from a decision of Mr. Justice Das, setting aside a decree of the Officiating District Judge, Bhagalpore.

Mr. *S. N. Sahay*, for the Appellant.

Mr. *C. C. Das* for Mr. *S. N. Mullick*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal under the Letters Patent by the plaintiff from a decision of Das, J., setting aside the decree of the Officiating District Judge of Bhagalpore and restoring that of the Munsif dismissing the suit.

The suit was instituted in 1916 by the plaintiff, the auction purchaser at an execution sale of a holding measuring 35 acres 72 decimals, against the landlords claiming (I) to set aside a rent-decree obtained by the landlords against the previous tenant and (II) declaration that the rent of 11 annas per *bigha* is payable upon a measurement expressed in *bighas* according to the Kamarkhole system, *viz.*, 57 *bighas* 3 *cottas*, and not as claimed by the landlords according to the Kamarband system, which amounts to 70 *bighas* The previous tenants were also added as second party defendants, but are not directly interested in the litigation and have taken no part in this appeal. The present appeal is concerned only with the second part of the claim above mentioned, and the question for determination is whether the plaintiff's suit is barred by the doctrine of *res judicata*, the issue having been determined in a previous litigation between the plaintiff's predecessors-in-title and the landlords, who are the first party defendants in this suit.

The facts giving rise to the dispute are as follows:—In 1911 the landlords brought a suit (No. 496 of 1911) in the Court of the Munsif at Bhagalpore against the second party defendants, who may be referred to as the tenants, claiming (*i*) recovery of possession of the land in question, which they described as measuring 70 *bighas* according to the Kamarband system, or alternatively (*ii*) assessment of a fair rent. Shortly afterwards in 1912 the tenants sued the landlords in Title Suit No. 62 of 1912 in the same Court for a declaration that the same lands, measuring according to the Kumarkhole system 57 *bighas* 3 *cottas*, were their *lakheraj* lands. Those suits were tried together and decided by the same judgment. The tenants' suit failed and was dismissed. The landlords' suit also failed in so far as it sought for *khas* possession, but succeeded on the question of assessment of rent which was assessed at 11 annas per *bigha*. The judgment did not in terms decide the area in *bighas* upon which rent should be payable, but in the decree signed in pursuance of the judgment the rent was stated as Rs. 48 annas 2, being 11 annas on 70 *bighas*, the measurement claimed by the landlords.

In 1914 the landlords sued the tenants for rent in Rent Suit No. 111/31 of 1914, claiming at the rate of 11 annas on 70 *bighas* or

Rs. 48 2 0 altogether. In that suit an issue was raised as to the number of *bighas* upon which the rent was payable, the tenants alleging that the area properly assessable to rent was 57 *bighas* 3 *cottas* according to the Kamarkhole system and not 70 under the Kamarband system, with a total rental of Rs. 35-1-0 after deducting 6 *bighas* as not fit for cultivation.

That suit, including the said issue, was decided on the 13th May 1915 in favour of the landlords and against the tenants.

Subsequently on the 20th July 1915 the holding was brought to sale by the landlords in execution of their decree for costs in the litigation of 1911 and 1912 and was purchased by the plaintiff. The attachment process and the sale certificate in that sale indicated that there was a charge upon the holding for the amount of the rent decree obtained by the landlords in the Rent Suit No. 111 31 of 1914. The landlords then put in execution that rent-decree and again put the property up for sale. The plaintiff, after an objection by him under Order XXI, rule 58, of the Civil Procedure Code had been disallowed, deposited the decretal amount under the provisions of section 170 of the Bengal Tenancy Act, and shortly afterwards in 1916 instituted the present suit claiming, as already stated, to set aside the decree obtained by the landlords in the rent suit of 1914 on the ground of fraud, and asking for a declaration that the proper area of the holding was that arrived at according to the Kamarkhole measurement, *viz.*, 57 *bighas* and not 70 *bighas* as previously decided. The sale in execution of the rent decree was then stayed pending the hearing of the suit. In answer to the claim the landlords pleaded, *inter alia*, that it was barred by the doctrine of *res judicata* as well as by estoppel, and the 5th and 6th issues framed were stated in general terms thus :—

5. Is the suit barred by the doctrine of *res judicata* ?

6. Is the suit barred by the principle of estoppel ?

The learned Munsif considered that the doctrine of *res judicata* did not apply, but that the plaintiff, having purchased the property with full knowledge of the charge for rent, *viz.*, Rs. 48-2 0, decreed in the Rent Suit No. 111/31 of 1914, could not afterwards turn round and be permitted to question the validity of that decree and further that as the rent had also been settled in the Title Suit No. 496 of 1912, although this might not operate as *res judicata*, the plaintiff not having been a party to it, it was strong evidence against him and that in any case the principle of estoppel precluded him from raising the question of area and rental. In the event he dismissed the suit with costs.

It is manifest that the learned Munsif was labouring under some confusion as to the principles underlying the doctrine of estoppel and *res judicata*, as has been pointed out by the learned District Judge before whom the case went on appeal. The learned District Judge came to the conclusion that the Munsif was wrong in applying the doctrine of estoppel and that if there was any estoppel, it was an estoppel by judgment, which is the same thing as *res judicata*. With this part of his decision I entirely agree. The doctrine of *res judicata* is sometimes treated in text-books as a branch of the doctrine of estoppel and is referred to as estoppel by judgment. The doctrine of estoppel, properly so-called, is dealt with in section 115 of the Evidence Act. There is, however, a difference in the principle upon which the two doctrines are based. *Res judicata* in this country is founded on the principle that there should be an end to litigation as to any issue between the parties when once that issue has been directly determined between them by a Court of competent jurisdiction, and it affects not only the original parties but all others afterwards claiming under them and litigating under the same title. It bars fresh litigation at the outset. Estoppel is a rule of evidence based on the principle that a man who by his acts or statements has induced another to believe a thing to be true, should not afterwards be heard to deny the truth of that thing to the prejudice of the other who acted upon the belief so induced.

In the present case no facts are disclosed which would bring the doctrine of estoppel into operation, but if the plaintiff is bound by the judgments in the previous litigation, then the doctrine of *res judicata* applies. The learned District Judge considered that if the present suit had been between the landlords and the previous tenants, the latter would have been effectually met by

the plea of *res judicata*, and with this part of his decision I am again in agreement. He was of opinion, however, that a purchaser at an execution sale who purchased the right, title and interest of the judgment-debtor, was not a person claiming under the latter and was, therefore, not bound by the rule of *res judicata* and might again in a suit between himself and the landlords re-open the matters already decided between his predecessor-in-title and the landlords. He then found as a fact that the Kamarkhole system of measurement prevailed in the *mauzah* in which the land is stituated and that the area upon which rent was payable, expressed in *bighas*, was 57 *bighas* 3 *cottas* and not 70 *bighas*. He accordingly allowed the appeal to that extent, but dismissed that part of the claim which sought to set aside the rent-decree as he found it was not obtained by fraud, and with that we are no longer concerned. From this decision the landlords appealed to this Court, and contended that the claim was barred by the rule of *res judicata*. The learned Judge before whom the appeal came decided that the plaintiff, as auction-purchaser of the holding sold in execution of a money-decree, was bound by the result of the previous litigation between his predecessors-in-title and the landlords and that the plea of *res judicata* was a bar to the suit. He accordingly set aside the decree of the District Judge and restored that of the Munsif. From that decision the present appeal is brought by the plaintiff.

It was contended by the learned Counsel on his behalf, in the first place, that the auction-purchaser who buys in execution of a money-decree is not bound as between himself and the landlord by any previous litigation between the landlord and the tenants whose interest he has purchased, and secondly, that the only decision pleaded in the written statement as a bar was the judgment in Suits No. 496 of 1911 and No. 62 of 1912, which were tried together, and that the question of the proper measurement of the land was left undecided in that judgment notwithstanding the decree. It is convenient to dispose of the second point first. It is not disputed that a direct issue was raised upon the question of measurement in the rent suit of 1914, which was decided in the landlords' favour and against the tenants on the 13th May 1915 before the plaintiff acquired his interest, but it is said this judgment was not pleaded as a bar. We have not seen the pleadings in the suit, as they form on part of the record before us on appeal. But if the appellant wished to rely upon those documents, it was his duty under the rules to have provided translations of them for the Court, which he has not done. We are unable, therefore, to say how far his instructions are accurate when he says that the only decision pleaded as *res judicata* was that come to in the litigation of 1911 and 1912. It appears, however, from the judgments of both the Munsif and the District Judge in the present case, which are before us, that not only the judgment in those suits but also the judgment in the Rent Suit No. 111/31 of 1914, where the point was determined, were relied upon and dealt with as supporting the defendants' plea and the issue framed, was as already stated, in general terms and not confined to any particular judgment. It seems clear, therefore, whatever the exact form of the pleading may have been, that the judgment in the rent suit was relied upon without objection at the trial and on appeal before the District Judge, and when the matter came before Mr. Justice Das, it does not appear from his judgment that the point was ever taken that the judgment in the rent suit could not be relied upon. Had objection been taken to the evidence of the decision in the rent suit at any stage of the proceedings, a formal amendment of the written statement, if in fact it was defective, would doubtless have been allowed and even at this late stage I should be inclined in the circumstances mentioned to allow such an amendment, if I thought it necessary, as by so doing the nature of the suit would in no way be altered, nor would any further evidence be necessary to determine the real issue between the parties. I do not, however, consider such a course necessary. The High Court Rules in Chapter IX specify the papers which shall be printed in the paper-book in first appeals and in second appeals where the value exceeds Rs. 50. These include, *inter alia*, the plaint and written statement. In a

second appeal not exceeding Rs. 50 in value, which this is, the paper-book which is prepared by the Court free of charge to the parties does not contain the pleadings, but under rule 35 the appellant must, before the hearing of the appeal, serve on the respondent a copy or translation of any document upon the construction of which, he considers, the determination of the appeal depends and provide another copy or translation for the use of the Bench and if he fails to do so, he shall not without special leave of the Bench refer to such document at the hearing. The appellant throughout the case has raised no objection until now that the judgment in the rent suit should not be taken into consideration, and has allowed the plea raised in the written statement to be treated as if it were properly framed so as to admit of evidence of that judgment. If in fact it is defective, an amendment would cure the defect and in view of the attitude of the appellant, who even now has not provided a translation of the document he relies upon, I think leave to refer to it should be refused.

The other point raised by the appellant depends on whether the previous tenants whose interest the appellant purchased at the execution sale are parties under whom he claims within the meaning of section 11 of the Civil Procedure Code. The appellant relies upon a dictum of Lord Justice James in pronouncing the judgment of the Judicial Committee in *Anundoo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (1) decided in 1871. That appeal was determined on the facts in favour of the respondent, it being found that the mortgage relied on by the appellant as the foundation of his title was made after the attachment of the property in pursuance of a decree in execution of which the respondent purchased. It was, therefore, unnecessary to determine what the rights of the parties would have been if the attachment had been posterior to the mortgage. Their Lordships, however, expressed the opinion that, even in the latter case, the execution purchaser, who took without notice of the encumbrance, thinking he had an absolute title, and who held possession for twelve years as absolute owner, was not in the same position as the mortgagor or a person claiming under a voluntary alienation from him. On the assumption that no notice of the mortgage was proved, their Lordships thought that the possession of the purchaser was the possession of a person claiming to be owner and that he could plead the Limitation Regulations by which he could set up a title by adverse possession against the mortgagee. This dictum, however, does not decide that the execution purchaser in all cases acquires a better title than the previous owner. It seems to me it is merely an exception to the general rule and should not be extended so as to destroy the effect of the rule in all cases of a sale in execution of a decree. Other exceptions may arise by Statute, as in the case of sales in execution of a rent-decree under the Bengal Tenancy Act, or under the law merchant in England in the case of sales in market overt. But I apprehend that the general rule is that no man can transfer to another a better title than he himself possesses.

The next case relied on by the appellant was *Imrit Kooer* v. *Lalla Debee Pershad Singh* (2) decided in 1872, in which Sir Richard Couch, C. J., held that the execution purchaser, the defendant in the suit, was not bound by statements made by the judgment-debtor on a previous occasion as he was not in the position of a person who takes a conveyance direct from the parties. It is not quite clear from the judgment how far the learned Chief Justice meant to rule that the doctrine of estoppel would not apply in such a case. There is nothing in the report to shew that the statement made by the defendant's predecessor was one which the plaintiffs had acted upon so as to place themselves in any worse position. Nine years later in 1881, *Direndronath Sannial* v. *Ramkumar Ghose* (3) was decided by the Judicial Committee and it was held that the purchaser in execution, "notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment debtor, and

(1) 14 M. I. A. 101; 16 W. R. P. C. 19; 8 B. L. R. 122; 2 Suth. P. C. J. 457; 2 Sar. P. C. J. 698; 20 E. R. 724.

(2) 18 W. R. 200.

(3) 7 C. 107; 4 Shome L. R. 236; 8 I. A. 65; 10 C. L. R. 281; 4 Sar. P. C. J. 213; 5 Ind. Jur. 376, 3 Ind. Dec. (N. S.) 619.

free from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution." It will be observed that the alienations and incumbrances which do not bind the purchaser are expressly limited to those arising after attachment. From the date of attachment the judgment-debtor's powers of disposal are of no effect as against the purchaser, who by operation of law takes adversely to the judgment debtor at least from the date of attachment. The execution purchaser is, therefore, in a better position than the purchaser by private treaty, but only to the extent to which the law operates in his favour from the date of the attachment. These decisions have been taken in some later cases as authority for the proposition that the execution purchaser was not the representative of the judgment-debtor so as to bring him within the rule of estoppel [See *Lala Parbhu Lal* v. *Mylne* (4)]. This view, however, can in my opinion, no longer be supported in face of the judgment of the Judicial Committee delivered by Sir Richard Couch in *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (5) in which it was laid down that where the principle of estoppel applied as against the judgment-debtor, the execution purchasers were in the same position and were equally bound by it as they purchased only his right, title and interest. More recently in 1909 the Calcutta High Court held in *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji* (6) that the purchaser at the execution sale is bound by the same rule of estoppel as the judgment-debtor, on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of greater advantage and that the contrary view is not supported by authorities nor defensible on principle. If then the execution purchaser as the representative of the judgment-debtor is bound by the doctrine of estoppel in cases where the latter would have been bound, what is his position with regard to the application of the doctrine of *res judicata* in similar circumstances? No argument has been adduced why we should differentiate the two cases. The representative of the judgment-debtor in the one case seems to me to be on the same footing as the person claiming under him in the other. A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by Statute or common law, he can have no better title than the person through or under whom he claims. In my opinion section 11 of the Civil Procedure Code applies to the facts of this case so as to bar the appellant's suit, and this appeal should be dismissed with costs.

COUTTS, J.—I agree.

P. D. *Appeal dismissed.*

(4) 14 C. 401; 7 Ind. Dec. (N. S.) 267.
(5) 22 C. 909; 22 I. A. 129; 5 M. L. J. 101; 6 Sar. P. C. J. 583; 11 Ind. Dec. (N. S.) 602.
(6) 1 Ind. Cas. 264; 10 C. L. J. 150.

PRIVY COUNCIL.

APPEAL FROM CALCUTTA HIGH COURT.

May 9, 1921.

Present :—Mr. Viscount Haldane, Lord Atkinson and Sir Jhon Edge.

CHANDRA KANTA DAS (SINCE DECEASED)—APPELLANT

versus

PARASULLAH MULLICK—RESPONDENT.

Contract Act (IX of 1872), s. 27—"Goodwill," sale of—Construction of documents.

Agreements were entered into between two rival owners of passenger ferry-boats. Under one of these, called the *kistibandi* bond, executed by the respondent in favour of the appellant, the former purported to buy from the latter the goodwill of his trade in plying the ferry-boats, and every description of interest and ownership which the appellant had acquired in several landing places for plying the boats, as well as the settlements, obtained for the collection of tolls, at a certain price payable by instalments, with interest, and on default in payment of any instalment the entirety was to become due at once. An agreement or *kobala* was executed about the same date, by which the appellant in consideration of the said amount sold his rights in the landing places and settlements and in the goodwill of the business of plying the ferry-boats, and the appellant undertook to close the business of plying the particular ferry-boats and agreed that if he ever carried on the business he would return the whole amount of the consideration. On default of payment of instalments the appellant sued the respondent. It was alleged *inter alia* on the other side that the agreements were in restraint of trade and void:

Held, on construction of the agreements, that the transaction amounted to a sale of the goodwill and was valid. [p. 273, col. 1.]

CHANDRA KANTA DAS v. PARASULLAH MULLICK.

Churton v. *Douglas*, (1859) 1 Johns. 174; 28 L. J. Ch. 841; 5 Jur. (N. s.) 887; 7 W. R. 365; 70 E. R. 385; 123 R. R. R. 56, *Trego* v. *Hunt*, (1896) A. C. 7; 65 L J. Ch. 1; 73 L. T. 514; 44 W. R. 225 and *Inland Revenue Commissioners* v. *Muller*, (1901) A. C. 217; 70 L. J. K. B 677; 84 L. T. 729; 49 W. R. 603; 17 T. L. R. 53, applied.

Appeal from a judgment and decree of the High Court, Calcutta, dated January 31, 1917, varying a decree of the Subordinate Judge, Khulna.

Messrs. *Sylvian Mayer*, *K. C.*, and *H. N. Sen*, for the Appellant.

JUDGMENT.

VISCOUNT HALDANE.—The question in this appeal arises in a suit by which it was sought to have decided that the plaintiff, who is the appellant, was entitled to recover a sum of Rs. 5,400, with interest amounting to Rs. 67-8, as due to him under certain agreements. The defence was a charge of fraud in obtaining the agreements, and as a separate defence, that the main agreement was invalid as being in restraint of trade. The learned Additional Subordinate Judge of Khulna in Bengal, who tried the case, decided it in favour of the appellant for the modified amount of Rs. 5,280, the difference being given on the footing that the respondent (being the defendant) was entitled to a small amount for compensation, on the ground of partial failure of consideration. As to this difference, no substantial controversy has been raised, and their Lordships do not think that any question is before them for decision in relation to it.

When the case went on appeal to the High Court at Fort William, the decree of the Subordinate Judge was reversed. Chatterjee, J., held that the parties were never *ad idem*, the respondent having been misled by the appellant, and further that there was no real goodwill to assign, such as was the basis of the agreement on the part of the appellant. But he thought that as the respondent had entered into possession on the footing of the agreement, although inoperative, he ought to make compensation to the appellant to the extent of Rs. 1,000. Walmsley, J., the other member of the Appellate Court, was of opinion that there was nothing fraudulent to render the agreement inoperative on that ground. But he held that it was void as contravening section 27 of the Indian Contract Act, which makes every agreement by which any one is restrained from exercising a lawful profession, trade or business, void. The Trial Judge had been of opinion that the case came within the exception to the section which provides that it is not to apply where there is a sale of the goodwill, but Walmsley, J., held otherwise, on the ground that there was no real goodwill.

The appeal comes before their Lordships *ex parte*, and they have scanned the case presented for the appellant with some closeness. But, particularly, having regard to the fact that the learned Judge who tried the suit found that there was nothing to establish fraud on the part of the appellant in obtaining the agreement, and that this opinion met with the concurrence of Walmsley, J., and also because of the character of the evidence itself, they are of opinion that the agreement was, apart from the point of law arising under the Indian Contract Act, a valid agreement.

All that it is necessary to observe is that there was a dispute between the appellant and the respondent. Each of them had passenger ferry-boats on a river. The respondent had entered on this business first. But he had not been prosperous, and the appellant gained an advantage over him by securing better landing places and negotiating facilities for collecting dues. In 1910 the parties, who had had controversies, entered into agreements for putting an end to them. Under one of these, called the *kistibandi* bond, executed by the respondent in favour of the appellant, the former purported to buy from the latter the goodwill of his trade in plying the ferry-boats, and every description of interest and ownership which the appellant had acquired in several river landing-places for plying the boats, as well as the settlements obtained for the collection of tolls. The price was to be Rs. 5,400, payable by instalments, with interest, and if default was made in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the respondent.

Default in payment was made, and the appellant has instituted the present suit. Much evidence was taken on the question of fraud, but for the reason already given

their Lordships do not think it necessary to enter on this question. It has been, in their opinion, satisfactorily disposed of in the Courts below. The question that remains is that raised as to the operation of section 27 of the Indian Contract Act. This section has, under the express exception which it contains, no application if there was here a genuine sale of the good-will of the business. It ought to be observed that, in addition to the transfer of good-will and other assets already referred to, there was an agreement or *kobala* executed about the same date by the appellant in favour of the respondent. Under this document the appellant contracted that, in consideration of the Rs. 5,400, he sold his rights in the landing-places and settlements and in the goodwill of the business of plying the ferry-boats, and that he ceased to have any rights thereto. The respondent was to be able to enjoy and possess these rights by exercising whatever right the appellant had in them, and the latter was not to be able to make any obstacle in the respondent's enjoyment of the same. The appellant further undertook to close the business of plying the particular ferry-boats, and that if he ever carried on the business again he would return the whole amount of the consideration.

Their Lordships are of opinion that this transaction amounted to sale of a real goodwill, and they are unable to agree with the views expressed in the judgment of the High Court. They entertain no doubt that what took place was a sale of the goodwill within the meaning put on the expression in such cases as *Churton* v. *Douglas* (1), *Trego* v. *Hunt* (2) and *Inland Revenue Commissioners* v. *Muller* (3) and as used in the same sense in section 27 of the Indian Contract Act. Accordingly they are of opinion that the decree of the Subordinate Judge must be restored, and that the appellant is entitled to his costs of this appeal and in the High Court.

(1) (1859) 1 Johns. 174; 28 L. J. Ch. 841; 5 Jur. (N. S.) 887; 7 W. R. 365; 70 E. R. 385; 123 R. R. 56.
(2) (1896) A. C. 7; 65 L. J. Ch. 1; 73 L. T. 514; 44 W. R. 225.
(3) (1901) A. C. 217; 70 L. J. K. B. 677; 84 L. T. 790; 49 W. R. 608; 17 T. L. R. 53.

They will humbly advise His Majesty accordingly.

J. P. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *G. & W. Webb.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1476 OF 1919.

February 15, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Newbould.

JAMIR HOWLADAR—PRINCIPAL DEFENDANT—APPELLANT

versus

ARABJAN BIBI AND ON HER DEATH SOME OF HER HEIRS AND LEGAL REPRESENTATIVES, ADELADDI HOWLADAR AND OTHERS—PLAINTIFFS AND PRATAP CHANDRA GHOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption, if and when can be effected before expiry of term stated in bond—Redemption and foreclosure, general principle as to—Transfer of Property Act (IV of 1882), ss. 60, 62.

The general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, the right to redeem and the right to foreclose are co-extensive and this principle is embodied in sections 60 and 62 of the Transfer of Property Act. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. The question in each case is whether upon the terms of the contract between the parties the intention was such as to give the mortgagor a right to redeem before the expiry of the latest date fixed for payment. [p. 275, cols. 1 & 2.]

Bakhtawar Begam v. *Husaini Khanam*, 23 Ind. Cas. 355; 18 C. W. N. 536; 16 M. L. J. 474; 12 A. L. J. 473; 36 A. 195; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.), *Vadju* v. *Vadju*, 5 B 22; 3 Ind. Dec. (N. S.) 16, *Purna Chandra Sarma* v. *Peary Mohan Pal*, 15 Ind. Cas 287; 17 C. W. N. 149; 39 C. 818 and *Rose Ammal* v. *Rajarathnam*, 23 M. 33; 8 Ind. Dec. (N. S.) 418, referred to.

Appeal against a decree of the Subordinate Judge, Faridpore, dated the 30th of April 1919, reversing that of the Additional Court at Madaripore, dated the 8th of September 1917.

FACTS appear from the judgment.

Babu *Troilokhya Nath Ghose*, for the Appellant, submitted that the suit was premature,

The right to redeem and the right to foreclose are so extensive. *Bakhtawar Begam* v. *Husaini Khanam* (1). On a proper construction of the mortgage deed, the plaintiff has no right to redeem before the expiry of the term. The expression 'within' has been the subject of judicial interpretation in similar cases, and it has been held that it does not import a right to redeem before the expiration of the term. *Vadu* v. *Vadju* (2), *Raghubar Dayal* v. *Budhu Lal* (3). See also *Husaini Khanam* v. *Husain Khan* (4), which is of similar import.

Babu *Brojolal Chuckerbutty* (with him Babu *Sushil Kumar Bose*), on behalf of the Respondents, submitted that the mortgage-deed provided for redemption before the expiry of the term. In *Purna Chandra Sarma* v. *Peary Mohan Pal* (5) the expression "within one year" was held to mean at any time before the expiry of the year. A similar construction was put in the case of *Rose Ammal* v. *Rajarathnam* (6) and in the case of *Chandu* v. *Koaja Poojari* (7). Provisions like those in the present case have generally been held to be in favour of the mortgagor.

JUDGMENT.—This appeal arises out of a suit for redemption of mortgage, and the question involved in the appeal is whether the suit was premature. The mortgage bond is dated 18th Joista 1319. The contention of the defendants is that the mortgage was for a term of eight years, from Asar 1319 to Joista 1327, and that that being so, the plaintiff (an assignee of the mortgagor) had no right to maintain the suit before the expiry of Joista 1327. The general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, the right to redeem and the right to foreclose are so extensive and this principle is embodied in sections 60 and 62 of the Transfer of Property Act. As pointed out by the Judicial Committee in the recent case of *Bakhtawar Begam* v. *Husaini Khanam* (1), "ordinarily in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor." The question, therefore, is whether in the present case, there is such a provision. In the first paragraph of the mortgage-bond it is stated that the properties are mortgaged by way of *kat* for a term of eight years, from Asar 1319 to Joista 1327. If there was nothing else to qualify the words, the mortgagor could not redeem before the expiry of the eight years any more than the mortgagee could foreclose before the expiry of that period. Later on, however, it provides: "If I re-pay your debt within the time stipulated above (*mead modhyai*) you shall give up the lands in my *khas* possession." We think that this gives the mortgagor a right to redeem before the expiry of eight years. Further on, the bond states: "I wish to re-pay your principal amount within the said month of Joista 1327 B. S. (*Joista modhya*). If I do not pay off the whole amount within the said time, this deed of conditional sale shall be regarded as deed of absolute sale on the expiry of the term, that is, from first day of Asar 1327."

It is contended on behalf of the appellant that the clause for redemption "within the time stipulated" refers to Joista 1327; in other words, that the last date of Joista 1327 was the date on which the mortgagor was to re pay the money. But this is expressly provided for in the next clause, namely, the clause where it is stated that the redemption of the principal amount would take place in the month of Joista 1327 and on failure the deed of conditional sale would be regarded as a deed of absolute sale. It was unnecessary to provide for the same thing again in the previous clause; and that clause, therefore, we think, contained an agreement under which the mortgagor was entitled to redeem the property before the expiry of eight years. There is nothing

(1) 23 Ind. Cas. 355; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 36 A. 195; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.).

(2) 5 B. 22; 3 Ind. Dec. (N. S.) 16.

(3) 8 A. 95; A. W. N. (1886) 13; 4 Ind. Dec. (N. S.) 1099.

(4) 29 A. 471; 4 A. L. J. 375; A. W. N. (1907) 133.

(5) 15 Ind. Cas. 287; 17 C. W. N. 149; 39 C. 828.

(6) 23 M. 33; 8 Ind. Dec. (N. S.) 418.

(7) 30 Ind. Cas. 370; 29 M. L. J. 86.

illegal or unusual for a debtor to come to an agreement with the creditor that he will have the right to re-pay the money before a certain date, although the mortgagee would not be entitled to foreclose him before that date. We are referred to certain cases to show that the word "in" or "within" a specified period does not give a right to the mortgagor to redeem the mortgage before the expiry of that period. In the case of *Vadju* v. *Vadju* (2) the word "within" was not considered a sufficient indication of an express agreement to entitle the mortgagor to redeem. But there the only stipulation was that the mortgagor was to pay the debt with interest within ten years, and the learned Judges were of opinion that it was not a sufficient indication of the intention of the parties that the ordinary principle should not prevail with respect to the mortgagor and that the mortgagor might redeem in a less period than 10 years. In the present case, there is an express stipulation that the mortgagor will be entitled to pay off the debt within the period of eight years "*mead modhyai.*" The further provision in the document in the present case that the principal amount will be re paid in Joista 1327, as stated above, merely states the latest date of payment.

The case of *Purna Chandra Sarma* v. *Peary Mohan Pal* (5) was relied upon, on behalf of the respondents. It is true that there was no time fixed for redemption in the deed as drawn up in in that case, but there was a clause added (and separately signed by the mortgagor after the deed had been executed) that the money would be paid, principal and interest, "within" one year. The learned Judges were of opinion that the case fell within the class of cases in which the mortgage is payable before a certain date, and not within the class where a day is fixed for the payment of the debt, and that it was open to the mortgagor to redeem within one year of the taking of the loan. See also the cases of *Rose Ammal* v. *Raiarathnam* (6) and *Chandu* v. *Koaja Poojari* (7).

As we have already said although the general principle is well-settled, the question in each case is whether upon the terms of the contract between the parties the intention was such as to give the mortgagor a right to redeem before the expiry of the latest date fixed for the payment. We are of opinion, having regard to the terms of the document in this case, that the view taken by the learned Subordinate Judge is correct, namely, that the plaintiff had a right to redeem before the expiry of eight years.

The next question is whether the defendants are entitled to claim interest because two of the plots covered by the mortgage were in the possession of tenants. The mortgage-bond provides that if the mortgagee is dispossessed from the mortgaged property, the mortgagor was to pay interest on the mortgage-debt at 2 per cent. per mensem. It appears that two of the plots of land were let out to tenants at the date of the mortgage. Whether the rent was payable by them in money or in kind, does not appear from the judgment. Whatever it was, the plaintiff was entitled to the same possession as the mortgagor had and was entitled to the rent which was stipulated to be paid by the tenants to the mortgagor. There is nothing to show that the mortgagees were deprived of such rent by the mortgagor, and the Courts below have found that the mortgagees had full knowledge of the fact that these plots of land were let out to tenants when they took the mortgage. It has also been found that there was no dispossession of the mortgagees by the mortgagor. In the circumstances, we do not think that the defendants were entitled to any interest.

The appeal is dismissed with costs.

B. N. & N. H.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 59-B OF 1920.

February 3, 1921.

Present:—Mr. Kotval, A.J.C.

NARAYAN—PLAINTIFF—APPELLANT

versus

NATHMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Interest—Damdupat, *rule of—Puisne mortgagee paying off prior mortgagee's decree, rights of—Transfer of Property Act (IV of 1882), s. 74.*

NARAYAN v. NATHMAL.

The rule of *damdupat* applies only so long as the relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree.

Hari Lall Mullick, In the matter of, 33 C. 1269; 10 C. W. N 884 and *Nanda Lal Roy* v *Dhirendra Chakravarti*, 21 Ind Cas 974; 40 C. 710, followed

The rights which a puisne mortgagee acquires on payment of the amount of the decree of the prior mortgagee to which he was also a party must be deemed to be the rights that are brought into existence by the decree in his suit, and not the contractual rights which have merged in the decree.

Therefore, a puisne mortgagee who thus steps into the shoes of the prior mortgagee is not debarred from getting interest in excess of *damdupat*.

Appeal against a decree of the District Judge, Amraoti, dated the 21st November 1919, modifying that of the Subordinate Judge, Daryapur, dated the 12th May 1919.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondents.

JUDGMENT.—Defendants Nos. 1 and 2 Ramchandra and Jawharmal executed a mortgage in 1905 in favour of Dhansingh and in 1913 two mortgages of the same property in favour of the plaintiff Narayan. Dhansingh sued on his mortgage. After the preliminary decree the plaintiff, who was joined in the suit, paid Rs. 1,026, which is double the amount of the principal then due to Dhansingh, in satisfaction of the decree on the 2nd April 1917 In the present suit which was filed on the 18th July 1918, plaintiff claims this amount and Rs. 274-7-0 for interest at Rs. 2 per cent. per mensem from the 2nd April 1917 to date of suit and further interest at the same rate till payment; and in default of payment foreclosure of the property mortgaged. Defendants Nos. 3 and 4 are purchasers of the mortgaged property at a sale in execution of a money decree against defendants Nos. 1 and 2. They alone contest the suit and plead that the plaintiff is not entitled to more than Rs. 1,026. The Trial Court decreed the claim. In appeal by defendants Nos. 3 and 4 the lower Appellate Court held that the plaintiff was not entitled to any interest in excess of *damdupat* on the original principal due to the prior mortgagee and reduced the decree to the sum of Rs. 1,026. This decision is challenged in second appeal.

The only question is whether the rule of *dam upat* applies. In *Hari Lall Mullick, In the matter of* (1) followed in *Nanda Lal Roy* v. *Dhirendra Nath Chakravarti* (2) it has been held that the rule of *damdupat* applies only so long as the relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree. It is argued on behalf of the defendants that the effect of the subrogation under section 74, Transfer of Property Act, is exactly the same as if the puisne mortgagee had taken a private assignment of the mortgage from the prior mortgagee and had brought a suit on the contract of mortgage. No authority is cited for this contention. Under section 74 when the puisne mortgagee has paid off the prior mortgagee, he acquires in respect of the property all the rights and powers of the latter. These rights must be deemed to be the rights that are brought into existence by the decree in his suit, and not the contractual rights which have merged in the decree. If the prior mortgagee is not debarred by the rule of *damdupat* from getting interest in excess of *damdupat* after the date fixed for payment, there is no reason why the puisne mortgagee who has stepped into his shoes should be debarred from getting it.

The lower Appellate Court has held with regard to the rate of interest that there was no justification for awarding interest at a rate other than that given in the prior mortgage, and I agree with its view.

The decree of the lower Appellate Court will be modified. A decree for Rs. 1,107 *plus* compound interest on Rs. 1,026 at Re. 1-2 0 per cent. per mensem from the date of suit to the 31st March 1921, which I fix as the date for redemption, will be passed. Due allowance will be made in respect of interest on the amount, if any, paid by the defendant after the lower Appellate Court's decree. Costs in the first Court as ordered by that Court. Costs in this and the lower Appellate Court on the defendant.

J. P. *Decree modified.*

(1) 33 C. 1269; 10 C. W. N. 884.
(2) 21 Ind. Cas. 974; 40 C. 710.

Srinagar

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 63 OF 1920.

June 21, 1921.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

CHANDRA MOHAN DUTTA AND OTHERS —DEFENDANTS—APPELLANTS

versus

SASI BALA DASI AND OTHERS—PLAINTIFFS —RESPONDENTS.

Construction of decree—Property given to two ladies for life for maintenance—Death of one—Half, property if reverts—Appeal, second—Pleadings—New point, when not allowed.

A compromise decree provided that two ladies will take into possession certain lands for maintenance for life and after the death of both of them the plaintiff will take possession of the lands. On the death of one of the ladies the plaintiff sued for half the lands:

Held, on construction of the decree, that the grant was to the two ladies for life as maintenance and that they were joint tenants of the property and that the plaintiff was not entitled to recover possession until the death of both the ladies. [p. 278, cols. 1 & 2.]

A new point should not be allowed to be taken for the first time in second appeal in the High Court when there is no evidence on the record and no finding to support it. [p. 278, col. 2.]

Letters Patent Appeal from a judgment of Mr. Justice Sultan Ahmad, in Second Appeal No. 184 of 1919, dated the 10th May 1920 and reported in 56 Ind. Cas. 937, modifying a decision of the Subordinate Judge, Manbhum, dated the 25th November 1918.

Mr. *Abani Bhusan Mukherji*, for the Appellants.

Messrs. *Susil Madhab Mullick* and *Narendra Nath Sen*, for the Respondents.

JUDGMENT.

COUTTS, J.—This is an appeal from the decision of a Judge of this Court sitting alone in second appeal. The suit was brought by two ladies—Srimati Sasibala Dasi and Srimati Nistarini Dasi—for recovery of *khas* possession of the whole of certain properties mentioned in Schedules *ka* and *ga* of the plaint and for possession of half the property mentioned in Schedule *kha* of the plaint, by ejectment of defendant No. 1 who was in wrongful possession. There was also a claim for mesne profits and costs.

The land is in Mouza Ranguni and it appears that 2 annas of that Mouza belonged originally to one Srishtidhar Dutta, the husband of plaintiff No. 1, Srimati Sasibala Dasi. Srishtidhar had two brothers, the father of Chandramohan Dutta, who is defendant No. 1, and Prasanna Kumar Dutta, who is now dead and whose widow Srimati Sumitra Dasi is the second defendant. After the death of her husband, plaintiff No. 1 was dispossessed of her husband's property and in 1902 she instituted a suit for recovery of *khas* possession after partition by metes and bounds This suit was compromised. By the terms of the compromise the property claimed by the plaintiff was divided into the three portions which are described in Schedules *ka*, *kha* and *ga* of the present plaint; the plaintiff's title was admitted, but it was agreed that she should get *khas* possession of the property mentioned in Schedule *ka* only. Her mother-in-law Sunayana Dasi and the defendant No. 2 in the present suit, the widow of Prasanna Kumar Dutta, were to hold possession of the lands described in Schedule *kha* for life as maintenance and the plaintiff No. 1 and her mother-in-law Sunayana Dasi were to have joint possession of the *ga* Schedule property.

Subsequently to the compromise decree Sunayana, the mother-in law of the plaintiff No. 1, died and the case of the plaintiff No. 1 is that she came into possession of the whole of the lands in Schedule *ga* and half the lands in Schedule *kha*. A rent-suit was then instituted by the landlords against her in respect of a portion of the property. They obtained a decree and took out execution and a proclamation for sale issued in respect of the whole of the 2 annas. Thereupon the defendant No. 1, who, as I have said, is the nephew of the plaintiff No. 1's husband, in order to protect whatever rights he might have, deposited the decretal amount, namely, Rs. 37. He then filed an application under section 6, Regulation XX of 1819: he was put in possession and was in possession of the property for the years 1322 and 1323. Meanwhile, however, the plaintiff No. 1 had leased a portion of the property to her mother, the plaintiff No. 2 and in 1323 when the latter tried to take the produce of the lands, she was prevented from doing so by the defendant No. 1. A criminal case was brought by the plaintiff No. 2, which failed on the ground that the question was in the nature of a civil dispute, and the defendant No. 1 remained in possession. The plaintiff No. 1 accordingly brought this suit for recovery of possession

and ejectment on the ground that the amount deposited by the defendant No. 1 has been fully realized and that the plaintiffs are, therefore, entitled to recover possession.

The only part of the property with which we are concerned in this appeal is the half share of the Schedule *kha* lands claimed by the plaintiff. In regard to this the defendants' contention is that under the compromise the plaintiff is not entitled to a half share on the death of Sunayana and further that she has not been holding possession of this property as statutory mortgagee as alleged by the plaintiff but that the defendant No. 1 has been holding the lands under the defendant No. 2 by virtue of a settlement from long before the year 1322.

The suit was decreed in the Court of first instance, but so far as half the *kha* lands were concerned, on appeal to the District Judge the suit was dismissed. On second appeal to this Court half the *kha* lands were decreed to the plaintiff and it is against this decision that the defendant No. 1 has filed this appeal.

In the appeal before the learned Judge of this Court the first contention was that by the terms of the compromise the plaintiff was, on the death of Sunayana, entitled to possession of half the *kha* lands. This was the main ground of the appeal and it was successfully urged, but it was further urged and held by the learned Judge of this Court that the plaintiff No. 1 having actually got possession of half the *kha* lands and the defendant No. 1 not having a better title than the plaintiff and the Rs. 37 which he deposited in Court having been paid off, the plaintiff was entitled to succeed.

Now with regard to the first of these points. The relevant portion of the compromise decree runs as follows: "Defendant No. 2 Srimati Sunayana Dasi and the widow of late Prasanna Kumar Dutta will take into possession the lands of Schedule Kha for maintenance for life. The defendants Nos. 1 and 3 will have no objection to this. After the death of both of them the plaintiff will take possession of the lands, to which defendants Nos. 1 and 3 will have no objection." It appears to me that there can be no doubt as to the construction of this term of the compromise. It is clearly a grant of this land to the two ladies for life as maintenance, that is to say, they are joint tenants of the property and even on the first sentence of this portion of the compromise alone I would be prepared to hold that the plaintiff was not entitled to recover possession until the death of both the ladies. But if there were any doubt, that doubt is set at rest by the last sentence: "After the death of both of them the plaintiff will take possession of the lands." This is a clear statement that it is only after the death of both ladies that the plaintiff will get possession and, in my view, there can be no possible ambiguity. This was the view which was taken by the learned Subordinate Judge in first appeal and, in my opinion, there can be no doubt on the point.

I now come to the next point, namely, that the plaintiff having actually come into possession of half the *kha* lands on the death of Sunayana and the defendant No. 1 not having been able to show a better title than the plaintiff and the amount which the defendants deposited having been recovered, the plaintiff is entitled to succeed. If the facts were correct the conclusion would also be correct, but there appears to have been some misapprehension as to the facts in the mind of the learned Judge of this Court. To establish the fact of the plaintiff's actual possession after the death of Sunayana, he has relied on the pleadings and he says that the allegation of the plaintiff's possession was distinctly made in the plaint and was not controverted in the written statement. This, however, is hardly correct, for in his written statement the defendant has distinctly stated that the defendant No. 1 does not hold possession as a statutory mortgagee but that the plaintiff No. 1 is in possession by virtue of a settlement from defendant No. 2. This is clearly a denial of the plaintiff's possession in her own right and there is no finding of any of the Courts on the point. The fact is that this point was a new one taken for the first time in appeal to this Court and there was no evidence on the record and no finding to support it. In these circumstances it cannot be assumed that the plaintiff was in possession except by virtue of a settlement from defendant No. 2 and this being so, the contention fails.

For the reasons I have given I would decree this appeal with costs.

MILLER, C. J.—I agree.

J. P. *Appeal decreed.*

ONKARLAL v. RAJ MOHAMUD.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 33 OF 1921.

June 20, 1921.

Present :—Mr. Dhobley, A. J. C.

ONKARLAL—APPLICANT

versus

RAJ MOHAMUD—NON APPLICANT.

Civil Procedure Code (Act V of 1908), O. VII, r. 6—Bar of limitation—Facts stated in plaint, whether can be controverted—Limitation Act (IX of 1908), s. 19—Acknowledgment—Existing liability—Construction of document—Signature of debtor, if necessary.

Where the plaintiff satisfies the requirements of Order VII, rule 6, of the Civil Procedure Code by stating in the plaint the ground showing how his claim is within limitation, he ought not to be debarred from taking another and even an inconsistent ground to get over the bar of limitation. [p. 279, col. 2; p. 280, col. 1.]

Hingu Miya v. *Heramba Chandra*, 8 Ind. Cas. 81; 13 C. L. J. 139, *Yakub Ebrahim Sayani* v. *Bai Rahimatbai*, 10 Bom. L. R. 346, *Parmeshri Das* v. *Fakiria*, 60 Ind Cas. 772; 2 L. 13, followed.

A writing, to be an acknowledgment within the meaning of section 19 of the Limitation Act, must itself import an acknowledgment of an existing liability. Such liability cannot be read into it by proof *aliunde* or by the subsequent admissions of the acknowledgor, although oral evidence is admissible to prove the identity of the debt, property or right in respect of which the acknowledgment is made, or the name of the creditor or of the person entitled to the right or property or the date of an acknowledgment, and these need not appear on the face of the writing. [p. 280, col. 2.]

Ittappan Kuthiravattat Nair v. *Nanu Sastri*, 26 M. 34: 12 M. L. J. 101, followed.

Unless the language of the document be identically the same, a decision upon the construction of one document cannot be of much assistance to the Court in construing another document and each case has to be treated on its own merits. [p. 280, col. 2.]

Jogeshwar Roy v. *Raj Narain Mitter*, 31 C. 195 at p. 200; 7 C. W. N. 168, followed.

A postcard stating "..... I had said that I would come on Tuesday but as the goods had not been sold and as I was not keeping good health, I could not come. But I will very positively come on Tuesday with the money. Have no doubt about this," was set up to be an acknowledgment of debt:

Held, on the construction of the writing in the postcard, that there was no acknowledgment of any debt or liability. [p. 280, col. 2.]

Semble.—The signature of a debtor need not appear at any particular part of the writing and the person authorised to give an acknowledgment may sign his own name or that of his principal. [p. 280, col. 2.]

Mathuradas v. *Babu Lal*, 1 A. 683 at p. 688; 1 Ind. Dec. (N. S.) 477, *Mahalakshmibai* v. *Firm of Nageshwar Purshotam*, 10 B. 71; 5 Ind. Dec. (N. S.) 432, *Mohesh Lal* v. *Bucunt Kumaree*, 6 C. 340 at p. 352; 7 C. L. R. 121; 3 Ind. Dec. N. S., 229, referred to.

Civil revision against a decree of the Judge, Small Cause Court, Gondia, dated the 15th November 1920.

Mr. *Erachshah*, for the Applicant.

Mr. *R. N. Padhye*, for the Non-Applicant.

JUDGMENT.—We have in this case to decide whether the plaintiff's suit, instituted on 1st October 1920 for the recovery of the price of tobacco purchased on 15th September 1917 by the defendant on credit, was time-barred. In the plaint it was stated that the cause of action for the recovery of the money had arisen on 10th October 1917, as the defendant had orally agreed to pay it by that date. The lower Court held that the alleged oral agreement was not proved and that hence the claim was time-barred, as the suit was brought more than three years after the accrual of the cause of action. In the lower Court, the plaintiff relied on a postcard received by him from the defendant, as saving limitation, but it was held that the postcard did not fulfil the requirements of an acknowledgment and could not thus help the plaintiff. The grounds given by the learned Judge of the lower Court for his view were :—

(*i*) That as the plaintiff had not originally relied upon this postcard as saving limitation and as he had not mentioned it in the plaint, as required by Order VII, rule 6, Civil Procedure Code, it could not be taken into consideration at all; and

(*ii*) That even if it be taken into consideration, it did not amount to an acknowledgment, as required by section 19 of the Limitation Act, as it did not contain an acknowledgment of an existing liability and as it was not signed by the defendant or by an agent duly authorised on his behalf.

As regards the first point, it will be sufficient to refer to the cases of *Hingu Miya* v. *Heramba Chandra* (1) and *Yakub Ebrahim Sayani* v. *Bai Rahimatbai* (2), which have been followed in a very recent case—*Parmeshri Das* v. *Fakiria* (3)—of the Lahore High Court. These are an authority for holding that where the plaintiff satisfies the requirements of old section 50, corresponding to Order VII, rule 6, Civil Procedure Code, by stating in the plaint the ground showing how his claim is within limitation,

(1) 8 Ind. Cas. 81; 13 C. L. J. 139.
(2) 10 Bom. L. R. 346.
(3) 60 Ind. Cas. 772; 2 L. 13.

be ought not to be debarred from taking another and even an inconsistent ground to get over the bar of limitation. In the present case the postcard in question was filed along with the plaint and though it was not originally sought to be used as saving limitation, the plaintiff relied upon it for that purpose at the evidence stage. Not only was no objection to this course taken either by the Court or by the other side, but the question whether the said postcard satisfied the requirements of section 19, Limitation Act, was fully argued and discussed in the judgment of the lower Court. Disagreeing with the lower Court, I hold that the postcard could be relied upon by the plaintiff for saving limitation.

In order to decide as to whether the postcard was an acknowledgment according to the requirements of section 19, it is necessary to know its exact wording. It is written in Marathi and its English rendering is as follows :—

"Best compliments to Ramchandra Onkarlal at Gondia from Raj Mohammad at Bhandara. Further, I had said that I would come on Tuesday, but as the goods had not been sold and as I was not keeping good health, I could not come. But I will very positively come on Tuesday with the money. Have no doubt about this."

The defendant is illiterate, and the contents of the postcard are in the handwriting of another person. He admitted that he had sent the postcard to the plaintiff and had mentioned in it that he would bring the money on Tuesday. There is no signature either of the writer or of the defendant at the foot of the writing on the card. The post marks show that the card was despatched from Bhandara on 3rd October 1917 and reached Gondia the same day.

From the contents and the wording of the postcard itself an acknowledgment by the defendant of any debt or liability cannot be gathered. The wording does not by itself show that the defendant meant to acknowledge any debt or liability on his part. All that he said in the postcard was that he could not, on account of certain reasons, go to the plaintiff on Tuesday as promised, and that he would go to him on the following Tuesday with the money. Whether that money was on account of any debt due by him to the plaintiff or was on any other account the writing on the postcard does not say. It is altogether silent on the point. No doubt, oral evidence is admissible to prove the identity of the debt, property or right in respect of which the acknowledgment is made, or the name of the creditor or of the person entitled to the right or property, or the date of an acknowledgment, and these need not appear on the face of the writing, but the writing itself must import an acknowledgment of an existing liability. Such liability cannot be read into it by proof *aliunde* or by subsequent admissions of the acknowledgor: See *Ittappan Kuthiravattat Nair* v. *Nanu Sastri* (4). If the writing itself does not contain any acknowledgment of personal liability or of a debt, this cannot be imported into it by referring to statements of the parties or to other writings. The writing sought to be used as an acknowledgment should in itself import that the person making the acknowledgment is under an existing liability. In the present case, such acknowledgment on the part of the defendant is entirely absent from the contents of the postcard As observed in *Jogeshwar Roy* v. *Raj Narain Mitter* (5), unless the language of the documents be identically the same, a decision upon the construction of one document cannot be of much assistance to the Court in construing another document and each case has to be treated on its own merits. Other reported cases in which documents were examined and construed with a view to see if these fulfilled the requirements of section 19 of the Limitation Act cannot, therefore, be of much help to us in the present case.

My opinion is that in the writing of the postcard there is no acknowledgment on the defendant's part of any debt or liability and that the limitation cannot, therefore, be saved by it.

As this finding is sufficient to uphold the dismissal of the plaintiff's suit, it is unnecessary to decide whether the postcard has been signed by the defendant. I may, however, say that the signature need not appear at any particular part of the writing and that the person authorised to give an acknowledgment may sign his own name or that of his principal: See *Mathuradas* v.

(4) 26 M. 34; 12 M. L. J. 101.
(5) 31 C. 195 at p. 200; 8 C. W. N. 168.

Babu Lal (6), *Mahalakshmibai* v. *Firm of Nageshwar Purshotam* (7) and *Mohesh Lal* v. *Busunt Kumaree* (8).

The plaintiff's suit was rightly dismissed as time-barred and his application for revision is dismissed with all costs on him.

J. P. *Application dismissed.*

(6) 1 A. 683 at p. 686; 1 Ind. Dec. (N. S.) 477.
(7) 10 B. 71; 5 Ind. Dec. (N. S.) 432.
(8) 6 C. 340 at p. 352; 7 C. L. R. 121; 3 Ind. Dec. (N. S.) 222.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 82 OF 1921.
July 23, 1921.

Present:—Mr. Justice Das and Mr. Justice Adami.

BASUDEO NARAIN—DEFENDANT—APPELLANT

versus

RADHA KISHUN—PLAINTIFF AND DABINDRA MISSIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 22 cl. (2)—Occupancy holding, purchase of, by co-sharer landlord—Partition between co-sharers, effect of—Holding allotted to share of another co-sharer, effect of—Bengal Tenancy Amendment Act (I of 1907).

Where a co-sharer landlord purchased the occupancy holding of a tenant before the amendment of section 22 (2) of the Bengal Tenancy Act in 1907 and thereafter on partition between co-sharers landlords the holding is allotted to the share of the other co-sharer, the holding does not cease, only the occupancy right comes to an end under section 22 (2) of the Act and the purchaser co-sharer is entitled to remain in possession.

Jawad-ul-Huq v. *Ram Das Saha*, 24 C. 143; 1 C. W. N. 163; 12 Ind. Dec. (N. S.) 761, *Ram Mohan Pal* v. *Sheikh Kachu*, 32 C. 386; 1 C. L. J. 1; 9 C. W. N. 249 (F. B.), referred to.

Quære:—What will be the position of such a co-sharer purchaser of holding under the Amending Act of 1907?

Appeal against a decision of the Subordinate Judge, Muzaffarpur.

Messrs. *C. C. Das* and *C. S. Banerjee*, for the Appellant.

Mr. *S. N. Ray*, for the Respondents.

JUDGMENT.

DAS, J.—The plaintiff and the defendant first party were co-sharers in an estate in which one Mithan Jha had an occupancy holding. Sometime in 1899 or 1900 defendant No. 1 brought a suit against Mithan Jha and purchased the occupancy holding and has continued to be in possession of the holding which has belonged to Mithan Jha. There has recently been a Collectorate partition between the plaintiff and defendant No. 1 and on such partition the lands in question have been allotted to the share of the plaintiff. The plaintiff, taking the view that upon the purchase of the occupancy holding by defendant No. 1 that holding became the *bakasht* of the plaintiff and defendant No. 1, claimed to be put in possession of the land in dispute. The Courts below, agreeing with the view of the plaintiff, have decreed his suit.

It is necessary to remember that in dealing with the question we are governed by the Bengal Tenancy Act of 1885 and we have nothing whatever to do with the amendment of the Act in 1907. Now section 22, clause (2), of the Bengal Tenancy Act as it existed before the amendment in 1907 ran as follows:

"If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or the permanent tenure-holder, it shall cease to exist; but nothing in this sub-section shall prejudicially affect the rights of any third person."

The question was debated so far back as the year 1896 as to the position of a co-sharer proprietor purchasing an occupancy holding. It was ruled in the case of *Jawad-ul Huq* v. *Ram Das Saha* (1) that "there is no law which prevents one of the several co-proprietors from holding the status of a tenant under the other co-proprietors of land which appertains to the common estate and that the effect of the purchase by one co-owner of land of the occupancy right is, not that the holding ceases to exist, but only the occupancy right which is an incident of the holding."

According to decision of the Full Bench, "there was nothing in the sub-section inconsistent with the continuance of the holding divested of this right of occupancy which attached to it."

The point again came up for consideration before the Calcutta High Court in the case of *Ram Mohan Pal* v. *Sheikh Kachu* (2). The Full Bench in that case agreed with the decision of *Jawadul Huq* v. *Ram Das Saha* (1). Mr. Justice Ghose in the course of his judgment

(1) 24 C. 143; 1 C. W. N. 163; 12 Ind. Dec. (N. S.) 761.
(2) 32 C. 386; 1 C. L. J. 1; 9 C. W. N. 249 (F. B.).

pointed out that since the Bengal Tenancy Act contemplated a class of *raiyats* different from *raiyats* with right of occupancy, namely, non-occupancy *raiyats*, and since section 22 of the Bengal Tenancy Act deliberately stated that the occupancy right shall cease to exist, it followed that the holding did not cease by virtue of the purchase by the co-sharer landlord. In his view the holding still continued notwithstanding the purchase by the co-sharer landlord.

Now if this be correct, then something must happen subsequent to the acquisition of the holding by the co-sharer landlord to put an end to the holding. It is suggested that the partition between the co-sharer landlord puts an end to the holding; but in my judgment there is no foundation for this argument in the Bengal Tenancy Act and we have not been referred to any cases which support the argument put before us by the learned Vakil on behalf of the respondent. I do not desire to express any opinion on the question as to what the position will be under the Amending Act of 1907. In my judgment the view taken by the Courts below is incorrect, and I would allow the appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff's action with costs throughout.

ADAMI, J.—I agree.

J. P. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 766 OF 1920.

February 16, 1921.

Present :—Mr. Justice Wilberforce.

THE FIRM KNOWN AS DURGA PARSHAD. MUTSADDI LAL—DEFENDANTS —PETITIONERS

versus

THE FIRM KNOWN AS RULIA MAL. DOGAR MAL—PLAINTIFFS— RESPONDENTS.

Contract—Offer—Invitation for offer—Proposal—Place of contract—Civil Procedure Code (Act V of 1908), ss. 20 (c), 115—Jurisdiction, wrong decision as to—Revision—High Court, power of interference of.

Plaintiff, residing at *L.*, wrote to defendant at *G.* asking for quotations for salt and the terms on which it would be supplied. In reply, defendant sent a post card stating his terms and asking plaintiff to wire should he require salt. Plaintiff wired for one wagon of salt and on a breach arising out of this contract he sued the defendant for damages at *L.* Defendant objected that the contract having been entered into at *G.*, the Courts at *L.* had no jurisdiction to entertain the suit. The lower Appellate Court overruled this objection. On revision:

Held, (1) that defendant's post card was a mere invitation for offers and not a proposal; [p. 283, col. 1.]

(2) that plaintiff's wire constituted the proposal and that the contract was completed by defendant signifying his assent to the proposal at *G.*; [p. 283, col. 1.]

(3) that, therefore, the contract was entered into at *G.* and the Courts at *L.* had no jurisdiction to entertain the suit: [p. 283, col. 1.]

(4) that a High Court had in revision power to set aside the order of a lower Appellate Court. [p. 283, col. 1.]

Thanawala, F. B. v. *Shahzada Basudeo Singh*, 1 Ind. Cas. 325; 12 O. C. 17, followed.

A High Court will exercise its revisional powers in the case of interlocutory orders where a failure to do so would result in irremediable damage to the parties. [p. 283, col. 1.]

Rama v. *Jowahir*, 64 P. R. 1885; *Dowlat Ram* v. *Asa Ram*, 46 P. R. 1886; *Mannu Lal* v. *Harcharan Das*, 10 Ind. Cas. 36; 147 P. L. R. 1911; 258 P. W. R. 1911; *Firm Damri Shah-Thakur Ram* v. *Firm Rulia Mal-Dogar Mal*, 46 Ind. Cas. 387; 2 L. L. J. 555, referred to.

Petition, under section 44 of Act IV of 1919, for revision of the order of the District Judge, Ludhiana, dated the 9th August 1920, reversing that of the Senior Subordinate Judge, Ludhiana, dated the 11th March 1920.

Lala *Balwant Rai* for Lala *Fakir Chand*, for the Petitioners.

Mr. *B. P. Khosla*, for the Respondents.

JUDGMENT.—The plaintiffs in this case wrote from Ludhiana to a shop at Gonda, in the United Provinces, asking for quotations for salt and the terms on which it would be supplied. In reply to this, the defendants sent a post card stating their terms and asking the plaintiffs to wire, should they require salt. In reply to this, the plaintiffs wired for one wagon of salt. On a breach which arose out of this contract the plaintiffs sued for damages at Ludhiana, and the defendants objected to the jurisdiction of the Ludhiana Court. The first Court held that the cause of action arose at Gonda inasmuch as the contract was accepted at Gonda. The lower Appellate Court disagreed with this finding and considered that the defendants' post card constituted a proposal and that the plaintiffs' wire was the acceptance. The District Judge held, therefore, that the contract was completed at Ludhiana and that

the cause of action arose there. Against this decision the defendants have preferred a petition for revision.

I do not agree with the decision of the lower Appellate Court that the post card can amount to a proposal within the purview of the Contract Act. The post card was merely an invitation for offers in the same way as a catalogue of goods sent out by any shop or business firm. A similar case is reported in 1 Indian Cases, page 325 [*Thanawala, F. B.* v. *Shahzada Basudeo Singh* (1)], in which it was held that such an invitation for offers did not amount to a proposal. It is clear that the plaintiffs' wire for the goods constituted the proposal in the case and that the contract was completed when the Gonda firm signified its assent thereto. I hold, therefore, that the contract was completed at Gonda.

Counsel for the respondents objected that in a case of this description a petition for revision did not lie. He referred to a large number of authorities, of which *Rama* v. *Jowahir* (2), *Dowlat Ram* v. *Asa Ram* (3) and *Mannu Lal* v. *Harcharan Das* (4) appear to be the most applicable. On the other hand, there are numerous rulings in which this Court has exercised its revisional powers in the case of interlocutory orders where a failure to do so would result in irremediable damage to the parties. This would obviously be the result of my refusal to interfere in the present proceedings. I agree especially with the latest published judgment of this Court printed on page 555 of Volume II, Lahore Law Journal [*Firm Dan.ri Shah Thakur Ram* v. *Firm Rulia Mal Dogar Mal* (5)], in which the learned Judge also pointed out that another result of his refusal to interfere would be an unnecessary waste of the time of highly paid Government judicial officers.

I accept the petition for revision and restore the order of the First Court. I give the petitioners their costs in all Courts.

Z K. *Petition accepted.*

(1) 1 Ind. Cas. 325; 12 O. C. 17.
(2) 64 P. R. 1885.
(3) 46 P. R. 1886.
(4) 10 Ind. Cas. 36; 147 P. L. R. 1911; 258 P. W. R. 1911.
(5) 64 Ind. Cas. 887; 2 L. L. J. 555.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 695 OF 1920.

July 27, 1921.

Present:—Mr. Justice Coutts and Mr. Justice Macpherson.

BANSIDHAR DHAR AND OTHERS — PLAINTIFFS — APPELLANTS

versus

TIKAIT HARNARAYAN SINGH AND OTHERS — DEFENDANTS — RESPONDENTS.

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 2A, 3, 21B - Suit pending—Estate taken under management—Effect on suit.

Section 21B of the Chota Nagpur Encumbered Estates Act does not restrict the provisions of section 3 of the Act as it refers to suits other than proceedings in regard to the debts or liabilities referred to in section 2A. [p. 284, col. 1.]

Therefore, a suit against a party whose estate is, after the institution of the suit, taken under management under the Chota Nagpur Encumbered Estates Act is barred by section 3 of the Act. [p. 284, col 1.]

Mr. *Atul Krishna Roy*, for the Appellants.

Messrs. *Kulwant Sahay* and *Panchanan Banerjee*, for the Respondents.

JUDGMENT.

COUTTS, J.—This was a suit for recovery of a sum of Rs. 566 2 0 principal and Rs 393 interest on a *bahikhata* transaction, which is said to have been jointly entered into with the plaintiffs by the defendant No. 1 and the deceased father of the defendants Nos. 2 and 3, who are minors. After the suit was instituted, the estate of the defendant No. 1 was taken under the management of the Encumbered Estates. The plaintiff then brought the manager on to the record. The manager objected on behalf of himself and the defendant No. 1 under the provisions of section 3 of the Chota Nagpur Encumbered Estates Act; and on this objection being disallowed, he did not enter any defence. The suit was decreed *ex parte*. Against this decree the defendant No. 4, the manager of the Encumbered Estates appealed on behalf of the defendant No. 1 and himself. The learned Judicial Commissioner has found that section 3 was a bar and has decreed the appeal.

Section 3 is to the effect that—

"On the publication of an order under section 2, the following consequences shall ensue;—

MUHAMMAD ABDUL AZIZ v. BHAGWAN DAS.

"All proceedings which may then be pending in any Civil Court in British India or in any Revenue Court in Bengal in respect to such debt or liabilities, shall be barred."

The debts and liabilities referred to are debts and liabilities mentioned in section 2-A (i) (a)—

"All debts and liabilities to which the said holder is subject."

Clearly then the suit which was brought by these plaintiffs was barred by the provisions of section 3.

It has been contended, however, that the plaintiffs are saved by section 21-B. Section 21-B runs as follows—

"During the period of management in every pending suit or appeal in which the holder is plaintiff or defendant, the manager shall be named as the representative of the holder for the purposes of the suit or appeal."

Clearly, however, section 21 B cannot restrict the provisions of section 3; this section refers to suits other than proceedings in regard to the debts or liabilities referred to in section 2-A

The view of the law which has been taken by the learned Judicial Commissioner is obviously correct and I would dismiss this appeal with costs.

MACPHERSON, J.—I agree.

J. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 169 OF 1921.

August 3, 1921.

Present:—Mr. Dalal, A. J. C.

MUHAMMAD ABDUL AZIZ—PLAINTIFF No. 1—APPELLANT

versus

BHAGWAN DAS—DEFENDANT,

MADAT ALI—PLAINTIFF No. 2—RESPONDENTS.

Pre-emption—Oudh Laws Act (XVIII of 1876), s. 9—Under-proprietary tenure—Proprietors and under-proprietors, preference between,

Under section 9 of the Oudh Laws Act an under-proprietary tenure may be any area of land, whether constituting an entire Mahal or only a portion of it. [p. 285, col. 2.]

Thus, where the vendor and the pre-emptor are co-sharers in an under-proprietary tenure and the vendee is a co-sharer in the proprietary tenure in which the under-proprietary tenure is situated, the pre-emptor comes within clause (1) of section 9 and has a preferential right, and he and the vendee do not come in clause 3) as members of the village community.

Sheoraj Kunwar v. *Harihar Bakhsh Singh*, 7 Ind. Cas. 196; 32 A. 351; 14 C. W. N. 817; 12 C. L. J. 40; 7 A. L. J. 709; 12 Bom. L. R. 508; 8 M. L. T. 89; (1910) M. W. N. 351; 13 O. C. 165; 20 M. L. J. 609; 37 I. A. 124 P. C.), *Bank of Upper India* v *Munshi Alopi Prasad*, 10 O. C. 257 and *Kaniz Zohra* v. *Nepal*, 54 Ind. Cas. 632; 22 O. C. 297, distinguished from.

Appeal from a decree of the Subordinate Judge, Bara Banki, dated the 12th March 1921, reversing that of the Munsif, Ramsanehighat, dated the 25th November 1920.

Mr. *Mohammad Wasim*, for the Appellant.

Mr. *Zahur Ahmad*, for Respondent No. 1.

JUDGMENT.—The question which arises in this appeal relates to the right of pre-emption under section 9 of the Oudh Laws Act. What is sold is three-fourths share of Khata No. 318 of under proprietary land, six *bighas* and odd, situated in Khata No. 17 of Mahal Sarju Pershad in village Badoserai. Mahal Sarju Pershad is divided into 19 Khatas or Pattis, each separately assessed and possessing a separate *lambardar*. The vendee of this suit, Bhagwan Das, is a co-sharer proprietor in Khata No. 1. The plaintiff pre-emptor owns one-fourth share of the area of land with under-proprietary rights of which three-fourths have been sold to Bhagwan Das. The question is whether the plaintiff comes within the first clause of section 9 and has a preferential right, or whether both he and the vendee come in the third clause as members of the village community. If both parties come in the third clause, the plaintiff has already lost his right in drawing lots.

The first Civil Court of the Munsif, Ramsanehighat, held in favour of the plaintiff and decreed his suit, but the learned Subordinate Judge of Bara Banki sitting as an Appellate Court held the rights of the parties to be equal and the vendee had the greater luck in that Court, to draw the winning lot. The plaintiff's suit was dismissed in consequence,

Reading section 9, it appears to me to be beyond question that the area of six *bighas* fourteen *biswas* formed an under-proprietary tenure of which the vendee and the pre-emptor are the co-sharers. The learned Subordinate Judge quoted a portion of a judgment of a learned Judge of this Court in a case which went up to the Hon'ble Privy Council in appeal. The judgments are reported in I. L. R. 32 Allahabad at pages 35 (*[*Sheoraj Kunwar* v. *Harihar Bakhsh Singh* (1)] and onward.

The particular portion referred to by the lower Appellate Court is at the top of page 359* where the learned Judge says that the word "tenure" (*i.e.*, in section 9) must be intended to mean a sub-division of such Mahal, though no definition of the word "tenure" is given anywhere in the Act. A detached portion of a judgment is not very helpful in understanding the meaning of the words. If the judgments of both the learned Judges of this Court are studied, it will be found that in that case the question was whether the pre-emptor and vendor were co-sharers of the whole Mahal or not. As regards their inclusion in clause 1 of section 9, it was taken for granted that they could not come within that clause. Mr. Chamier observed :—

"As regards the first clause it seems sufficient to say that even if, as has been suggested, each of the villages assigned to Uma Pershad is a sub-division of the tenure: it cannot be said that the plaintiff and Gajadhar are now co-sharers in any sub-division, for under the partition Gajadhar alone is entitled to the three entire villages and Harihar Pershad is entitled to the remaining Pattis in the villages Himmatnagar and Kathwa. It is truly said that since the partition, the position of Ganesh and Gajadhar had been analogous to that of the co-sharers of an ordinary proprietary Mahal which had been the subject of an imperfect partition under the Revenue Act."

It is apparent, therefore, that the vendor and the pre-emptor in that case were not co-sharers in any under proprietary tenure. In the present case there is one under-proprietary tenure, to wit, holding No. 318 in Khata No. 17, and both the vendor and the pre-emptor are co-sharers therein. The respondent's learned Counsel attempted to make out that tenure was equivalent to a Mahal and that unless there is an under-proprietary Mahal, *i.e.*, an entire Mahal sub-settled with under-proprietors, there can be no right of pre-emption *inter se* between the under-proprietors. I am not prepared to interpret the opening paragraph of section 9 in that manner. The under-proprietary tenure may be any area of land, whether constituting an entire Mahal or only a small portion thereof. It was rightly said by the respondent's learned Counsel that the rulings quoted on behalf of the appellant, *Bank of Upper India* v. *Munshi Alopi Prasad* (2) and *Kaniz Zohra* v. *Nepal* (3), were applicable to proprietary tenure. I am, however, of opinion that the plaintiff is entitled to succeed on the wording of section 9.

In the result I set aside the decree of the lower Appellate Court, restore the decree of the first Court and grant to the plaintiff a month's time from to-day to deposit the sale-consideration fixed by the first Court. The plaintiff shall receive costs here and in the lower Appellate Court.

J. P. *Appeal allowed.*

(1) 7 Ind. Cas. 196; 32 A. 351; 14 C. W. N. 817; 12 C. L. J. 40; 7 A. L. J. 709; 12 Bom. L. R. 508; 8 M. L. T. 89; (1910) M. W. N. 351; 18 C. C. 165; 20 M. L. J. 603; 37 I. A. 124 (P. C.).

*Pages of 32 A.—[*Ed.*].

(2) 10 C. C. 257.

(3) 54 Ind. Cas. 632; 22 C. C. 297.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 573 OF 1920.

June 27, 1921.

Present:—Mr. Justice Das and Mr. Justice Ross.

FOUJDAR SAHU—DEFENDANT—APPELLANT

versus

NEMA BHOGTA—RESPONDENT.

Chota Nagpur Tenancy Act (VI of 1908), ss. 87, 224 (2)—Suit under s. 87—Appeal, second, to High Court, maintainability of—Civil Procedure Code (Act V of 1908), s. 104.

No second appeal lies to the High Court from the decision of the Judicial Commissioner in an appeal arising in a suit under the provisions of

section 87 of the Chota Nagpur Tenancy Act either under section 224 (2) of the Chota Nagpur Tenancy Act or under the provisions of the Civil Procedure Code. [p. 287, col. 1.]

Jagdeshar Dayal Singh v. *Bhagdi Mahton*, 58 Ind. Cas. 434; 5 P. L. J. 697; (1920) Pat. 302; 1 P. L. T. 705 and *Lal Man Naik* v. *Kanhaya Lall Pandey*, 40 Ind. Cas. 891, followed.

Raghubir Sahi v. *Protab Udoy Nath Sahi Deo*, 13 Ind. Cas. 193; 16 C. W. N. 294; 39 C. 241; 15 C. L. J. 145, not followed.

Appeal from a decision of the Officiating Judicial Commissioner, Ranchi, dated the 13th March 1920, reversing that of the Revenue Officer, Daltongunj, dated the 9th December 1918.

Messrs. *Ram Lal Dutt* and *R. P. Sinha*, for the Appellants.

Mr. *S. A. Asghar* (with him Mr. *H. B. Mukharji*), for the Respondents.

JUDGMENT.

DAS, J.—The defendant, who is the appellant before us, was recorded as proprietor of a certain share in Mauza Meral. Thereupon the respondent instituted a suit under the provision of section 87 of the Chota Nagpur Tenancy Act before a Revenue Officer for a decision of the dispute between them regarding the entry which the Revenue Officer had made in the record. The Revenue Officer dismissed the suit. Thereupon the plaintiff appealed to the Court of the Judicial Commissioner, Ranchi. The learned Judicial Commissioner allowed the appeal and decreed the plaintiff's suit. The defendant has now appealed to this Court from the decree passed by the Judicial Commissioner.

The first point taken on behalf of the respondent is that no appeal lies. The decisions of this Court on the point raised by Mr. Asghar are conflicting. But there is a judgment of two Judges of this Court in favour of the view which has been advanced before us by Mr. Asghar, whereas there is a decision of a single Judge in favour of the view maintained by Mr. Ramlal Dutt. The decision which is relied upon by Mr. Asghar is *Jagdeshar Dayal Singh* v. *Bhagdi Mahton* (1) and the decision relied upon by Mr. Ramlal Dutt is *Lal Man Naik* v. *Kanhyaa Lall Pandey* (2). There is a decision of the Calcutta High Court in favour of the view which has been advanced before us by Mr. Asghar. That decision is in *Raghubir Sahi* v. *Protab Udoy Nath Sahi Deo* (3).

In my opinion the decision in *Jagdeshar Dayal Singh* v. *Bhagdi Mahton* (1) is correct. The point is this. Section 224, sub section (2), gives a right of appeal to this Court first from any appellate decree passed by the Judicial Commissioner under Chapter XVI, and secondly from any order passed by him on appeal under section 215, sub-section (3). There is, therefore, a right of appeal to this Court if the decision of the Judicial Commissioner is a decision under Chapter XVI, or is an order passed by him on appeal under section 215, sub-section (3). Mr. Dutt does not contend that the order passed by the learned Judicial Commissioner is an order passed by him on appeal under section 215, sub-section (3). But he strenuously contends that the decree passed by the Judicial Commissioner is a decree under Chapter XVI and, therefore, appealable under clause (2) of section 224.

His argument is this. He says that an appeal from an order passed under section 87 lies in the prescribed manner and to the prescribed officer. The Local Government under the provisions of section 264, clause (8), has framed rules prescribing the manner in which and the officer to whom appeals lie from decisions passed under section 87. Those rules are to be found at page 110 of Mr. Reid's book on the Chota Nagpur Tenancy Act. They are as follows:—

(1) Appeals from decisions of Revenue Officers under section 87 (1) shall lie to the Judicial Commissioner.

(2) Every such appeal must be presented within thirty days from the date on which the decision appealed against was signed and delivered.

(3) The provisions of sections 220 to 223 shall, as far as they are applicable, apply to such appeals.

Mr. Dutt's contention based on the Notification passed by the Lieutenant-Governor on the 24th May 1909 is this: He says that the appeal lies to the Judicial Commissioner of Ranchi and the procedure laid down

(1) 56 Ind. Cas. 434; 5 P. L. J. 697; (1920) Pat 302; 1 P. L. T. 705.

(2) 40 Ind. Cas. 891.

(3) 13 Ind. Cas. 193; 16 C. W. N. 294; 39 C. 241; 15 C. L. J. 145.

in sections 220 to 223 of the Chota Nagpur Tenancy Act applies to appeals which must be taken to the Judicial Commissioner. Under section 223 the Judicial Commissioner has to give judgment in the manner provided in section 170 for giving judgment in original suits. Therefore, Mr. Ramlal Datt says, the order of the Judicial Commissioner in an appeal from an order under section 87 is an order under section 22', and as section 223 is to be found in Chapter XVI of the Chota Nagpur Tenancy Act, an appeal lies to the High Court under section 224, sub-section (2). In my opinion the argument does not deserve any success. It is quite true that by virtue of the Notification passed by the Lieutenant-Governor the Judicial Commissioner is competent to deal with an appeal from an order passed under section 87 of the Chota Nagpur Tenancy Act, but he does not exercise that jurisdiction under Chapter XVI but under a special jurisdiction which has been conferred on him by the Lieutenant Governor by the Notification of the 24th May 1909: in other words, Chapter XVI does not by its own force apply to the decision of the Judicial Commissioner. Accordingly that decision cannot be a decision under section 223. In my opinion, therefore, an appeal does not lie to this Court under section 224, sub-section (2), of the Chota Nagpur Tenancy Act.

Next it was contended by Mr. Ramlal Datt that there is a right of appeal to this Court under the Civil Procedure Code. In my opinion this argument again is unsound. A decision under section 87 of the Chota Nagpur Tenancy Act is not a decree; it is a decision, and there is no appeal to the High Court under the Civil Procedure Code from a decision. The point was discussed in the Calcutta High Court in the case of *Raghubir Sahi* v. *Protab Udoy Nath Sahi Deo* (3). I agree with the decision of Stephen, J., in that case, and in accordance therewith and with the decision of this Court in the case of *Jagdeshar Dayal Singh* v. *Bhagdi Mahton* (1) must dismiss this appeal with costs.

There is a revision petition against the order of the Judicial Commissioner. In my opinion there is no error of jurisdiction at all. It was argued by Mr. Ramlal Datt that the learned Commissioner had no business to decide a question of title. But I do not think that he has in fact decided any question of title. No doubt in deciding whether the entry in the Record of Rights is correct or incorrect he had incidentally to discuss the question of title, but his decision on the question of title is only incidental; it is nothing more than that. His decision really is a decision on the question of possession. I must refuse the revision petition but without costs.

Ross, J.—I agree.

J. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 54 OF 1920.

August 5, 1921.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

Syed DILDAR HUSAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FATEH BAHADUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Inheritance — Daughters excluded — Presumption as to sisters and their sons.

When it is proved that by custom daughters are excluded from inheritance in a certain family, it may be safely assumed that sisters and their sons are also excluded.

In the family of Chain Shah of Saraura sisters and sisters' sons are excluded from inheritance.

Appeal from a decree of the First Subordinate Judge, Sitapur (Biswan), dated the 31st July 1920.

Messrs. *Haider Husain* and *Wasi Hasan*, for the Appellants.

Syed *Ali Muhammad*, for Respondents Nos. 1 to 4.

JUDGMENT.—Three of the plaintiffs are sons and one a grandson of one *Musammat* Zeb un-nisa, sister of Muhammad Husain Khan (deceased). The property of Muhammad Husain, which formed his assets at the time of his death, is in the possession of the defendants, who are his cousins related to him through males. Admittedly the parties are descended from one Chain Shah, who was

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originally a Bais Thakur. The defendants are descendants of Chand Khan, a son of Chain Shah, while Muhammad Husain was the grandson of Yusuf Khan, another son of Chain Shah. The defendants took possession of the property on the ground that by custom prevailing in the family of Chain Shah daughters and sisters were excluded from inheritance. In fact, *Musammat* Aziz-un-nisa, daughter of Muhammad Husain, took possession of the property on his death and the defendants to the present suit obtained a decree against her for possession from this Court. In the present suit the plaintiffs' allegations were that *Musammat* Zeb-un nisa survived her brother, Muhammad Husain, that the finding of this Court that a daughter is excluded from inheritance does not apply to a sister and that Chand Khan and Yusuf Khan being illegitimate sons of Chain Shah, the defendants bore no legal relationship with Muhammad Husain to entitle them to succeed to Muhammad Husain's property. The case, as put up before us, was that if the plaintiffs succeeded in proving the illegitimacy of Chand Khan and Yusuf Khan, the plaintiffs would be the heirs to the property of Muhammad Husain in the category of distant relations, even if *Musammat* Zeb-un nisa was excluded by custom from inheriting her brother's property or predeceased him.

The learned Subordinate Judge of Biswan recorded the following findings:—

1. That Chain Singh, after becoming a Muhammadan, validly married a Pathan woman and that Chand Khan and Yusuf Khan were his legitimate sons.

2. That a sister as well as a daughter was excluded by custom from inheritance in the family of Chain Shah.

3. That *Musammat* Zeb-un-nisa predeceased her brother, Muhammad Husain Khan, and that in consequence the defendants had a preferential right of inheritance apart from the custom of exclusion.

We have been taken through the evidence on record by Counsel on both sides and we agree with the findings recorded by the lower Court. Chain Shah died over a hundred years ago and it would not be possible for the defendants to produce direct evidence of his conversion to Muhammadanism and marriage of a legal character. The Court can only be guided by extraneous evidence on which presumption can be founded. The most important fact to notice is that the sons of Chain Shah inherited his propery and were not excluded by his collateral relations, as they would have been if they had been illegitimate sons. The Settlement Record of 1864 of the villages Saraura and Bijwaman contain *wajib-ul-arais* which give the history of the family of Chain Shah (Exhibit B-4 and Exhibit 2). In the *wajib ul arz* of village Saraura it is stated that there was one Chain Singh in the family of the Zamindars of Harharpur, in whose house came a Pathan woman who was a Muhammadan, and their descendants were Chand Khan, Yusuf Khan, Darya Khan and Fateh Jang Khan. This *wajib-ul-arz* was dictated by the then Zemindars who call these sons of Chain Shah their ancestors. The vernacular words used are:—"*Uske ghar men ek aurat, qaum Musalman Pathan, par gayi thi.*" The learned Counsel for the plaintiffs-appellants desired us to construe these words to mean that the Muhammadan woman was his concubine. To our knowledge the words do not have any such meaning. The same expression in vernacular would be used by a legally married wife going to the house of her wedded husband. In the *wajib-ul arz* of Bijwaman the account given is that Chain Shah separated his share and his descendants Saadat Khan and others, Thakurs Bais Turkiya (that is to say, who have become Muhammadans), are up to now in possession of the property. The plaintiffs-appellants' learned Counsel took this entry to mean that the descendants of Chain Shah had embraced the Muhammadan religion and not Chain Shah. There is no such distinction made in the recital and the note of conversion to Muhammadan religion is simply made to explain as to why Thakurs of the Bais clan were termed Turkiya. The pedigree given in the *wajib-ul-arz* of Bijwaman takes it for granted that the sons of Chain Shah were legitimate. In a pedigree prepared in 1871 (Exhibit B3) Chain Shah is designated by the name of Muhammad Khan, indicating that he was treated as Muhammadan. This pedigree was prepared when there was no dispute as to the legitimacy of Chand Khan and others. In a judgment of this Court of 6th September 1912 (Exhibit B2) the evidence at present on the record was reviewed, and the following observations were made by the learned Judicial Commissioner:—

"It was suggested that we ought to regard the ancestors of the parties as illegitimate offspring of a union between a Bais Thakur and a Muhammadan woman..... It seems clear to me that this view should be put on one side. If the Settlement Records be considered in connection with oral evidence, it becomes clear that the Bais Thakur who contracted the union with a Muhammadan woman, from the children of which this family descends, himself became a Muhammadan and adopted a Muhammadan name. If his children had been regarded as bastards and as having no status in the world other than what would be attached to the illegitimate offspring of a Muhammadan woman, they would never have inherited the landed property, a portion of which is now to be the subject-matter of this litigation."

It may also be noticed that when the defendants of the present suit sued the daughter of Muhammad Husain Khan for recovery of the property of the present suit, no defence of the illegitimacy of Chand Khan and his brothers was put forward.

In the nature of things oral testimony about such an ancient event can be of little value. Some witnesses came forward on behalf of the plaintiffs to depose by hearsay that Chain Shah was a Hindu and that his body was cremated. This evidence is clearly fabricated. We hold that Chand Khan and his brothers were the legitimate sons of Chain Shah.

Coming to the question of custom, it has been proved out of the mouths of the plaintiffs' own witnesses. The plaintiffs' witness Akbar Khan deposed that no daughter or sister or their sons have received any share in the inheritance in the family of Chain Shah. Baldeo Singh (P. W. No. 2) deposed that in his family (*i. e.* the family of Chain Shah) daughters or sisters and their children were excluded from inheritance. Similar statements were made by Abdul Rahman Khan (P. W. No. 3) and Mendu Khan (P. W. No. 8).

The learned Counsel for the plaintiffs-appellants quoted a large number of rulings to discredit the testimony of his own witnesses. He argued that they were not persons who were likely to have any knowledge of the custom. This argument is surprising when the plaintiffs themselves produced these witnesses as persons well-acquainted with the family of Chain Shah, who could depose whether Chain Shah died a Hindu or a Muhammadan. For that reason it must be assumed that in the plaintiffs' opinion these witnesses were well-acquainted with the family of Chain Shah and the customs observed by that family. The evidence, moreover, is supported by definite entries in the *wajib ul arz*. In that record relating to village Saraura the custom relating to inheritance is recorded in paragraph 4 to this effect: "Although among Muhammadans the Muhammadan Law is acted upon, yet in our family the practice on the basis of the custom obtaining in the country is that a daughter and her sons are not entitled to inheritance." It is important to notice that the *wajib-ul arz* was not prepared by an officer as the result of enquiries held by him, but contains actual statements by family members of Chain Shah. It is signed by all his descendants who were in existence at the time. In the judgment of this Court referred to above, the learned Judicial Commissioner observes:—

"It is scarcely necessary to refer to the numerous cases in this Court in which it has been held that the custom of entirely excluding daughters and daughters' sons from inheritance is and has long been exceedingly prevalent amongst the Thakur clans in Oudh. The essential reason for this custom, as has been frequently pointed out, is to be found in the custom of exogamy by which the daughter of a Bais Thakur would necessarily marry a man of some other clan. It is certain that the desire to keep the landed property of the family from going out of the clan or sect was so strong amongst the Thakur families in Oudh, that a very widespread custom grew up and has long prevailed amongst such families excluding daughters and daughters' sons from inheritance in favour of collaterals, however remote."

The plaintiffs admitted that daughters were excluded from inheritance, but this admission they based not on a prevalent custom but on a finding by this Court in a certain litigation. When it is

proved that by custom daughters are excluded from inheritance, it may be safely assumed that sisters and their sons are also excluded. One of us pointed out during the arguments that the daughters of one generation were the sisters of the next. All the women of the family would be talked of as daughters of the family (*khandan ki larkian*), so it would not strike the family members who admitted the custom in the *wajib-ul-arz* to make a special mention of the exclusion of sisters. There is one very important piece of evidence on this subject in the statement of *Musammat* Qamran Bibi, a witness of the plaintiffs. She gave the instance of one *Musammat* Asghari Bibi being excluded from the inheritance of her brothers who died without leaving any issues. *Musammat* Asghari Bibi is a descendant of Darya Khan, one of the brothers of Chand Khan. We hold that sisters and sisters' sons are excluded from inheritance in the family to which the parties belong.

Beyond oral testimony there is no evidence of the exact date of the death of the plaintiffs' mother, *Musammat* Zab-un nisa. One of the plaintiffs' witnesses, Baldeo Singh, deposed that the plaintiffs' mother died during the lifetime of Muhammad Husain. It was pointed out by the plaintiffs appellants' learned Pleader that a defence witness, Muhammad Noor Khan, deposed that Muhammad Husain predeceased all his three sisters. But this witness corrected himself later on in his statement. On a balance of evidence we are not prepared to disagree with the lower Court's finding on this subject and hold that *Musammat* Zeb-un-nisa died before her brother, Muhammad Husain.

We dismiss this appeal with costs.

J. P.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 592 AND 593 OF 1919.

June 29, 1921.

Present:—Mr. Justice Jwala Prasad, Acting Chief Justice, and Mr. Justice Das.

Mahant JAI KRISHNA PURI—

PLAINTIFF—APPELLANT

versus

BHUKHAL GOPE—DEFENDANT—RESPONDENT.

Hindu Law—Religious Endowment—Mahant, *power of, to lease* math *lands*—Karta *of joint Hindu family and* mahant, *position of.*

A *mahant* is entitled to let the *math* lands if he does that in the ordinary course of business. [p. 291, col. 1.]

Palaniappa Chetty v. *Sreemath Deivasikamony Pandara Sannadhi*, 39 Ind Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.), distinguished.

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 393; 18 W. R. 81; Sevestre 253*n*; 2 Suth P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.), referred to.

There is no difference at all between the case of a *mahant* and the case of the manager of a joint family. [p. 291, col. 1.]

Obiter.—A *karta* of a joint family must have a large discretion in granting leases of joint family property and his discretion ought not to be fettered unduly. The only thing to be seen is that he does it in the ordinary course of business. [p. 291, col. 1.]

Second appeals from a decision of the District Judge, Bhagalpur, dated the 13th March 1919, reversing that of the Additional Munsif, Madhopura, dated the 15th April 1918.

Messrs. *Lachmi Narayan Singh* and *B. N. Mitter*, for the Appellant.

Mr. *Hasan Jan*, for the Respondent.

JUDGMENT.

DAS, J.—These analogous appeals arise out of suits instituted by the appellant to eject the respondents from certain lands which are specified in the plaint. The plaintiff is the *mahant* of the Marona *math* and his case is that his predecessor-in title, *Mahant* Bisseswar, settled these lands in perpetuity with the defendants. He says that *Mahant* Bisseswar was not entitled to settle these lands in perpetuity, as there was neither necessity for such settlement nor any benefit which accrued to the *math* in question.

The Court of first instance agreed with the contentions put forward on behalf of

the plaintiff and decreed the suits. The learned Judge in the Court below has differed from the Court of first instance and has dismissed the suits.

Now the learned Judge has found that the lease was not a perpetual lease; secondly, that it was not a lease at a fixed rent. He has further found that the late *mahant* granted these leases in the ordinary course of management and that, therefore, they are binding upon his successor-in interest. Mr. Lachmi Narain Sinha on behalf of the appellant argues that the learned Judge in the Court below has not displaced the finding of the Court of first instance, *viz*, that these lands were in the cultivating possession of the *mahant* and that they yielded him a profit of 10 to 15 maunds per *bigha*, and he strongly relies upon the case of *Pulaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (1). In that case the *mahant* sold a piece of land and lent the sale-proceeds at a remunerative rate of interest to somebody else, and the Judicial Committee held that it was not the ordinary course of business for a *mahant* of an institution to engage in a money-lending business. That case is entirely distinguishable. In this case it was for the *mahant* to decide whether it was profitable for him to cultivate the land himself or to let it out to tenants, and I can see no difference at all between the case of a *mahant* and the case of the manager of a joint family. I have always entertained the view that the *karta* of a joint family must have a large discretion in these matters and that we ought not to fetter his discretion unduly. We must of course be satisfied that he entered into the transaction in the ordinary course of management. That is the test which was laid down by the Judicial Committee in the leading case of *Hunoomanpersaud Panday* v *Musammat Babooee Munraj Koonweree* (2). That is the test which we must apply to this case. Did the *mahant* let these lands to the defendants in the ordinary course of business? The lower Appellate Court has found that he did. I agree with the decision of the learned Judge of the Court below and would accordingly dismiss these appeals with costs in Appeal No. 592.

JWALA PRASAD, A. C. J.—I agree.

J. P. *Appeals dismissed.*

(1) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 P. C.).

(2) 6 M. I. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.).

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 11 OF 1921.

August 10, 1921.

Present:—Mr. Justice Walsh and Mr. Justice Wallach.

THE UNION INDIAN SUGAR MILLS COY., LTD.—OPPOSITE PARTY—APPELLANTS

versus

JAI DEO—PETITIONER—RESPONDENT.

Companies Act (VII of 1913), s. 38—Rectification of register—Question of title—Jurisdiction—Appeal—Company, power of, to waive compliance with formalities for registering transfers of shares.

When a Company refuses to recognise the right of a person to be registered as a member on account of his failure to comply with certain prescribed rules and formalities, a question arises between the Company and that person, and he may apply under section 38 of the Companies Act and compel the Company to register him. [p. 292, col. 2.]

In proceedings under section 38 of the Companies Act, a Court may, but is not bound, to decide a serious question of title. Where the Court elects to decide the question, it may either decide it itself, or, under the proviso to the section, send it to somebody else in the form of an issue, but the decision on the issue, in either case, is the decision of the Court and is appealable in the manner provided by section 100 of the Civil Procedure Code. [p. 294, cols. 1 & 2.]

Snow, Ex parte, Diamond Rock Boring Co., In re, (1877) 2 Q. B. D. 463; 46 L. J. Q. B. 394; 36 L. T. 578; 25 W. R. 669, referred to.

The formalities and rules prescribed by the articles of association of a Company for compliance by an alleged transferee, or proposing member of a Company, to get his name registered, are matters which the Company may or may not insist upon. A Company has always a right to accept such evidence as satisfies its mind that an applicant is really the owner and a real transferee and entitled to be registered. [p. 292, col. 2.]

Appeal from an order of the District Judge, Cawnpore, dated the 3rd January 1921.

Mr. *B. E. O'Conor* Dr. *K. N. Katju*, for the Appellants.

Dr. *S. N. Sen* and Mr. *S. N. Mukerji*, for the Respondent.

UNION INDIAN SUGAR MILLS CO., LTD. v. JAI DEO.

JUDGMENT.—This is a simple matter. Certain property, including the shares in question in a limited liability Company known as the Union Indian Sugar Mills Co., Ltd., having its registered office in Cawnpore, was held by a family jointly. It is alleged by one Debi Dat, who happens to be at this time the Managing Director of the Company, with of course a commanding influence in the managment of its affairs, that in the year 1918 he separated from the branches of the family whom we will refer to compendiously as the respondents, and that an elaborate partition was carried out, with the result that the shares now in dispute were made over to him as part of his share. Although the evidence of the fact has never been put on the record, either by sworn testimony or by formal admission, so that one could say that it was properly on the record in the way in which we are accustomed to use that language, it appears from the surrounding circumstances that what he did was, having the share certificates in his possession, as would naturally be the case if his story is true, he did not trouble himself very much about the state of the register of share-holders in the Company's book. At the time of the partition, various blocks of these shares were registered in the names of the six different individuals who now figure as respondents. Some time afterwards, namely on the 2nd of January 1919, Debi Dat appears to have woke up, and to have carried out the partition in his own interest so far as it affected these shares by the following proceeding. He was armed with a *bahi khata* which has figured very largely in the learned Judge's judgment and, therefore, cannot be treated as non-existent, although it certainly has not been formally proved, which purported to record the result of the partition signed by some of the predecessors of the respondents, and authorised Debi Dat to transfer, or deal with, or otherwise effectually carry out the partition so far as the shares were concerned. He was also armed with the certificates, as we have said. He preferred, for reasons into which it is no business of ours to enquire, that his alleged holding should be distributed between various nominees of his own, possibly as rewards to these doubtless deserving individuals, possibly as an inducement to get votes at the annual meeting in case Debi Dat required the support of the share holders. He, therefore, filled up the formal transfers with the names of his nominees as transferees, and executed the formal transfers in the names of the alleged transferors "by the pen of Debi Dat." He then approached the Company, which in other words means the paid Secretary, and it can surprise nobody in connection with the case, that at his request the Company made the necessary alterations in the register of share-holders. Now if these shares had been lawfully sold or allotted to Debi Dat for good consideration by the respondents, nobody could complain of that transaction. If, on the other hand, they have never been partitioned or allotted in favour of Debi Dat and are the property of the respondents, he was perpetrating a gross swindle. So long as that question remains undecided, there is a question of title between share holders of the Company on the one hand and alleged share-holders on the other. So far as the Company is concerned, we have been unable to discover any question between the respondents as the former registered holders of the shares and the Company, although we have constantly called upon the respondents' Advocate to formulate such question. There would be a question, if the present respondents and former owners were still the owners of the shares, and a very grave question, but it would be merged in the question of title, which we have already described, between the two sets of contending owners. Although the articles of association prescribe certain conditions which have to be complied with to entitle a transferee, or proposing member of a Company, to get his name on to the Company's register as a member of the Company, those are matters which the Company may or may not insist upon. If the Company insists upon them and an alleged transferee is not recognised as such by the Company, and the Company refuses to register his name, undoubtedly a question arises between him and the Company, and he may apply under section 38 and compel the Company to register his name; and then the question will arise whether he has complied with the articles or not, and whether the

Company has a right to insist upon conformity with the articles. But a Company has always a right to accept such evidence as satisfies its mind that an applicant is really the owner and a real transferee and entitled to be registered, and it would be surprising if the Company did not accept the word of its own Managing Director, especially if he produced any evidence in support of it.

There are some observations in the judgment, and some observations have been addressed to us in support thereof, which are so startling from the ordinary business point of view of the working of a Company, that we find it difficult to deal with them in the course of this judgment. To suggest, as the learned Judge seems to suggest, that upon an alleged transferee presenting himself and his material to the Company for registration, the Company is not to do anything until it has given notice to the transferor and is to constitute itself an amateur Court of inquiry with power to hear witnesses and examine documents, and goodness knows what, is really unreasonable, and if it were conceivable it would bring work in many Companies to a standstill. Substantial Companies in which shares are constantly changing hands would have the whole of their time taken up and their offices occupied by struggling transferors and transferees awaiting judgment. Dr. Sen seems to make it a grievance that the act of January 1919 was done "behind his back." We are unable to understand what bearing this suggestion has. Of course it was done behind his back. The duty of a transferee is to get his shares registered and the name of the transferor removed from the register of share-holders. The duty obviously lies upon somebody. Nothing would be more embarrassing to an ordinary share-holder, after he has sold his share and forgotten all about it, to find that his name still figured upon the register of share-holders, possibly exposing him to unforeseen liabilities, and therefore the Act has gone out of its way to give the transferor a statutory right to apply for rectification if the transferee and the Company neglect their obvious duty in the matter. Why Dr. Sen thinks that this section helped his argument we are at a loss to understand. In the circumstances above mentioned and bearing in mind these general observations, the present respondents, discovering that they were not summoned at the last annual meeting and being refused permission to vote, made this application to the learned Judge for rectification of the register. If they had proved to the satisfaction of the learned Judge that they were the owners of the shares and that the assertion of the right of Debi Dat was a mere sham, they would have been entitled to succeed. If on the other hand the learned Judge had gone into evidence and examined the applicants' title and had decided against them, their application ought to have been dismissed. There was a *tertium quid*. The learned Judge was not bound, and some Judges have even expressed a doubt whether they are entitled, to decide in a proceeding of this kind a serious question of title. In England the matter seems to have been more or less set at rest by the decision in *Shaw, Ex parte, Diamond Rock Boring Co., In re* (1) that "it is a matter of discretion whether the Court or Judge will exercise the summary jurisdiction; and in a complicated or doubtful case the jurisdiction ought not to be exercised; but when the legal title in the applicant is clear the order ought to be made." It is possible that in view of the slight judicial controversy in England, the final proviso to section 38 was added in India which finds no place in the English legislation. However, the learned Judge elected not to decide the question of title; indeed he held that he could dispose of the matter without doing so, and it is sufficient to say for this purpose that no sworn testimony of any sort or kind was given. The most informal evidence was laid before the learned Judge. Both parties before us seem to be agreed that a suit is sooner or later inevitable. Therefore, we come to the conclusion that the learned Judge was perfectly right, on the material which he had before him, in declining to adjudicate on the question of title. It is the latter part of his judgment, after he leaves that question, where we are unable to follow him. What he thought he was really deciding, or what he thought the real object of the section was, we are unable to say. He seems to have failed to consider whether the question

(1) (1877) 2 Q. B. D. 463; 46 L. J. Q. B. 894; 36 L. T. 573; 25 W. R. 569.

which he was dealing with was a question, as mentioned in sub-section 3 of section 38, between members or one between alleged members on the one hand and the Company on the other. Having felt himself unable, and having declined, to adjudicate on the question of title, the only thing to do was to dismiss the application. Indeed the application was bound to fail unless the applicants chose to prove their title. No wrong has been done them, no infringement of any right of theirs has been committed by the Company. Assuming that they were not the rightful owners of these shares, if the application was made independently of that question, it was wholly misconceived. We should have been prepared, if that view of the question had been taken by the respondents, to treat this matter as a matter which had gone off in the wrong direction and to make the costs of both sides in both Courts costs in the suits, but having regard to the tenacious way in which the appeal has been resisted by the respondents, we must allow the appeal with costs in both Courts including in this Court fees on the higher scale.

The respondents took a preliminary objection to the hearing of the appeal. That point really has given us more trouble than any other in the case. The section is certainly drafted in a singular form which gives colour to the objection raised on behalf of the respondents. The language used is that the Court "may direct an issue to be tried in which any question of law may be raised." The plain English of that provision would suggest that the intention was that the ordinary jurisdiction of the Civil Courts for the determination of questions of title was to be ousted, but that view does not seem to have been taken in India and we express no opinion about it. At any rate the parties before us are prepared to seek a decision from the Civil Courts by suit. It is to be observed that the language used is not that the Court may direct an issue of law to be tried, but "may direct an issue", and it then goes on to say that in that issue any question of lay may be raised. We think that means that the Court may direct an issue on the question, for example, of title, and in such issue a question of law may be raised. It then goes on to provide that an appeal from a decision of such an issue shall lie in the same manner as directed by the Code of Civil Procedure. We must give an intelligible meaning to the section. The Legislature can hardly have meant that if the learned Judge himself decided the question of title involving difficult and important questions of law, there should be no appeal, but that if he sent it to somebody else in the form of an issue, his decision on the issue should be appealable. We think that it must mean that the decision, as the result of the issue, is the decision of the Court. The issue may be tried by the Subordinate Judge or the Munsif or even a Vakil appointed for the purpose, but the order passed under the section resulting from the issue would be the decision of the Court, and from such decision or rather from the decision of such an issue, whether tried by the Judge or somebody else, an appeal lies in the manner provided by section 100. That means that the right of appeal is limited, as it is in second appeal, to a point of law. Nobody hearing Dr. Sen's argument could seriously doubt that a question of law was involved in the hearing of this appeal. The learned Judge clearly misdirected himself. In our view an appeal lies.

N. H.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1023 OF 1921.

June 28, 1921.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

RACHHYA RAUT AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Musammat CHANDO AND OTHERS—DEFENDANTS—RESPONDENTS.

Court-fees—Partition suit—Court-fee payable, determination of—Prayer for declaration of title and possession —Ad valorem *Court-fee payable.*

In order to determine what Court-fee is payable in a suit one must look to see what is the real nature of the claim [p. 295, col. 1.]

Mohendro Chandra Ganguli v. *Ashutosh Ganguli*, 20 C. 76; 10 Ind. Dec. (N. S.) 514 and *Bidhata Rai* v. *Ram Chariter Rai*, 12 C. W. N. 37; 6 C. L. J. 651; 3 M. L. T. 38, followed.

PHULCHAND v. KANDHYA LAL.

Where in a suit for partition the plaintiff in the very forefront of his olaim asks for a declaration of his title and possession, as a cloud is cast upon his title by reason of some of the lands being entered in the Record of Rights as in the possession of the defendants, an *ad valorem* Court-fee is payable on the value of his share not entered in his name.

Appeal.

Mr. *Atul Krishna Kai*, for the Appellants.

JUDGMENT.—It appears to us that in this case the decision of the Taxing Officer was right. The plaintiffs brought a suit for partition of 13 *bighas* 16 *cottas* 1 *dhur* of land. Before the suit was brought, it appeared that some of the land had been entered in the Record of Rights as in the possession of the defendants and in these circumstances a cloud was cast upon the title of the plaintiffs, and in the forefront of their prayer in the plaint they claimed a declaration that the land in suit with the trees standing thereon is the ancestral property of the plaintiffs and the defendants, and that both the parties, according to their respective shares, are in joint possession and have been appropriating the produce thereof, and, secondly, they claimed that as a result of the adjudication on the above point a decree for partition may be passed by the Court. We quite agree. As appears from the cases of *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli* (1) and *Bidhata Rai* v. *Ram Chariter Rai* (2), one must look to see what is the real nature of the claim. If it is merely a suit claiming a partition and nothing else, then it makes no difference that the defendants by their written statement raise a question disputing the title or possession of the plaintiffs. But if, as here, in the very forefront of their claim they ask the Court for a declaration of their title and possession, then it seems to us that they are claiming under the guise of a partition suit a declaration of their title, which is the proper subject-matter of a title suit, and, therefore, as the Taxing Officer has determined, the fee payable in the Court of first instance was deficient to the extent of Rs. 17-4 0. Before this appeal can proceed, we must declare that the deficit Court-fee upon the plaint, viz., Rs. 17-4-0, must first be paid. The learned Vakil for the appellants has undertaken to pay the Court-fee by the end of this week. Let the Court-fee be accepted if paid by Saturday next,

J. P. *Order accordingly.*

(1) 20 C. 762; 10 Ind. Dec. (N. s.) 514.
(2) 12 C. W. N. 37; 6 C. L J. 651; 3 M. L T. 33.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 259 OF 1920.

August 9, 1921.

Present:—Mr. Justice Walsh and Mr. Justice Wallach.

PHULCHAND AND OTHERS—OPPOSITE PARTIES—APPELLANTS

versus

KANDHYA LAL—APPLICANT—RESPONDENT.

Res judicata—*Execution proceedings—Civil Procedure Code (Act V of 1908)*, s. 11, *O XXI, r.* 50 (2), *applicability of.*

The provisions of *res judicata* as laid down in section 11 of the Civil Procedure Code are not specifically applicable to execution proceedings, but where, in such proceedings, an issue is actually before the Court, and is heard and finally decided by it, the decision is binding on the parties on principles analogous to those of *res judicata*. [p. 301, col. 1.]

K, a decree-holder, applied for execution against a firm represented by one *M*. and got a certain property attached. *P.*, a brother of *M*, applied for the release of the property, alleging that it belonged to him and not to the firm and that he was not a party to the decree. The Court released the property, holding (1) that the objector was not a party to the decree, and (2) that the attached property was not proved to be the property of the firm. *K.*, then made an application under Order XXI, rule 50 (2), asking for an adjudication as to whether *P.* was, or was not, a member of the firm. *P.* objected that the question being already decided by the order for the release of the attached property, the application was not maintainable:

Held, by *Wallach, J*, *Walsh, J*, dissenting), that the application was not barred, as the Court releasing the attachment had not specifically before it, nor did it decide, the issue, under Order XXI, rule 50 (2) of the Civil Procedure Code as to whether *P.* was or was not a member of the firm and that this issue might have been raised but as section 11, Civil Procedure Code, was not specifically applicable to execution proceedings, Explanation IV to that section had no bearing upon the point. [p. 302, cols. 1 & 2.]

Ram Kirpal v. *Rup Kuari*, 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind Dec. (N. s.) 718, *Kishan Sahai* v. *Aladad Khan*, 14 A. 64; A. W. N. (1891) 221; 7 Ind. Dec. (N s.) 413, *Kalyan Singh* v. *Jagan Prasad*, 0 Ind. Cas. 523; 37 A 389; 13 A. L. J. 828, *Kalian Singh* v *Jagan Prasad*, 27 Ind. Cas. 950; 13 A. L. J. 1[illegible], referred to.

Execution first appeal from a decree of the Subordinate Judge, Banda, dated the 23rd of June 1920.

Mr. *A. P. Dube*, for the Appellants.

Mr. *L. M. Banerji*, for the Respondent,

JUDGMENT.

WALSH, J.—This is an appeal from an order passed by the Execution Court under Order XXI, rule 50, attaching the property of two young alleged partners, one of whom, Phul Chand is dead, so that the order has been made against his heirs, and the other of whom Suraj Karan is still a minor, by reason of their being, as I understand the judgment, members of a joint Hindu family and, therefore, members of the firm which undoubtedly had been carried on by their father Mahadeo Prasad and was afterwards undoubtedly actively carried on by his elder son Mangli Prasad on behalf of them as members of a joint family, if they continued joint, and on behalf of himself and any other person who was interested if they were separate. The case seems to me an important one and by no means a simple one, although I take a very clear view of what our order ought to be. Unfortunately my brother and I do not agree in the view we take of the questions raised by the appeal, and according to the ordinary practice my judgment, when delivered, will be withdrawn and the appeal will have to be dismissed, as the appellants have failed to satisfy both members of the Bench. The detailed facts of the proceedings which led up to this application are fully and clearly set out in my brother's judgment, which I have had the advantage of reading, and it is, therefore, unnecessary for me to repeat them. I gather that the broad view on which he thinks this order ought to be supported is that grave injustice may be done to the decree-holder if he be precluded, as he would be precluded, if we allow the appeal, from proving that the appellants were partners. It seems to me that one answer to this is that, if injustice there be, it has been brought upon the decree-holder by the procedure which he has followed in his endeavour to execute the decree, not in my view by misfortune or by miscalculation, but by a deliberate effort in my view to overreach himself and get an order against the present appellants without running the risk of a decision against him under Order XXI, rule 50, which was the appropriate procedure. In other words, he assumed everything in his own favour and applied for execution of the decree by an injunction and by obtaining an attachment of the appellants' property without waiting for a decision that the appellants were partners in the firm, whether as members of a joint family or otherwise.

There is another answer. It may be that this is a hard case, but there are instances in which hard cases, if admitted, make bad law, and in my judgment this is one. We have to consider the effect of our decision upon the general law and the sort of future experiments which a decree-holder with a decree against a firm may make if we uphold this order.

By the attachment of the 18th August 1917 which was made by the decree-holder, the present appellants were forced in self-defence, if they ever wanted to save their property, to object. Their objection was that the property belonged to them and not to the firm. The order of the 6th of September 1918, which to my mind is the main difficulty in the way of the decree-holder in these present applications, exempted the share upon the present appellants' objection and exempted it as though they were separated Hindus entitled each to one third of the property which had been attached, and held that the attached property had not been proved to be the property of the firm. I pause here for one moment to examine the converse case. If it had been found by the Court in that proceeding that the property was the property of the firm and that it was attachable in the hands of the then objectors as being members of the firm, what possible remedy had the appellants, or what possible means was there of escaping from that order and from submitting to their property being sold unless they successfully appealed against the order?

Order XXI, rule 50, is a provision in favour of the decree-holder and in my judgment it ought to be interpreted in that light. It is framed upon the English model, and it provides a scheme for enabling a decree-holder to obtain execution against an alleged partner, in the first place, who has appeared and has either admitted or been adjudged to be a partner, or alternatively, against a person who has been served in the suit as a partner and has failed to appear. Sub-rule (2) provides an additional

procedure for meeting the difficulty which is just the difficulty in this case, which is a frequent difficulty in the case of business firms, who in fact trade under other descriptions than their right names, and are allowed by the law to sue and be sued in their trade names. It often happens in such cases that there are persons who are members, and who have provided capital, and are enjoying the profits, whose identity is concealed beneath the trade title which has been adopted, and sub-rule 2 provides that where in such cases a decree-holder desires to enforce his decree against any other person than the persons referred to, whom I have mentioned already, as being members of the firm, he may apply to the Court for leave. If the liability is not disputed, he obtains the leave as a matter of course and the property is liable to execution. If the liability is disputed, then the matter is to be tried in any manner in which an issue may be tried and determined. Nobody can deny that that issue was in fact, however well or however badly, determined by the order of the 6th of September 1918. If this order now appealed from is upheld it necessarily follows that a decree-holder can enjoy a preliminary attempt to execute a decree by attachment or other ordinary proceeding in execution. If he fails, after resistance by the person whose property is sought to be attached, he is then to be allowed to fall back upon Order XXI, rule 50, and have, as in colloquial language, a second shot. If he succeeds, the order is undoubtedly binding upon the person who objects to the attachment. How can it be said in such a proceeding that a judgment-debtor is bound and a decree-holder is not? It is my difficulty upon this point which makes me differ from the view taken by my learned brother.

It seems to me that the argument becomes *a fortiori* when the order of the 3rd of May 1919 is looked at. That was an application by the decree-holder for review. No doubt it was misconceived, but it was made and it still stands as a binding decision upon the parties in this execution proceeding, and the decision of the Court there was that the previous decision had been that the present appellants were not parties to the decree (which by the way was a bad reason because it begged the whole question) and, secondly, that the property sought to be attached was not the property of the firm. Mr. Lalit Mohan Banerji, seeking to justify the position of his clients, adopted an argument which I can only describe as a counsel of despair, by taking the line throughout his argument that these proceedings of the decree-holder were *ultra vires*. I do not know what this means. He applied for attachment in the ordinary way to the proper Court, and the Court which entertained the application entertained it within the scope of its jurisdiction under section 47. I fail to see how these proceedings can be considered *ultra vires*. But assuming that it is a correct description of them, I further fail to see how a decree holder can improve his position by getting an order against himself in a proceeding which he wishes to ignore and then treating it, although he himself brought it for his own advantage, as a proceeding which should have been treated as *ultra vires*.

I think the decision appealed from is contrary to principle and the direction as given to the Courts in India by the Privy Council. I refer particularly to the decision in *Ram Kirpal* v. *Rup Kuari* (1), the well-known case in which it was sought to get behind an order with regard to mesne profits which had been passed in the interlocutory stages of a case between the same parties by the District Judge; the matter afterwards went up to the High Court, and in the final decree the High Court held that inasmuch as there had been no final disposal of the point, it was open to the parties in the final proceeding to re-open the question which had been decided by Mr. Probyn in the interlocutory proceedings. An appeal was brought to the Privy Council, and they held that the order construing the decree having been made in the same suit in which the application was made, the question whether the law of *res judicata* applied was not relevant. The decision had become final between the parties upon general principles of law, and Sir Barnes Peacock used this language:—

(1) 6 A. 269; 11 I. A. 87; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718.

PHULCHAND v. KANDHYA LAL.

"The question, if the term *res judicata* was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon section 13 (now section 11) but upon general principles of law. If it were not binding, there would be no end to litigation."

In my judgment every word of this passage applied to the present appeal. On page 275 Sir Barnes Peacock used the following language:—

"Mr. Probyn's judgment and the order passed thereon was never reversed or set aside. It was said that a special appeal from that judgment did not lie to the High Court. If so, the judgment was final; if an appeal did lie and none was preferred, the judgment was equally final and binding upon the parties and those claiming under them. It would be a reproach upon the administration of justice if, after endeavouring for 11 years to obtain execution for mesne profits in accordance with a judgment of a Court of competent jurisdiction against which no appeal was preferred, the parties could now be told that that judgment was erroneous, and that they were not entitled to mesne profits."

That case was referred to—I do not say explained—because it seems to me to require no explanation, and acted upon by a judgment of this Court in *Kishan Sahai* v. *Aladad Khan* (2). In that case the judgment-debtor sought to raise, in objection to execution, a point which he had refrained from pleading in the suit and there was a binding order upon him in the same suit between the same parties. The then Chief Justice, Sir John Edge, used this language:—

"Although section 13" (now section 11) "may not in terms apply by reason of the matter not having been decided in another suit, still the Privy Council in an analogous case has told the Courts in India that the principle of law underlying section 13 is to be applied to proceedings in the execution of decrees. The case to which we refer is *Ram Kirpal* v. *Rup Kuari* (1)."

Those two cases both apply against a judgment-debtor. It seems to me that the same principle must be applied against a decree-holder who has the misfortune to obtain an order in the proceeding against himself which he does not set aside. To my mind difficulty is created by attempting to apply the provisions of section 11 to a general principle of law. In fact the principle which the Privy Council has set is not governed by section 11 at all. It only confuses the issue to examine the explanation to section 11 in a matter to which section 11 does not apply. It further confuses the issue to talk about *res judicata* when the principle of *res judicata* is not involved. That is the respectful comment which I make upon the decision of Mr. Justice Chamier which was affirmed in Letters Patent Appeal by this Court in *Kalyan Singh* v. *Jagan Prasad* (3). It seems to me that somewhat unsuccessful effort is made to distinguish that case from the decision in the Privy Council. The Privy Council expressly decided that the principle of *res judicata* did not apply and, therefore, it does not help matters to hold that the judgment debtor is not prevented by certain proceedings by the principle of *res judicata* and to examine the explanation contained in section 11. In that case, if I may respectfully say so, the decision was clearly right, but the point was somewhat different. It certainly has no application to the present appeal in my view. The point was, what was the balance due from the judgment debtor to the decree holder when the final decision in the execution proceeding was reached? There had been previous execution proceedings, but the

(2) 14 A. 64; A. W. N. (1891) 221; 7 Ind. Dec. (N. s.) 413.

(3) 30 Ind. Cas. 523; 37 A. 589; 13 A. L. J. 828.

question of the balance due was not then relevant. Intermediate matters had to be got out of the way. Property which had been attached and seized by the decree-holder had to be realised before the pecuniary extent of the judgment debtor's remaining liability could be put into precise figures. When at the last stage in winding up the final account it was necessary to see how much remained due from the judgment-debtor, it was discovered that the decree-holder was charging interest upon costs beyond what he was entitled to receive. The correct answer, in my humble judgment, if it was a correct answer, was that that point had never been decided. In my view the issue is confused by introducing a discussion of Explanation IV to section 11 in matters in which the Privy Council has distinctly said that section 11 has no application. In my view the orders of the 6th of September 1918 and 3rd of May 1919 are final and binding upon the decree-holder and on that ground the appeal ought to be allowed.

In that event it would be unnecessary to consider the evidence on the merits. I do not propose to dwell, at the length I otherwise might do, upon the evidence taken in the Court below upon the merits, inasmuch as, if this order stands to-day, the question will never arise, and if an appeal is brought from this decision, the appellant will be able to go into that question before the Appellate Court. I will content myself with saying that, ignoring the positive evidence which was given in the previous proceeding in 1918 in favour of the appellants and the somewhat attenuated answer which the decree holder at that stage made (I am doubtful whether we, sitting as an Appellate Court, are entitled to look at the evidence given in the previous proceeding in 1918 which might have been brought on the record in this case and was not), I am bound to say that the judgment of the learned Judge in this case does not strike me as founded upon a really careful examination of the balance of the evidence. He apparently accepts the evidence of three witnesses who acted some time or another as *mukhtar-am* for Mangli Prasad. Still on the other hand he assigns that as a reason for rejecting the evidence of a person who was acting in a similar capacity for the other side at the time of the hearing. The case for the appellants is that being originally members of a joint family, the elder brother retired from this province and went to Jaipur, and that in this application they did not trouble to call much evidence on the question as they had done so once already. It was on the record in the execution proceeding of the very Court which was hearing the case and they had an order in their favour with reference to this actual property. But it is to be observed that the present respondents on the merits, although they had had the benefit of a dress rehearsal, or preliminary hearing upon the merits, did not attempt to call any evidence from Jaipur where the partition had been said, and, in my opinion, had been found, to have taken place, and all the witnesses they put forward carefully refrained from professing any knowledge as to what happened after the brothers went to Jaipur. The only question with regard to Jaipur which they relied upon at all was the date when the removal took place. They contended that the date was after the liability was incurred and even after the commencement of the suit; whereas every witness was judiciously vague and hopelessly contradictory with the other, and it is impossible to come to a definite conclusion on that point. It seems to me that this is one of the salient points in controversy and the learned Judge has altogether missed it. He throws no light upon it, but merely finds as a fact that the appellants are members of a joint family. On these questions I am strongly in favour of upholding the finding of fact of the Court below, but I am not at all satisfied that the decision in this case was according to the weight of evidence.

But the point that strikes me about the investigation of the evidence, particularly the evidence which was given at the hearing in 1918—and because that order is in question, I think we were bound to look into that evidence—is that there was a mass of evidence on both sides with regard to the partition, with regard to the date, with regard to the membership of the appellants' joint family and their membership of the firm, and whether the Court in the order which it passed on that occasion expressed itself well or badly, or disposed of the case in a satisfactory way, there is no doubt that the parties were under no misapprehension as to the issue in dispute. The issue in dispute on the

evidence was clearly whether or not they were members of the joint family and, in my view, the learned Judge could not by law have come to the conclusion he did, and passed the order exempting the property as he did, without deciding that question as a question of fact. For these reasons I think the appellant is right.

WALLACH, J.—This appeal arises out of an application, dated the 5th of May 1919, under Order XXI, rule 50, clause 2. It appears that on the 9th April 1915 the firm Bhairon Prasad Mahadeo executed a *hundi* for Rs. 2,500 in favour of Gajadhar Prasad payable 181 days after date. On the 10th April 1915 the same firm executed a *hundi* for Rs. 2,500 in favour of Bhagwan Das and Babu Damodar Das payable 181 days after date. The rights of the payees of both these *hundis* were bought by Lala Kandhya Lal, the respondent in this appeal. On the 10th August 1915 he brought a suit for Rs. 5,377-8-0, being the principal and interest due on the two *hundis* aforementioned. He impleaded as defendants (1) the firm of Bhairon Prasad Mahadeo, (2) Bhagwan Das, (3) Babu Damodar Das and (4) Gajadhar Prasad. A compromise decree was passed on the 28th November 1919, in which Mangli Prasad on behalf of the defendant firm undertook to pay Rs. 6,120 in five instalments. Four houses and certain Zemindari property were mortgaged as security for the due payment of the instalments due under the decree. The decree provided that on the failure to pay one instalment or if interest payable fell into arrears for six months, the whole decree could be executed and that the decretal amount could be realised from the mortgaged property and the person or other property of Mangli Prasad, Phul Chand and Suraj Karan, members of the firm Bhairon Prasad Mahadeo. The decree was only against the defendant No. 1, defendants Nos. 2, 3 and 4 having been exempted by the plaintiff's Vakil. There having been a breach of a condition of the compromise decree, the decree holder applied on the 30th July 1917 for execution and asked that the property charged in the decree be attached and sold. On the 8th August the plaintiff applied for an injunction restraining Mangli Prasad, Phul Chand and Suraj Karan from dealing with the property which had been mortgaged. The property was actually attached on the 18th August 1917. On the 12th September Phul Chand on behalf of himself and on behalf of his minor brother Suraj Karan applied to have the property exempted from attachment. This application sets out that the attached property belongs to the objectors and not to the judgment-debtor and that the decree in execution of which the property had been attached did not contain the names of the objectors as judgment-debtors. The objection further stated that the objectors had filed an application to set aside the *ex parte* decree. In fact an application by Phul Chand on behalf of himself and his minor brother was filed on the 8th September 1917 to set aside the *ex parte* decree. Orders in both these cases were passed on the 6th September 1918. The order in the case objecting to the attachment of the house and Zemindari property is as follows:—

"The decree holder has obtained a simple money decree against defendant No. 1, *i. e.*, firm Bhairon Prasad and Mahadeo. The present objectors were not parties to the decree. Mangli Prasad appeared for the firm. These objectors are brothers of Mangli Prasad. They were never disclosed in the plaint as partners. The property attached has not been proved to be the property of the firm. Under the circumstances attached property must be the property of the objectors as well as that of the judgment-debtor Mangli Prasad representing the firm.

Ordered

2/3rd share in the property attached be released; parties to bear their own costs."

The order dismissing the application to set aside the *ex parte* decree was that the applicants were not parties to the decree and that the Court did not see how they could apply to have the decree set aside in the execution department. The decree-holder filed on the 14th September 1918 an application for review of the order of 6th September 1918 releasing 2/3rds of the mortgaged property from attachment. This application was dismissed on the 3rd May 1919. The Court in dismissing the application for review explained that the order of

6th September 1918 was based on two points, namely:—

(1) That the objectors were not parties to the decree, and

(2) The attached property was not proved to be the property of the firm

The learned Subordinate Judge (who has succeeded the Subordinate Judge who passed the orders of 6th September 1918 and 3rd May 1919) delivered on the 23rd June 1920 the order now under appeal. He held that the previous orders were no bar to the application under Order XXI, rule 50, clause 2. On the merits he held that Phul Chand and Suraj Karan were members of the firm Bhairon Prasad Mahadeo at the time when the *hundis* of the 9th and 10th April 1915 were executed and that they were as much liable to pay the decretal debt as Mangli Prasad was. It has been strenuously contended in appeal before us that the learned Subordinate Judge was wrong in allowing the parties to go into the merits of the case and that he should have held that the order of the 6th September 1918 was final and conclusive between the parties. On behalf of the respondent it is urged that the application for attachment of the mortgaged property was unnecessary and that the filing of this application in no way prevented the decree-holder from seeking an adjudication under Order XXI, rule 50, clause 2. The present application is as to who the members of the firm Bhairon Prasad Mahadeo were. I do not think that the decree-holder can escape being bound by the decision of the 6th September 1918 merely because his application was unnecessary. This application gave rise to Phul Chand and Suraj Karan's application of the 28th September to have the attachment removed. If in these applications the issue now before the Court has been heard and finally decided, then on the analogy of section 11 of the Code of Civil Procedure the decree-holder would be barred from re opening the issue. Explanation III to section 11 reads as follows: "The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

Explanation IV lays down:—"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." Explanation IV, therefore, extends the principle of *res judicata* not only to questions which have been heard and finally decided by the Court, but also to matters which might and ought to have been made ground of defence or attack. There is no doubt that in the proceedings anterior to the application under Order XXI, rule 50, clause 2, the question which has been decided on the merits by the learned Subordinate Judge in favour of the decree holder might have been raised. In considering whether the doctrine set down in section 11 of the Code of Civil Procedure is to be applied by analogy it is convenient to refer to the decision of Chamier, J., in *Kalian Singh* v. *Jagan Prasad* (4), which decision was subsequently upheld in appeal under section 10 of the Letters Patent by Richards, C. J., and Rafique, J., in *Kalyan Singh* v. *Jagan Prasad* (3). The report shows that previous rulings on this point were brought to the notice of Chamier, J. Chamier, J., on page 165* of the report says:—"It has been held in several cases that a matter once decided by a Court executing a decree cannot be re opened at a subsequent stage of the proceedings; but I am not aware that it has been held that a judgment debtor who puts forward objections in the execution department must put forward all possible objections once and for all, and that if he does not do so, matters which he has omitted must be treated as *res judicata* against him even if he was not aware of them. In the present case there has certainly been no decision on the question now raised, and in the absence of authority, I am not prepared to hold that the matter is *res judicata* against the judgment-debtor because he had a previous opportunity of raising the question but did not do so." On page 590† their Lordships in upholding the decision of Chamier, J., say:—"It seems quite clear that the provisions of the Code as to *res judicata* are not expressly made applicable to execution proceedings. It is said, however, that there are numerous authorities, in which the principle of *res judicata* has been applied to execution proceedings. No authority has been shown to us where it has been decided that if a judgment-debtor does not take exception to the amount set forth as

(4) 27 Ind. Cas. 950; 13 A. L. J. 162.

*Page of 13 A. L. J.—[*Ed.*]

†Page of 37 A.—[*Ed.*]

being due in an application for execution, he is prevented by the rule of *res judicata* from ever afterwards raising the question. To hold that he was would not only be applying the rule of *res judicata* in a way not provided for by the Code, but would be also seriously extending the authorities cited. In the present case the question as to how far the decree remained unsatisfied was never raised or decided. It is only by calling to his aid Explanation IV that the decree holder can contend that the question has already been decided.....If it is considered expedient (we do not say it is) to make all the provisions of section 11 of the Code applicable to execution proceedings, it should be done by Legislature and not by the Judges."

In the application for attachment the decree-holder did not ask for an adjudication as to whether Phul Chand and Suraj Karan were members of the firm Bhairon Prasad Mahadeo, but took for granted that they were members of that firm and without asking for an adjudication on this point, claimed attachment of the property mortgaged as well as of their own property, if the mortgaged property was not sufficient to satisfy the decree. In the application to release the property from attachment, which may be taken as the answer to the decree-holder's application of the 30th July, the present appellants did not specifically raise the plea that they were not members of the firm and that, therefore, their property could not be attached in execution of the decree. What they did say was that the attached property was their sole property and did not belong to any judgment-debtor, that Mangli Prasad, the brother of the objectors, having become ruined had emigrated to Jaipur and that the decree in execution of which the property had been attached did not contain the names of the objectors as judgment-debtors and was also invalid according to law. The evidence of the two witnesses who were examined by the Court in the proceedings for setting aside the *ex parte* decree was read to us. That evidence was to the effect that Mangli Prasad had emigrated to Jaipur and that no separation between the objectors and Mangli Prasad had taken place in the presence of the witnesses. We were told that there was other evidence which had been taken on commission and which went to show that a separation had actually taken place between the brothers. The Judge evidently did not take the view that the brothers were separate, because he released a 2/3rd share of the attached property and directed the parties to bear their own costs. The order of the Judge has already been quoted. Had the Sub-Judge accepted the objectors' contention, he would have released the whole of the attached property. The reason for his decision appears to be that the objectors were not parties to the decree, that their names were not disclosed in the plaint as partners and that it had not been proved that the attached property belonged to the firm. It seems that the learned Judge did not have before him, and did not intend to decide, the issue which was adjudicated upon in the order which is now under appeal. This is the issue as to whether or not Phul Chand and Suraj Karan were members of the firm of Bhairon Prasad Mahadeo at the time when the *hundis* of 9th and 10th April 1915 respectively were executed. It seems to me that a grave injustice might be done to the decree-holder if in the circumstances he were precluded from proving in these proceedings that the appellants were partners of the firm in question. In my opinion, therefore, the appeal must now proceed on the merits.

We have now been addressed on the merits of the case. Mr. Dube on behalf of the appellants has read not only the evidence of the two witnesses who were examined in Court in the proceedings in 1918, and to which I have already referred above, but has also read the evidence which was taken on commission in that proceeding in Jaipur. In my opinion that evidence is not admissible in these proceedings, not having been legally brought on the record. But as the evidence has been read, I should like to say that in my opinion it does not carry the case of the appellants very far. Five witnesses were examined on commission in Jaipur on the 3rd of March 1915. They all profess to have taken part in the division of the property between Mangli Prasad and his two minor brothers. They do not say when the partition took place, except that it happened 2 or 2½ years before they gave evidence. They say that a partition deed had been executed. It is not said whether the deed of partition was registered or not,

KANGALI CHARAN *v.* SURJA NARAIN.

The partition deed was never produced in evidence. It does not appear who acted on behalf of the minors in those proceedings. Having heard the evidence read, I hold that it does not prove a partition of the family. Certain documentary evidence, which was produced in that case, was also referred to by Mr. Dube, but, in my opinion, it does not carry his case any further. The documentary evidence produced on behalf of his clients consisted of the plaint and written statement in a suit brought by the firm Baijnath Juggi Lal against the firm Bhairon Prasad Mahadeo through Mata Din. In paragraph 3 of the written statement Mangli Prasad alleged that he and his two minor brothers were members of the firm. Two documents had also been produced on behalf of the respondents in the proceedings of 1918. One was the plaint in Suit No. 55 of 1915 in the Munsif's Court at Banda, in which Mangli Prasad and his two brothers, Phul Chand and Suraj Karan, jointly sued a person for a debt which had been contracted in favour of their deceased father. The second document was the plaint in Suit No. 451 of 1915 in the same Court, in which the three brothers and Mata Din sued, as members of the firm of Bhairon Prasad Mahadeo, two persons for a debt contracted in the lifetime of their father. That evidence is certainly not in favour of the appellants. In 1919 in the proceedings out of which this appeal has arisen a certain number of witnesses were produced on behalf of the respondent. Of these one Mahadeo Prasad, a Vakil practising at Karwi, giving evidence in 1919, said that the three brothers were members of a joint Hindu family 2 or 2½ years before he gave evidence. That would take us back to the year 1917, about a year after the decree which is sought to be executed, was passed, and a considerable time after the *hundis*, which were the basis of the suit, were executed. Sarju Din, who lives in Karwi close to the house of the firm, also testifies that Mahadeo Prasad was the owner of the firm and that after his death his three sons were members of the joint Hindu family and remained members of the firm, and that after the decree was passed the three sons went away to Jaipur. It is unnecessary to refer to the other evidence which was produced on behalf of the appellants. I agree with the Subordinate Judge that that evidence is credible and substantiates the respondent's case.

On behalf of the respondent we were referred to the evidence of Kammu Beg. He admits in cross-examination that at the time the suit on the *hundis* was instituted, he was the *munim* of Mangli Prasad, and as such, he professes to have signed the *vakalatnama* in favour of the Vakil on behalf of Mangli Prasad and his two minor brothers. The only other witness who was referred to was Sheo Balak. He says that after the death of Mahadeo Prasad, Mangli Prasad remained *malik* of the shop, but does not know if Phul Chand and Suraj Karan had any concern with the shop or not. He adds they were minors. This evidence does not establish the case set up by the appellants. In my opinion the appeal must be dismissed on the merits as well as upon the point of law that has been raised.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs, including fees on the higher scale.

N. H.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 830 OF 1920.

July 27, 1921.

Present:—Mr. Justice Coutts and Mr. Justice Macpherson.

KANGALI CHARAN MUKHARJI—APPELLANT

versus

SURJA NARAIN SAH—RESPONDENT.

Landlord and tenant—Bemiadi patta, *nature of*—*Permanent tenure*—Bemiadi pattas *in Patkum Perganah*—Ghatwal, *grant of permanent tenure by.*

A *bemiadi patta* or lease without a term can create a permanent right. [p. 304, col. 2.]

Parshan Kuer v. *Tulsi Kuer*, 39 Ind. Cas. 658; 2 P. L. J. 180; 1 P. L. W. 477; (1918) Pat. 11, referred to.

In Patkum Perganah *bemiadi ijaradars* hold permanent tenures with rent liable to enhancement. [p. 304, col. 2.]

A *ghatwal* is incompetent to create a permanent tenure. [p. 304, col. 1.]

KANGALI CHARAN v. SURJA NARAIN.

Appeal from a decision of the District Judge, Manbhum, dated the 2nd August 1920, affirming that of the Subordinate Judge, Purulia, dated the 28th February 1920.

Mr. *Atul Krishna Roy*, for the Appellant.

Mr. *Abani Bhushan Mookerjee*, for the Respondent.

JUDGMENT.

COUTTS, J.—This was a suit by a *ghatwal* for *khas* possession of Mouza Lapsadi in Pargana Patkum. The plaintiff's case is that the *mouza* was originally held by one Bodh Singh Mura on a *bemiadi ijara patta* dated the 9th *Jaith* 1300. His interest was sold for arrears of rent and was purchased by the plaintiff, who sold it to one Nilkamal Mandal by a registered *kobala* in 1315. Nilkamal defaulted in payment of rent. The property was again sold and purchased by defendant's father.

The plaintiff in this suit contended that the defendant's right was only that of a tenant from year to year, and accordingly asked for *khas* possession. The defendant contended that, standing in the shoes of Nilkamal Mandal and Bodh Singh Mura, he had a heritable, permanent and transferable right. Both the Courts below found that the defendant had a permanent right in the *mauza*.

The point raised in this appeal on behalf of the plaintiff is that being a *ghatwal*, he was incompetent to create a permanent tenure, and that, therefore, the *ijara* which he granted to Bodh Singh was not a heritable, permanent and transferable right. Now the *ijara* having been granted by the plaintiff, he is estopped from alleging that the *ijara* did not create a permanent right if what it purported to grant was such a right. It is necessary to see, therefore, what the right created purported to be. The *ijara* is described as a *bemiadi ijara* and it is contended by the learned Vakil for the appellant, on the authority of *Parshan Kuer* v. *Tulsi Kuer* (1), that a permanent tenure cannot be created by a *bemiadi patta*. This contention, however, is by no means supported by the judgment referred to. In that case what happened was that the defendant pleaded that because the *patta* was a *bemiadi* one, it created a permanent right, but the learned Judges held that a *bemiadi patta*, or lease without a term, did not necessarily create such a right; and on a consideration of the terms of the lease itself they came to the conclusion that it was not a permanent lease. That is a very different matter to saying that because a lease is a *bemiadi* one, it cannot, therefore, be a permanent lease. This contention, therefore, is unsustainable and so far as the present case is concerned, we find it definitely stated in the Settlement, Report of the Patkum Pargana that *beniadi ijaradars* hold permanent tenures with rent liable to enhancement; and in the Record of Rights this defendant has been described as a *bemiadi ijaradar*.

The findings of the lower Courts, that the defendant holds a heritable, permanent and transferable right, are clearly correct. I would accordingly dismiss this appeal with costs.

MACPHERSON, J.—I agree. In view of the *kobala* executed by him in favour of Nilkamal in whose shoes defendants stand, plaintiff at least cannot recover Lapsadih from defendants. Still less could he recover, if, as he avers (it is not necessary to decide with what truth), defendants stood in the shoes of Bodh Singh Mura, whose tenancy was at the lowest a *bemiadi ijara* of the class which in Pargana Patkum is a permanent tenure, and at the highest a *mundari khunkati* tenancy situated in plaintiff's *ghatwali tenure*.

J. P.

Appeal dismissed.

(1) 59 Ind. Cas. 658; 2 P. L. J. 180; 1 P. L. W. 447; (1918) Pat. 11.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 18, 1921.

Present:—Lord Buckmaster, Lord Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

NABAKISHORE MANDAL AND OTHERS—APPELLANTS

versus

UPENDRAKISHORE MANDAL AND ANOTHER—RESPONDENTS.

Hindu Law—Alienation by widow—Necessity—Burden of proof—Purchase by widow out of income of husband's estate—Accretion—Appeals—Appellant's duty to show judgment appealed from is wrong.

A person who deals with a Hindu widow having a limited estate is bound to establish the facts which justify the transactions under which he claims. [p. 305, col. 2.]

It is competent for a Hindu widow to so deal with the income of her deceased husband's estate, as to make it her own separate property, but the fact of her having so dealt with it must always be traced and proved. [p. 306, col. 2.]

Where a Hindu widow acquires the rights of the tenants of her deceased husband's estate, in part by release of arrears of rent, and in part by payment of cash derived from income of her husband's estate, the tenant rights so acquired are an accretion to the husband's estate, which, if it be possible for the widow to segregate, would require some unequivocal act on her part to lead to the inference of such segregation. [p. 308, col. 2.]

In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. [p. 307, col. 1.]

Appeal from a decree of the Calcutta High Court, (Chatterjea and Smithers, JJ.,) modifying a decree of the Subordinate Judge (First Court), 24 Parganahs.

FACTS are set out sufficiently in their Lordships' judgment. The Trial Judge allowed only a part of the plaintiff's claim: the High Court decreed the suit in full; hence this appeal.

Mr. *Dube*, for the Appellants.—The widow is justified in granting the permanent lease. The rent reserved is a fair market rent. The Trial Judge found that the lease was for necessity and beneficial to the estate. See *Nanda Lal* (*Banga Chandra*) v. *Jagat Kishore Acharjya* (1) for effect of recitals.

The property sold was acquired by the widow. It is her *stridhan*. The price paid was a fair market price.

Mr. *DeGruyther*, *K. C.*, (with him Messrs. *Parikh* and *Palat*), for the Respondent.—The net profits of the estate were Rs 5,000. There was no necessity to grant the permanent lease or sell the lands. The recital that the lands were purchased out of her *stridhan* is not sufficient. The sale purports to be for necessities of debts and costs of litigation. This clearly shows that the widow was aware that the property sold was the property of the husband.

Mr. *Dube* replied.

JUDGMENT.

LORD BUCKMASTER.—A person who deals with a Hindu widow having a limited estate must be aware that he may be called upon to establish the facts which justify the transactions under which he claims. The appellants in this case, who are the successors-in-title of one Rajkishore Mandal, find themselves in that position.

Rajkishore Mandal entered into two transactions, in the one case with two Hindu widows, and in the other case, with one. These transactions are now impeached, and the burden of proving them valid lies on the appellants. The first was a lease of the 17th September 1859, which was executed by two Hindu widows, Prasana Kumari Dasi and Bamakali Dasi. Their estate in the property arose in the following way. Prasana was the widow of Madhusudan and Bamakali was the widow of Harinarayan, his brother. Harinarayan, when he died, was entitled to an undivided third share in properties held jointly, and Madhusudan, who died in 1867, was entitled to the remaining two-thirds. The case that is suggested is, that this lease was required for the purpose of raising the money necessary for the payment of debts and the performance of the *shradh* in connection with Madhusudan. Now, Madhusudan had died on the 13th August 1867, and certainly a period had not elapsed so long as to render it probable that the debts must have been paid; but, fortunately, the circumstances connected with his estate are not unknown, and there is information that enables their Lordships to recast what that position was. There is no doubt that before his death he had been borrowing money, sometimes in small

(1) 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 333; 4 L. W. 458; 18 Bom. L. R. 838; 14 A. L. J. 1103; 24 C. L. J. 497; 1 P. L. W. 1; 21 C. W. N. 245; 44 C. 183; 19 Bur. L. T. 177 (P. C.).

sums and sometimes in large, but at the date of his death the debts are nowhere put as exceeding Rs 15,000 or Rs. 16,000, which is probably a very liberal estimate. On the other hand, there is evidence, part of which was called on behalf of the appellants themselves, to show that he had moveable property to the extent of Rs. 20,000. The petition of the widow showed that he had debts owing to him to the extent of Rs. 9,000, which, it may be, were included in the Rs. 20,000 of moveable property. In addition to that, there can be no doubt that part of the property of the testator had been disposed of shortly after his death, because, although the actual deed of sale is not produced, a deed of sale from the person who purported to have bought is, and that shows that property belonging to Madhusudan had in fact been disposed of. There, therefore, was not, upon the evidence as it stands, any reason whatever why the property included in the lease should have been used for the purpose of paying debts, and, indeed, if such necessities were the real justification for the transaction it is not probable that it would take the form of a permanent lease, but would have been an out and out sale. Their Lordships have no hesitation in saying that the proof of the necessity required to justify the lease of the 17th September 1869 is not forthcoming.

It is then said that this lease must have been a lease for the benefit of the estate, and that it can be supported upon that ground. It is not easy, and in this case it is not necessary, to define what is exactly the character of the transaction entered into by a Hindu widow, which can be supported on the ground that it enured for the benefit of the estate. It is sufficient to say that the mere fact that the rent reserved was a fair market rent, or the price obtained was a fair market price, cannot alone and in themselves be regarded as sufficient, and in the present case there is nothing more suggested.

In their Lordships' opinion the lease was not executed because it was for the benefit of the estate, nor because circumstances arose which rendered it necessary; the true explanation is that it was granted to a man, Khetramohan Samanta, who was the nephew of one of the widows, Prasana, by whom he had been brought up and with whom he had lived for many years.

Their Lordships think there is no need to add anything further to the very careful and reasoned judgment of the High Court upon this point, with the criticisms contained in which they are in agreement.

There remains only the transaction which was entered into later on the 5th May 1895. That was entered into by the survivor of the two widows, Prasana Kumari. The alleged justification for this depends on different considerations. It is said that the property sold had been acquired by the widow out of her *stridhan*, and that, consequently, she was quite free to deal with it as she thought best. Now, there can, their Lordships think, be no doubt that whatever *stridhan* she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in this case there is no sufficient evidence of this having been done. Further, in this particular case it appears that part, at least, of the property had been purchased from the tenants of the estate itself. This does not mean that the inheritance had been so acquired, but that, owing, it may be, to difficulties which had arisen in connection with the occupiers, their tenant rights had been bought in part by the release of the arrears of rent and in part by a payment of cash; and having so acquired their interest, it was the property which they had formerly occupied which was sold under the *kobala* of the 5th May 1895. If that be the true transaction no question could arise about the right of the widow in connection with her *stridhan*, because the tenant rights so acquired would be an obvious accretion to the husband's property, which, if it were possible for her to segregate would require some more unequivocal act for the purpose than anything to be found in this evidence. The evidence of the deed itself leads once more to the conclusion that not only was this property the husband's property, but that the widow knew it and that she was attempting to support the deed by a further effort to urge

the necessities of debts and the costs of litigation as a justification. No other explanation can be offered of the fact that the deed contains recitals which, upon the hypothesis that the property was the widow's own, would have been quite unnecessary.

Their Lordships hold with regard to this also that the appellants have failed to establish, what once more the burden lay on them to prove, that the widow was in a position to deal with this estate. This opinion differs from that formed by the learned Subordinate Judge, but is in agreement with that of the High Court at Fort William, from whose decree this appeal has been brought.

The only further observation that their Lordships desire to make is to call attention once more to the fact that in appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. It is not necessary to invoke that doctrine against the appellants in the present instance because, for reasons that have already been stated, their Lordships think they have failed, but it is a matter which would be well for appellants to bear in mind.

Their Lordships think that this appeal should be dismissed, and that the first respondent who alone appeared should have his costs, and they will humbly advise His Majesty accordingly.

K. V. L. N. *Appeal dismissed.*

Solicitors for the Appellants,—Messrs. *W. W. Box & Co.*

Solicitors for Respondent No. 1,—Messrs. *T. L. Wilson & Co.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 9 OF 1921.

January 18, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Jwala Prasad.

GOPAL RAI AND OTHERS—APPELLANTS

versus

RAMBHANJAN RAI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 —Full satisfaction of decree certified to Court—Subsequent withdrawal by decree-holder of sum deposited by another judgment-debtor in Court by mistake —Application for refund of money so withdrawn—Execution—Execution Court, jurisdiction of—No separate suit necessary.

A decree-holder was paid out of Court by one of the judgment-debtors and an application was made to the Court under Order XXI, rule 2, Civil Procedure Code, certifying that the full decretal money had been paid. Subsequently, another judgment-debtor deposited the decretal money in Court not knowing that the decree-holder had already been paid off in full. The decree-holder withdrew this money out of Court. The judgment-debtor then made an application for refund of this money:

Held, that the Executing Court was the proper Court to decide the matter notwithstanding that the decree had already been executed some time before and that no separate suit was necessary. [p. 308, col. 1.]

Letters Patent appeal against the judgment of Mr. Justice Das, affirming a decision of the District Judge, Shahabad.

Mr. *S. N. Roy*, for the Appellants.

Mr. *L. N. Singh*, for the Respondents.

JUDGMENT.

MILLER, C. J.—In my opinion this appeal ought be allowed. The appellant is one of the judgment-debtors in a suit in which the respondent was the plaintiff. A decree for Rs. 95 was made in favour of the respondent. One of the defendants settled the matter out of Court by paying to the decree-holder the full amount of his claim on the 21st May 1915. After the decree-holder had been paid a petition was presented to the Court, in accordance with the provisions of Order XXI, rule 2 of the Civil Procedure Code, certifying that the full decretal amount had been paid. Subsequently, the appellant in this suit, not knowing that the decree-holder's claim had been satisfied, paid the money into Court and this was subsequently taken out by the decree-holder. The appellant afterwards discovered that the decree had previously been satisfied by one of his co-debtors. He thereupon made an application to the Executing Court for a refund of the money which had been taken out of Court by the decree-holder. In that application the facts were not in dispute. It was admitted by both sides that the decree had been satisfied before the

decree holder took the money out of Court which is now claimed back and, indeed, the petition certifying the payment is signed by the decree holder himself. The Court, therefore, which had the record before it, must have been aware that the payment of the debt had been properly certified within the meaning of Order XXI, rule 2. The learned Munsif, however, came to the conclusion that as the matter had been disposed of some time before it was too late then to apply to the Executing Court to have it set right.

The matter then went on appeal to the District Judge, and the District Judge took the same view and dismissed the appeal.

When the case came on second appeal to this Court the learned Judge did not deal with the question which had been raised in the lower Courts but found that, even assuming the appellant to be right upon the contention previously raised by him in the lower Courts, still the position here was different because he said it had not been proved that any payment or adjustment had been certified as provided by Order XXI, rule 2, and that, therefore, even if the money had been paid to the decree holder, there was nothing to show that it had been certified and, therefore, the Executing Court was not entitled, under Order XXI, rule 2, sub rule 3, to recognise the payment. With great respect to the learned Judge, I think that he was in error in introducing this matter. It was admitted in both the lower Courts that the facts were not in dispute and it was never suggested that the payment had not in fact been certified within the meaning of Order XXI, rule 2. That was taken for granted.

On appeal to this Court under the Letters Patent the appellant has produced a certified copy of the petition which was before the Executing Court showing quite clearly that the decretal amount had been paid before the appellant had paid the same sum into Court, and that this had been accepted by the decree holder in full satisfaction of his debt. The result is, that the decree holder has very cunningly obtained payment twice over, a thing which he was clearly not entitled to do. The only question, therefore, which arises before us is whether, seeing that the decree had in fact been executed, it was the proper procedure which was adopted, that is to say, whether the judgment-debtor could have this matter determined by the Executing Court or whether he was bound to bring a separate suit. In the case of *Collector of Jaunpur* v. *Bithal Das* (1) it was laid down that an application to recover property which had been improperly sold in excess of the decretal amount was a matter relating to the execution, satisfaction or discharge of the decree and, further, that the Executing Court was the proper Court in which to have the matter decided notwithstanding that the decree had already been executed some time before. I see no reason to differ from the opinion there expressed which is supported by other cases and, in my opinion, this appeal ought to be allowed. The orders of the lower Courts will be set aside and the case will be sent back to the Executing Court and reinstated on the file to be tried according to law. The appellant is entitled to his costs of this appeal and in all the Courts below.

JWALA PRASAD, J.—I agree.

J. P. *Case sent back.*

(1) 24 A. 291; A. W. N. (1902) 67.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 62 OF 1919 AND 8 OF 1920.

July 15, 1921.

Present:—Mr. Daniels, J. C., and Mr. Dalal, A. J. C.

Nawab Bahu MUMTAZ UN-NISA BEGAM *Saheba*—AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

WAZIR ALI AND OTHERS—DEFENDANTS —RESPONDENTS

AND

Musammat SAIDANI BEGAM AND OTHERS —PLAINTIFFS—APPELLANTS

versus

WAZIR ALI AND OTHERS—DEFENDANTS RESPONDENTS.

Appeals—Bench cases—Parties, position of—Evi

MUMTAZ-UN-NISSA BEGAM v. WAZIR ALI.

dence, which, to be referred to—Printing of record— "Walda", *interpretation of*—"Bhaiya", *interpretation of—Construction of document*—Wajib-ul-arz, *interpretation of—Custom—Daughters, exclusion of from inheritance—Step-sisters, whether excluded—Evidence Act (I of 1872), ss. 32, 33—Mutation case, witnesses examined in—Statements, admissibility of, in Civil suit.*

In appeals triable by a Bench if either party desires to make use of any evidence in support of his argument, whether for the purpose of supporting the judgment of the lower Court or attacking it, it is incumbent on him to get it printed. If he omits to do so in the expectation that his opponent will be kind enough to get it printed for him, he runs the risk of his opponent disappointing his expectation. [p. 311, col.]

The terms "*walda*" (mother) and "*bhaiya*" (brother) are often applied out of love, affection and respect among Indians to persons held in the same affection as mother and brother. [p. 313, col. 1.]

Where a *wajib-ul-arz* ran as follows:—

"After the death of a co-sharer his sons inherit his property in equal shares. The daughters do not inherit when there are sons surviving. If any one leaves behind him only daughters and not sons then daughters get a share in the property of the deceased; if a man leaves behind him issues *aulad* by his wives then the property will be divided according to the dower, that is the issues of both the wives will receive half and half;" and was supported by a large number of instances of sons excluding daughters from inheritance:

Held, that a custom was established under which a brother excluded both his own sisters and his step-sisters. [p. 314, col. 2.]

Statements of deceased witnesses as to the legitimacy of a claimant to a property made in a mutation case before a Tahsildar Assistant Collector authorised by law to record the statements of witnesses on oath are not admissible under sections 32 and 33 of the Evidence Act in a subsequent Civil suit for the property by a person who was no party to the mutation case but are admissible in a suit by one who was a party to the mutation case. [p. 310, col. 2.]

But where two such civil suits, one by a person who was no party and the other by a person, who was a party to the mutation case, are tried together it would be more consonant with justice not to take into consideration in either suit the statements of witnesses recorded in the mutation proceedings. [p. 310, col. 2.]

Appeal from a decree of the Officiating Subordinate Judge, Hardoi, dated 13th September 1919.

IN APPEAL No. 62.

Messrs. *M. Wasim* and *Mahund Behari Lal*, for the Appellants.

Mr. *Ali Mohammad*, for Respondent No. 1.

Messrs. *Bisheshwar Nath Srivastava* and *Rajeshwari Prasad*, for Respondents Nos. 2, 4 and 5.

Mr. *Rai Bahadur*, for Respondents Nos. 2 and 5.

IN APPEAL No. 9.

Messrs. *Bisheshwar Nath Srivastava*, *Rajeshwari Prasad* and *Puttoo Lal*, for Appellants.

Mr. *Dularey Lal*, for Appellant No. 4.

Mr. *Ali Mohammad*, for Respondent No. 1.

Mr. *M. Wasim* for Respondent No. 5.

Mr. *Makund Behari Lal*, for Respondent No. 6.

JUDGMENT.—In the two suits before the lower Civil Court the dispute related to an entire village Mendhawa and a plot of land in village Gauri Khalisa, both in the Hardoi District. They were owned by one Roshan Ali Khan, a high-placed functionary in the household of the late Kings of Oudh. He had several titles conferred on him by his master but it will avoid confusion to designate him by the one title of Roshan Ali Khan in this judgment. He died in 1906 and mutation was made in favour of the defendant, Wazir Ali, on the 16th January 1907 as his son and heir. The application for mutation of names was made by *Musammat* Saidani Begam on the ground that she and her sisters, who were the daughters of Saiyid Basharat Ali, brother of Roshan Ali, were the only surviving heirs of the deceased. Wazir Ali objected and, finally, mutation of names was made in his favour. *Musammat* Saidani Begam filed Suit No. 146 in the Court of the Subordinate Judge of Hardoi on the 19th of July 1918 for recovery of possession of the property in suit on the ground that Wazir Ali was not the son of Roshan Ali Khan. Another suit was filed on the 22nd of July 1918 by *Musammat* Batto Begam with the allegation that Wazir Ali was an illegitimate son of Roshan Ali Khan and as she was a legitimate daughter she was entitled to succeed to her father's property. Plaintiffs of both the suits combined in alleging that Wazir Ali was the son of Nawab Mukhtar Mahal, a *mutai* wife of

Wajid Ali Shah, the last King of Oudh, the difference in their allegations being that *Musammat* Saidani Begam was unable to state who the father of Wazir Ali was, while *Musammat* Batto Begam's plea was that he was an illegitimate son of Roshan Ali Khan. It will be noticed that both the suits were brought within a few days of the expiry of the period of limitation, Roshan Ali Khan died on the 23rd of July 1906.

The learned Subordinate Judge held that *Musammat* Saidani Begam and her sisters were daughters of Basharat Ali, that Wazir Ali was the legitimate son of Roshan Ali Khan, and that *Musammat* Batto Begam was in no way related to Roshan Ali Khan. He was further of opinion that, even if *Musammat* Batto Begam had been the legitimate daughter of Roshan Ali Khan, she would be excluded from inheritance by a brother Wazir Ali according to the custom of inheritance prevailing among Saiyids of Mendhawa and Gauri Khalisa. For these reasons, both the suits were dismissed and these are two appeals filed by the plaintiffs of the two suits for hearing before us.

The points which arise for our decision are:—

(1) Whether Wazir Ali is the legitimate son of Roshan Ali Khan?

(2) Whether *Musammat* Batto is a legitimate daughter of Roshan Ali Khan?

(3) Whether a daughter is by custom excluded from inheritance by a son among the brotherhood and in the locality to which Roshan Ali Khan belonged.

The parentage of *Musammat* Saidani Begam is not in dispute here and she and her sisters are admitted to be the daughters of Basharat Ali.

Wazir Ali produced evidence which may be divided into four groups; oral testimony of witnesses produced before the lower Court; evidence of his treatment and acknowledgment as a son of Roshan Ali Khan; documents leading to the conclusion that he was the son of Roshan Ali Khan; and the statements of witnesses, since deceased, who were examined by the Tahsildar Assistant Collector during the mutation proceedings. It was urged on behalf of the appellants that the statements of deceased witnesses of the Tahsildar's Court were not admissible in evidence against either plaintiffs under the provisions of sections 32 and 33 of the Evidence Act. This point is correctly stated as regards *Musammat* Batto who was no party to the mutation proceedings and the statements in those proceedings were made after the question in dispute regarding the legitimacy of Wazir Ali had arisen.

In the case of *Musammat* Batto the statements would not be covered by the provisions of section 32 (5) of the Evidence Act. It is doubtful whether those statements are admissible against *Musammat* Saidani Begam who was a party to the mutation proceedings. Reading the various relevant sections of the Land Revenue Act, No. III of 1901 (local), we have come to the conclusion that the Tahsildar Assistant Collector was authorised by law to record the statements of witnesses on oath. A report of succession has to be made to the Tahsildar under section 25 who, in a case of dispute, makes a report to the Collector. Under section 227 (8) the powers of a Collector to settle a dispute regarding entries in the annual registers under section 40 can be exercised by an Assistant Collector in charge of a sub-division. Section 229 enacts that Assistant Collectors of the second class shall have power to investigate and report on such cases as the Collector or Assistant Collector in charge of a sub division of a district may from time to time commit to them for investigation and report. Another question arises, however, whether the questions in issue in the mutation proceedings which depended on a decision of possession, were the same as in the present case. We have not sufficient materials before us to decide the point, and as the suits of *Musammat* Batto, against whom the statements cannot be used under section 32, Evidence Act, and *Musammat* Saidani were jointly tried we consider it would be more consonant with justice not to take into consideration the statements of witnesses recorded in the mutation proceedings, in arriving at a decision on the first point in issue here.

The statements of witnesses examined by the lower Court on behalf of Wazir Ali have not been printed. The appellant has made it a ground for complaint that he is prevented from referring to the evidence adduced by Wazir Ali because the latter has not elected

to get it printed. This is a very curious attitude to take up, and indicates a misconception of the rules of practice of this Court. These are rules made under section 125 of the Code of Civil Procedure, with the previous sanction of the Local Government under section 126 (*b*) of the same Code, and have the force of law. Rule XXVII of Part IV of these rules lays down that, in cases to which Part IV applies, namely, appeals triable by a Bench, no evidence which has not been printed shall be read or referred to at the hearing except with the leave of the Court. The result of this is clear. If an appellant wishes to be in a position to refer to any evidence in the course of argument, it is incumbent on him to apply for the printing of that evidence. If he omits to do so, in the expectation that his opponent will be kind enough to get it printed for him, he runs the risk of his opponent disappointing his expectation as has happened in this case. No party can dictate to his opponent what evidence the latter shall get printed. The correctness of this view may be tested by considering what would happen if no evidence at all were printed on either side. In that case the Appellate Court would have to fall back on the judgment of the Trial Judge, and the appellant could only succeed if he could show from the judgment itself that the decision was erroneous. He might be able to show, for instance, that the decision was based on an erroneous view of the law or that it had found a custom to be proved on facts which were legally insufficient to establish a custom, but so far as the lower Court's findings were based on evidence, the effect of which was set out in the judgment, the Appellate Court would have no option but to accept those findings, since neither party would be in a position to attack them.

The appellant suggests that he ought only to be required to print evidence favourable to himself. He relies on the language of rule V which says that each party shall deposit the charges for printing of all evidence upon which he relies and of rule VI which gives a form of notice to the parties couched in similar language. The phrase on which he relies is certainly not happy when used in reference to evidence which a party prints for the purposes of showing that the lower Court was wrong in believing it, but the rule must be read in connection with rule XXV I. The two rules together can only mean that if either party desires to make use of any evidence in support of his argument, whether for the purpose of supporting the judgment or attacking it, it is incumbent on him to get it printed.

It is urged that if this view is correct the burden of printing almost the entire record will fall on the appellant. No doubt, the appellant will ordinarily require much more of the record than his opponent. This is the necessary result of the fact that he is the attacking party. The Trial Court has considered the evidence and has found against him. Moreover, he is the party who has first to put in his list of documents. The respondent need only print those which the appellant has omitted. It does not at all follow, however, that there will be nothing for the respondent to print. Particular issues may be found in the appellant's favour. There may be, and often is, evidence which the Trial Court dismisses as unreliable or irrelevant which the respondent wishes to make use of to support his case. In any case, the view taken above is the only one consistent with a giving full effect to rule XXVII. The judgment of the lower Court cannot be wiped out because evidence has not been printed and if a party is not in a position to challenge any portion of the judgment the Appellate Court will have no option but to accept it.

We have, however, read the statement of Mukhtar Mahal and noted the detailed references made to the witnesses of Wazir Ali in the elaborate judgment of the learned Subordinate Judge. There is the definite evidence of Nawab Mukhtar Mahal that Wazir Ali was not her son but the son of Roshan Ali Khan by a married wife, Nannhi Khanam. She denied giving birth to any child. It was pointed out on behalf of the appellant that this statement ought to have been tested by medical examination for which application was made by the appellants in the lower Court. No adverse conclusion can be drawn from the want of examination because the application was dismissed by the Court and the lady herself did not refuse to submit to such an examination. It may also be noted that physical evidence of the bearing of children will not amount to proof

of Wazir Ali being her son. Zamin Ali, Miran Saheb and Nawab Khair un nisa Begam, a *mutai* wife of Wajid Ali Shah, deposed before the lower Court in support of the legitimacy of Wazir Ali. They are persons who had means of knowing the exact relationship between Wazir Ali and Roshan Ali Khan. The testimony of the large number of witnesses produced on behalf of the appellants has not impressed us. The testimony of the witnesses of *Musammat* Saidani does not accord with what one would expect of human curiosity. All those witnesses deposed that they heard Wazir Ali being the son of Mukhtar Mahal, a *mutai* wife of the last King of Oudh, and yet they never troubled to enquire who his father was. Two of the witnesses, Ali Mohammad and Jawwad Ali, when hard pressed in cross-examination stated that they believed him to be the son of the King. Other witnesses had no such belief and took no steps to enlighten their ignorance. It is not as if Wazir Ali was a person indifferent to them. Niaz Husian and Ali Raza stated that they considered him to be of respectable descent (*sharif*) and permitted him to visit their *zanana*. Niaz Husain, while asserting that he had not up to this time discovered the name of Wazir Ali's father, made the absurd statement that Roshan Ali Khan treated Wazir Ali as a servant treats the son of his master. Obviously, the witnesses were prepared to make any statement on the spur of the moment to back up the allegation of Wazir Ali's illegitimacy. Except *Musammat* Jhabbo, examined on behalf of the plaintiff Saidani Begam, and Ummatul Husaini Begam, examined on behalf of the other plaintiff, no witness of the plaintiff spoke from personal knowledge. Admittedly, Wazir Ali was born in Calcutta at Matiaburj after Wajid Ali Shah was deposed. Ali Mohammad had been to Matiaburj but he admitted that his information was not derived at that time. The other witnesses, except the two females mentioned above, spoke by hearsay. The statements of *Musammats* Jhabbo and Ummatul Husaini Begam are contradictory: the one stated that the illegitimate children of the *mutai* wives of the King were not talked of publicly while the other deposed that no secret was made of them. Most of the witnesses alleged that they derived their information of Wazir Ali's birth from Mukhtar Mahal from Roshan Ali Khan himself. It is in evidence that Roshan Ali Khan served Mukhtar Mahal up to the end of his days and there appears to be no reason why he should expose her shame so continuously without any compelling reason for it. It is true that Wazir Ali was brought up by Mukhtar Mahal, but the cause of it has been clearly explained. His mother died while he and his sister were infants and as Ali Roshan was a favourite servant of the King and had been in the service of his predecessors first Nawab Nishat Mahal, the married wife of the King, and after her death *Musammat* Mukhtar Mahal brought up the children. It appears that Roshan Ali had married three wives but they all died young and none survived at the time of the death of Wajid Ali Shah. After the death of Wajid Ali Shah, Mukhtar Mahal appears to have depended on the service of Roshan Ali Khan and his children in consequence were highly favoured by her.

It is probable that all the King's *mutai* wives who numbered some hundreds were not chaste but the position of Mukhtar Mahal was admittedly superior. The *muta* was never dissolved. She was the niece of the married wife Nawab Nishat Mahal and on the death of Nawab Nishat Mahal was placed by the King in possession of Nishat Mahal's quarters. Unchastity on the part of a wife of this status would not be kept concealed from the King and escape his disfavour. It is not only one lapse that is alleged against her, but she is declared to be the mother of three or four children. In this connection, it would be fitting to refer to the evidence given by Roshan Ali on behalf of Mukhtar Mahal in a suit brought against her by Government in connection with an Imambara. The statement was recorded on the 5th of May 1880 (Exhibit E 10) and in cross-examination various questions were put to him to prove his partiality to Mukhtar Mahal. One was whether he was married to her before the King took her in marriage. No question, however, was put to him as to her bearing him illegitimate children. This fact of no such question having been put to him is admissible in evidence here under section 11 (2) of the Evidence Act because it makes highly improbable the allegation of the plaintiff's witnesses that the illegitimacy was well-known.

Coming to documents, it was pointed out on behalf of the appellants that during mutation proceedings Wazir Ali's Pleader was not able to give the name of his mother in full and called her Khanam (Exhibit 5). The Court was desired to conclude from this that Khanam Saheba was a recent invention for the purpose of these suits. This argument loses all force when it is remembered that the name of Khanam Saheba was first mentioned by the plaintiff *Musammat* Batto six or seven years prior to the mutation proceedings and to the death of Roshan Ali. She then stated (Exhibit A28) that Khanam Saheba and Ahmadi Khanam were in keeping of her father. Various documents were produced on behalf of the defence (Exhibits A16 to A21) in which Wazir Ali was mentioned as a son of Roshan Ali who has directed a certain sum of money to be paid to his son Wazir Ali. Exhibit A25 is a letter written by *Musammat* Batto to Roshan Ali in which she calls Mukhtar Mahal *walda* (mother) and Wazir Ali *bhaiya* (brother). It was argued on behalf of Saidani Begam that the term *walda* meant real mother and proved *Musammat* Batto and Wazir Ali to be her illegitimate children. These terms, however, are applied out of love to persons held in the same affection as mother and brother and they cannot be taken literally. Exhibit A41 is the *nikahnama* (marriage statement) prepared at the time of Wazir Ali's marriage while Roshan Ali was alive. In this paper, which bears the seal of Roshan Ali, Wazir Ali is described as the son of Roshan Ali. On behalf of the plaintiff *Musammat* Saidani four documents (Exhibits 1, 2, 20 and 21) were produced in support of the contention that Wazir Ali was the son of Mukhtar Mahal. By the deed, Exhibit 1, Roshan Ali and Mukhtar Mahal jointly borrowed money and under the deed, Exhibit 2, this was done by Wazir Ali and Mukhtar Mahal. Executants were described in the deeds as residents of the same street in Lucknow. These entries do not prove that Roshan Ali and Mukhtar Mahal lived together as husband and wife. Mukhtar Mahal does not appear to have any male relation alive and, consequently, is on affectionate terms with Wazir Ali. After the King's death Roshan Ali managed the business of the lady and in the case of Wazir Ali there was affection between the two. There would, therefore, be no reason to conclude from the joint documents that Mukhtar Mahal was the mistress of Roshan Ali and mother of Wazir Ali. Exhibit A21 is a statement of Wazir Ali made in 1917 in a Magistrate's Court in which he called Wajid Ali Shah his Khalu (husband of mother's sister). Mukhtar Mahal was admitted niece of Nishat Mahal wife of Wajid Ali Shah, so Wazir Ali's statement that Wajid Ali Shah's wife Nishat Mahal was sister of his mother does not amount to an admission of his being the son of Mukhtar Mahal. Exhibit 20 is a mortgage-deed of 1913 executed by Wazir Ali. In this document there is a recital with reference to another mortgage-deed having been executed by the executant's mother, Mukhtar Mahal.

As noticed above, mother is a term used out of respect and affection among Indians and the whole tenor of the document shows that Wazir Ali could not have claimed to be the son of Mukhtar Mahal. At the commencement, Wazir Ali described himself as the son of Roshan Ali and in the body of the document describes Mukhtar Mahal (Exhibit 20) as the wife of Wajid Ali Shah. These descriptions make it impossible that Wazir Ali should have desired to claim Mukhtar Mahal as his mother.

Evidence was produced on behalf of Wazir Ali to show that he was acknowledged by Roshan Ali as his son. Roshan Ali took Wazir Ali to the villages in suit and presented him to his tenants as his son. Bande Hasan is a tenant who deposes to that effect. A similar introduction was made to various neighbouring Zamindars. There is the testimony to this effect of Raja Durga Prasad, Taluqdar, and Saiyid Jamil ud-din, a Zamindar and member of the Municipal Board of Sandila.

As regards the oral evidence, a remark was made on behalf of the appellants that the learned Subordinate Judge who delivered the judgment had heard a very small portion thereof, but has gathered from various questions put to witnesses by the officer who recorded the statements that he was not satisfied with the testimony of the plaintiff's witnesses.

On a consideration of the evidence noticed by us in detail, we have come to the

conclusion that Wazir Ali is the legitimate son of Roshan Ali.

We shall now examine the defence plea of exclusion of *Musammat* Batto from succession under the customary law applicable to Roshan Ali. First of all, there are the entries in the *wajib-ul-arz* of Gauri Khalisa and Mendhawa in the following words: "After the death of a co-sharer his sons inherit his property in equal shares. The daughters do not inherit when there are sons surviving. If any one leaves behind him only daughters and not sons then daughters get a share in the property of the deceased.

"If a man leaves behind him issues (*aulad*) by his wives then the property will be divided according to the dower, that, is the issues of both the wives will receive half and half."

Witnesses not only for the defence but those produced on behalf of the plaintiff *Musammat* Saidani Begam and cross-examined on behalf of the defendant, give a large number of instances of sons excluding daughters from inheritance. As many as 27 instances will be found tabulated in the judgment of the lower Court. The evidence of the custom being followed in practice is so convincing that the learned Counsel for the appellant *Musammat* Batto confined himself to the argument that a brother excluded his sister by the same mother and not a step-sister. Wazir Ali was born of Khanam Saheba and *Musammat* Batto of another wife of Roshan Ali, *Musammat* Najam-un-nisa. So it was argued that the second clause of the *wajib-ul arz* would apply and that the issues of two wives would share equally. This interpretation of the custom does not appear to us to be justified either by the language of the *wajib-ul-arz* or by the evidence on the record. The second clause defines the first and is not independent of it. It means that where there are sons by two wives they will share half and half and the property will not be divided among them; for instance, if one wife has three sons and the other two, the three sons of one wife would succeed to half the property and the two sons by the other would receive the other half. In the lower Court this plea appears to have struck the Pleaders of *Musammat* Batto at the time of arguments. Out of the many witnesses examined on the subject of custom only one, Ghulam Abbas, (P. W. No. 10) was questioned as regards the second clause of the *wajib ul-arz* applying to a daughter. Ghulam Abbas was a witness produced on behalf of the plaintiff *Musammat* Saidani Begam and was not a defence witness. Obviously, to please *Musammat* Batto, he stated in answer to a question by a Pleader "It is the custom in our village that if a man dies leaving a daughter by one wife and a son by another the daughter and son both inherit in equal shares." The witness was left there and was not asked to give any examples. The defendant had already cross-examined him and had no opportunity to cross examine him again on this subject. If this argument had been clearly advanced on behalf of *Musammat* Batto during the proceedings it might have been possible to ascertain some of the cases in which a brother excluded a step-sister. Questions were not asked to the witnesses to make it clear that in all the 27 instances collected in the lower Court's judgement the exclusion was only of own sisters and not of step-sisters. We hold that, under the custom, a brother excluded both his own sisters and his step-sisters.

No necessity now arises to decide about the parentage of *Musammat* Batto but as we have come to the conclusion that she is a legitimate daughter of Roshan Ali we do not desire that she should be under the stigma of illegitimacy under the lower Court's judgment. The lower Court was of opinion that she was an illegitimate daughter of a servant in the household treatment of Wajid Ali Shah in Calcutta. Having regard to the equal treatment accorded to her by Roshan Ali and by the ex King's wives in the palace of the ex-King at Calcutta such a theory cannot be accepted. There is the definite acknowledgment of *Musammat* Batto as his daughter by Roshan Ali in the statement, Exhibit E-10 already referred to. He stated "Muhammad Husain (that is husband of *Musammat* Batto Begam) is my son-in-law...I am married to Muhammad Husain's wife's mother." These questions in cross examination were necessary because it was the case of the Solicitor-General against Mukhtar Mahal that the Imambara in suit was used as a private residence of the King

for a dance at the time of the marriage of *Musammat* Batto Begam. The story of Mukhtar Mahal, unsupported by any other testimony, does not appear to us to be probable that Muhammed Hasain compelled Roshan Ali to acknowledge *Musammat* Batto Begam as his daughter under threat to give evidence in that suit against Mukhtar Mahal. The plaintiff had already closed his case when Roshan Ali was examined; so no effective threat could have been exercised by Muhammad Husain at the time when Roshan Ali made a statement for the defense. Two other witnesses, since deceased, also stated in that suit in 1890 that *Musammat* Batto was a daughter of Roshan Ali, one of them was Amanat ud-daula, keeper of the purse in the service of the ex-King, (Exhibit E 11) and the other Mirza Muhammed Jalal, son of the ex-King (Exhibit E12). Both the statements of the deceased witnesses are admissible in evidence under section 32 (5) of the Evidence Act because no question had arisen then as to the legitimacy of *Musammat* Batto. One witness *Musammat* Jhabbo produced by the plaintiff Saidani Begam alleged that *Musammat* Batto was a daughter of Mukhtar Mahal and we have already given reasons for holding that Mukhtar Mahal bore no children. It is certain that *Musammat* Batto Begam was married in great style, a fact admitted even by the defence witness Miran. It does not stand to reason that any one would have gone to such an expense to marry the illegitimate daughter of a servant. Our finding is that *Musammat* Batto is the daughter of Roshan Ali by his wife *Musammat* Najamun nisa.

The appeals fail and we dismiss them with costs.

J. P. *Appeal dismissed*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 39 OF 1919.

January 9, 1922.

Present:—Mr. Justice Das and Mr. Justice Adami.

DEBI LAL SAH AND OTHERS—APPELLANTS

versus

NAND KISHORE GIR AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Mortgage of joint family property by co-parcener invalid—Marriage of male members of joint family—Legal necessity.

Where a mortgage is granted by one co-parcener on his own account over the joint family properties it is invalid. The estate is wholly unaffected by it and its entirety stands free of it. [p 316, col. 1.]

The marriage of a male member of a joint Hindu family is a legal necessity and a debt created to meet the expenses of such marriage is binding on the joint family property. [p. 317, col. 2.]

Gopalakrishnama Raju v. Venkatanarasa Raju, 17 Ind. Cas 308; 37 M. 273; 23 M. L. J. 288; 12 M. L. T. 92; 1912 M. W. N. 903 and 1231, *Bhagirathi v. Jokhu Ram Upadhai*, 6 Ind. Cas. 465; 32 A 575; 7 A. L. J 667, *Sundrabai Javaji Dagdu Pardeshi v. Shivanarayana Ridkarna*, 32 B. 81; 9 Bom. L R. 1366; 3 M. L T. 44, followed.

Govindarazulu Narasimham v. Devarabhotla Venkatanarasayya, 27 M. 206, referred to.

Appeal from a decision of the Subordinate Judge, Mozufferpore.

Messrs. *P. K. Jayaswal* and *Janak Kishor*, for the Appellants.

Messrs. *A. B. Mukherji*, *L. K. Jha* and *H. P. Sinha*, for the Respondents.

JUDGMENT.

DAS, J.—This was a suit by the appellants to enforce five mortgage-bonds executed by Bholanath, the *karta* of the joint family, and by Nand Kishore and Bir Gir, his sons. One of these bonds, namely, the bond dated the 10th August 1904, was executed only by Bholanath, but it appears from the subsequent bond dated the 6th April 1906 that Nandkishore and Bir Gir accepted the bond of the 10th August 1904 as binding on them.

The learned Subordinate Judge found that the consideration money was advanced by the mortgagees to the mortgagors. But, taking the view that there was no legal necessity in respect of the advances made by the plaintiffs to the defendants, he has given a mortgage-decree to the plaintiffs to the extent of the shares of Bholanath,

Nand Kishore and Bir Gir in the properties; he has dismissed the suit as against those members of the family who were not parties to the mortgage-bonds.

On the facts, as found by the learned Subordinate Judge, the decree was far too favourable to the plaintiffs. He found that there was no legal necessity in respect of the bonds, and yet he gave the plaintiffs a mortgage decree to the extent of the shares of the executants of the mortgage-bonds in the properties. Apparently, the learned Subordinate Judge was not aware of the celebrated decision of the Judicial Committee in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1). That case establishes the proposition that where a mortgage is granted by one co-parcener on his own account over the joint family properties, it is invalid, the estate is wholly unaffected by it and its entirety stands free of it. But it has been urged on behalf of the plaintiffs-appellants that the decision of the learned Subordinate Judge on the question of legal necessity is erroneous. Mr. Jayaswal, indeed, argues that most of these bonds are binding upon the entire joint family on the doctrine of antecedent debt which was recognised and affirmed by the Judicial Committee in the case to which I have already referred. It is necessary, therefore, to consider the evidence which has been adduced by the plaintiffs in regard to the different bonds which were executed in their favour.

The first of these bonds is dated the 1st August 1902. That was a bond for Rs. 7,900 and was executed by Bholanath, Nand Kishore and Bir Gir. The document recites that Rs. 7,600 was due by the executants to Gopal Sahu and Motilal Sahu on previous registered bonds dated the 13th December 1893, 24th May 1896, 28th June 1898 and unregistered bonds dated the 25th March 1898 and 22nd September 1897. All these bonds have been produced in the case and Mr. Abani Bhusan Mukerjee does not dispute that money was in fact due to Gopal Sahu and Motilal Sahu on the foot of these bonds. If that be so, there was clearly a debt due by Bholanath to Gopal Sahu and Motilal Sahu on the date of the execution of the bond Exhibit 1. In my opinion Rs. 7,600 was clearly an antecedent debt and was binding upon the family. The bond further recites that Rs. 300 was paid in cash to the executants for household expenses. The evidence establishes that enquiry was made on behalf of the plaintiffs as to the necessity for this sum of money and that upon enquiry it was found that the necessity was a real necessity. There is no reason to doubt that Rs. 300 was in fact required by the executants for household expenses. In my opinion, the bond dated the 1st August 1902 is binding upon the entire joint family.

I now come to the bond dated the 25th September 1902, Exhibit 2. This bond was again executed by Bholanth, Nand Kishore and Bir Gir. The bond recites that the money was required in order to pay off Gopal Sahu and Motilal Sahu. There is no dispute that money was in fact due to Gopal Sahu and Motilal Sahu on the date of the execution of this bond. If that be so, then Rs. 933 out of Rs. 989 which was borrowed on the 25th September 1902 constituted an antecedent debt. So far as Rs. 6 is concerned, it is a very small sum of money and may be left out of account. In my opinion, the bond dated the 25th September 1902 is binding upon the joint family.

Now, the third bond is dated the 10th August 1904 and has been marked Exhibit 3 in the case. This bond was executed by Bholanath alone: the bond recites that Rs. 859-1-3 was due to the plaintiffs on the foot of three simple bonds which had been executed by Bholanath in favour of the plaintiffs. These three simple bonds are dated the 6th Aghan 1311, 25th Sawan 1311, and 15th Jeth 1311 respectively. All these documents have been produced in the case and the sum of Rs. 859-1-3 undoubtedly constituted an antecedent debt. As regards the balance, the evidence is that Rs. 282 was required to buy a plough bullock and other accessories for agricultural purposes. The evidence as to the enquiry conducted by the plaintiffs, in my opinion, is sufficient to establish the debt as against the joint family.

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 489; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

The fourth bond is dated the 6th April 1906 and has been marked as Exhibit 4 in the case. This bond was executed by Bholanath, Nand Kishore and Bir Gir. The document recites that Rs. 925 was necessary for the marriage expenses of a son and a daughter of Bholanath Gir. The evidence on this point establishes that one Shewjas Singh on behalf of the plaintiffs went to the defendants' house to make an enquiry and he found that the money was required for certain marriage ceremonies in the family. Shewjas Singh has given evidence in the case and he says that he enquired from several people in the village about the necessity. The money was borrowed for marriage of one of the defendants and his sister. This evidence receives strong corroboration from the evidence of Mahabir Puri who was examined on behalf of the defendants. He says that the *Barat* came from Bhavanpur twelve years ago and that Bhola's daughter was married there. Now, this witness was giving evidence in 1918. This supports the case of the plaintiffs that there was a marriage in the family of the defendants in 1906.

The learned Subordinate Judge apparently does not disbelieve the case of the plaintiffs that Rs. 925 was required for the marriage expenses in the family, but he has come to the conclusion that marriage being a luxury and not a necessity, the debt did not bind the joint family properties. Now, the authorities on this point are all one way. It is quite true that some of the earlier decisions in the Madras High Court took the view that the marriage of any of the sons by the father is not, according to Hindu Law, a family purpose because there is no moral or religious obligation on either the father or the co-parcener to bring about the marriage; see the case of *Govindarazulu Narasimhan* v. *Devarabhotla Venkatanarasayya* (2). But this case has been overruled by a Full Bench decision of the Madras High Court in *Gopalakrishnama Raju* v. *Venkatanarasa Raju* (3). In that case the Madras High Court held that "marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi, and debts reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family family properties". The same view has been adopted both in Bombay and in Allahabad, see the case of *Bhagirathi* v. *Jokhu Ram Upadhia* (4) and *Sundrabai Javaji Dagdu Pardeshi* v. *Shivanarayana Ridkarna* (5). The decision of the Bombay High Court is a very careful one and was arrived at on a critical study of the texts on the subject. I am of opinion that the view of the learned Subordinate Judge is entirely erroneous and ought to be overruled.

It follows, therefore, that the bond dated the 6th April 1906 is binding upon the joint family properties.

The last bond is dated the 7th April 1906 and was executed by Bholanath, Nand Kishore and Bir Gir. The document recites that the money was necessary in order to enable them to pay off prior debts incurred by Bholanath to certain other creditors. There was, therefore, an antecedent debt binding on Bholanath on the 7th April 1906. This bond accordingly binds the joint family properties.

I must allow the appeal, modify the decree passed by the learned Subordinate Judge and give the plaintiffs a mortgage-decree in terms of the prayers in the plaint. The period of redemption, three months from the date of this judgment. The plaintiffs are entitled to their costs in this Court as well as in the Court below.

ADAMI, J.—I agree.

P. D. *Appeal allowed.*

(2) 27 M. 206.
(3) 17 Ind. Cas. 308; 37 M. 273; 23 M. L. J. 288 12 M. L. T. 292; (1912) M. W. N. 903 and 1231.
(4) 6 Ind. Cas. 465; 32 A. 575; 7 A. L. J. 667.
(5) 32 B. 81; 9 Bom. L. R. 1366; 3 M. L. T. 44.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1603 OF 1919.

July 6, 1921.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Pearson.

THE INDIA PROVIDENT COMPANY, LIMITED—DEFENDANTS—APPELLANTS

versus

GOBINDA CHANDRA DAS AND ANOTHER—PLAINTIFFS AND ISHAN CHANDRA CHAKRAVARTY—*Pro forma* DEFENDANT—RESPONDENTS.

Decree, fraudulent, suit to set aside—Jurisdiction—Decree obtained in one District—Execution sought in another District—Executing Court, when competent to entertain suit.

Save under special circumstances, a suit to set aside a decree on the ground of fraud, in which no other relief whatsoever is claimed, cannot be maintained in any District outside the District in which the fraud was committed and the fraudulent decree obtained. [p. 320, col. 1.]

Umrao Singh v. *Hardeo*, 29 A. 418 at p. 419; A. W. N (1907) 112; 4 A. L. J. 392 and *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee*, 5 C. W. N. 559, referred to.

Where an *ex parte* decree is obtained in one District and an application for its execution is made in another, a suit against the threatened execution with a prayer for an injunction, is entertainable by the Executing Court which has the power to go into the question whether the *ex parte* decree was obtained by fraud. [p. 320, cols. 1 & 2.]

Banke Behari Lal v. *Pokhe Ram*, 25 A. 48; A W. N. (1902) 179, *Jawahir* v. *Neki Ram*, 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190 and *Khushali Ram* v. *Gokul Chand*, 41 Ind. Cas. 352; 39 A. 607; 15 A. L. J. 638, referred to.

Dan Dial v. *Munna Lal*, 24 Ind. Cas. 978; 36 A. 564 at p. 567; 12 A L. J. 955, disapproved.

Where an *ex parte* decree is obtained by suppression of summons and suppression of real facts from the Court, it is a case of a fraudulent decree and not of one obtained by perjury. [p. 320, col. 2.]

Appeal against a decree of the Subordinate Judge, First Court, Sylhet, dated the the 4th of June 1919, affirming that of the Munsif, Second Court at Sylhet, dated the 24th of September 1918.

FACTS appear from the judgment.

Dr. *D. N. Mitter* (with him Babu *Heramba Chandra Guha*), for the Appellants.—The defendants are the appellants. The suit was to set aside a decree passed by the Court of Small Causes at Calcutta. The decree was obtained by the defendant Company on account of moneys received by the plaintiffs for the Company. The suit was commenced on the ground that the decree had been obtained by fraud. The suit as originally framed asked for a declaration that the decree was void. The plaint was subsequently amended and a prayer for injunction was added. Our defence was that the Court at Sylhet had no jurisdiction to entertain the suit. The summons of the Small Cause Court suit were sent out by a registered letter. The case, therefore, was not one of fraud. It might have been a case of non-service of summons for which no suit would lie. When the summons were sent out by registered letter, the presumption is that they reached the defendants unless the contrary is affirmatively proved. If the Court at Sylhet had jurisdiction it could only entertain the question of fraud. It had no power to go into the merits of the case. I shall first contend that the Court had no jurisdiction. Reads section 20, Civil Procedure Code.

[PEARSON, J.—The service or non-service of the summons is part of the method by which the fraud was perpetrated.]

The whole thing was completed in Calcutta. The cause of action consisted in obtaining the fraudulent decree in Calcutta. I rely on *Umrao Singh* v. *Hardeo* (1). Unless something is done by way of execution of the decree within the jurisdiction of the Sylhet Court, that Court had no power to entertain the suit. Refers to *Banke Behari Lal* v. *Pokhe Ram* (2). Refers also to *Jawahir* v. *Neki Ram* (3), *Khushali Ram* v. *Gokul Chand* (4), *Dan Dial* v. *Munna Lal* (5) and *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee* (6). The case in *Banke Behari Lal* v. *Pokhe Ram* (2) is distinguishable. There the decree itself stated that it affected property within the jurisdiction of the Court in which the suit to set aside the decree was brought. In the present case only a notice of execution was served on the plaintiffs at their residence in Sylhet. That would not give jurisdiction to the Sylhet Court to entertain the suit. The plaintiffs could

(1) 29 A. 418 at p. 419; A. W. N. (1907) 112; 4 A. L. J. 392.
(2) 25 A. 48; A. W. N. (1902) 179.
(3) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190.
(4) 41 Ind. Cas. 352; 39 A. 607; 15 A. L. J. 638.
(5) 24 Ind. Cas. 978; 36 A. 564 at p. 567; 12 A. L. J. 955.
(6) 5 C. W. N. 559.

have applied for review of judgment in the Small Cause Court at Calcutta. As was pointed out by Sir John Stanley in *Umrao Singh* v. *Hardeo* (1), startling consequences would ensue if decrees of a Court of one Province could be questioned in this way by a Court of another Province. Reads *Dan Dial* v. *Munna Lal* (5) (per Sir Henry Richards).

[PEARSON, J.—Here the suit is for a declaration that the decree was void and inoperative and for an injunction.]

That would not make any difference.

Assuming that the Court had jurisdiction, I submit that the summons were sent under registered cover. On the cover it is written "refused." The presumption is that it reached the addressee. See section 114 of the Evidence Act. Fraud cannot be presumed, it must be proved. My third point is that the Court could not discuss the merits of the case. I refer to the following string of cases, *Mahomed Golab* v. *Mahomed Sulliman* (7), *Moruful Huq* v. *Surendra Nath Roy* (8), *Keaar Nath Das* v. *Hemanta Kumari Dasi* (9), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (10), *Lakshmi Charan Shaha* v. *Nur Ali* (11).

Babu *Poresh Lal Shome*, for the Respondents.—As to the question of jurisdiction my submission is that as the defendants got the decree of the Calcutta Small Cause Court transferred and sought execution in Sylhet, that is sufficient to give the Sylhet Court jurisdiction to entertain the suit. See *Khushali Ram* v. *Gokul Chand* (4) and *Lakshmi Charan Shaha* v. *Nur Ali* (11).

[N. R. CHATTERJEA, J. refers to *Manindra Nath Mitra* v. *Hari Mondal* (12).]

About the notice my submission is, that the notice alleged to have been refused was not produced in Court. As regards the third point I submit that, as a matter of fact, the Courts below have not gone into the merits of the case. Then the suppression of summons was committed in collusion with the Postal peons at Sylhet. That also gives that Court jurisdiction as part of the cause of action arose in Sylhet.

Babu *Herambo Chandra Guha* replied.

JUDGMENT.—The defendants who are the appellants before us obtained a decree in the Small Cause Court, Calcutta, for Rs. 1,200 odd on the 1st March 1916. The suit was decreed *ex parte*. After obtaining the decree, the defendants got it transferred to the Court of the Subordinate Judge of Sylhet within whose jurisdiction the present plaintiffs resided and applied for execution of the decree against the plaintiffs. The plaintiffs thereupon instituted a suit in the Court of the Subordinate Judge of Sylhet for a declaration that the *ex parte* decree obtained by the defendant in the Calcutta Small Cause Court was obtained by fraud, was void and not fit to be executed. They also applied for the issue of an injunction against the defendant No. 1 restraining him from executing the said decree.

The plaintiffs alleged that, as a matter of fact, no summons was served upon them in the suit brought in the Small Cause Court, that there was no adjustment of accounts although the suit was brought on the allegation that the accounts had been adjusted and that it was not brought to the notice of the Court that the plaintiffs were sureties only for a limited sum. The case for the plaintiffs was that the summons had been fraudulently suppressed, that the decree was obtained by practising fraud upon the Court, and that, in these circumstances, the decree was not binding upon them.

The defendants raised the objection that the Sylhet Court had no jurisdiction to try the suit as the cause of action did not arise in Sylhet, but in Calcutta, where the decree complained of was obtained.

The Courts below overruled the objection. They found that the decree was fraudulently obtained and gave a decree to the plaintiffs.

Two contentions have been raised on behalf of the defendants-appellants. The first is, that the Sylhet Court had no jurisdiction to try the suit.

The learned Pleader for the respondent has contended that a part of the cause of action arose in the jurisdiction of the

(7) 21 C. 612 at p. 619; 10 Ind. Dec. (N. S.) 1038.
(8) 15 Ind. Cas. 803; 16 C. W. N. 1012.
(9) 22 Ind. Cas. 709; 18 C. W. N. 447.
(10) 23 Ind. Cas. 337; 18 C. W. N. 691; 19 C. L. J. 457; 41 C. 990.
(11) 11 Ind. Cas. 626; 15 C. W. N. 1010; 38 C. 936.
(12) 54 Ind. Cas. 628; 24 C. W. N. 138.

Sylhet Court inasmuch as the suppression of process, by reason whereof the *ex parte* decree was obtained in Calcutta, took place within the jurisdiction of Sylhet and that, therefore, it might be said that a part of the cause of action arose within the jurisdiction of the Sylhet Court.

We do not think, however, that the cause of action arose in Sylhet by reason of suppression of processes in that Court, when the decree which gave rise to the cause of action was obtained in Calcutta. However that may be, we think that the Sylhet Court had jurisdiction to try the suit As stated above, the plaintiffs asked for a declaration that the decree was void and not fit to be executed, and also prayed for a permanent injunction restraining the defendant from executing the decree.

The question whether a suit can be instituted in one District for setting aside a decree passed by a Court in another District has been the subject of many decisions and the decisions cannot be said to be uniform. The general principle which may be said to have been established by the cases, however, is that, save under special circumstances, a suit to set aside a decree obtained by fraud in which no other relief whatever is claimed, cannot be maintained in any District outside the District in which the fraud was committed and the fraudulent decree was obtained [see the case of *Umrao Singh* v. *Hardeo* (1)], and in the case of *Dan Dial* v. *Munna Lal* (5) it was held that the addition of a prayer for injunction would not give such Court jurisdiction. A contrary view was taken in the case of *Kelar Nath Mukerjee* v. *Prosonna Kumar Chatterjee* (6). Where, however, the decree is obtained in one District and executed in another, it has been held in some cases that the Court in which execution is taken out is competent to try such a suit. See the cases of *Banke Behari Lal* v. *Pokhe Ram* (2), *Jawahir* v. *Neki Ram* (3) and *Khushali Ram* v. *Gokul Chand* (4)]. In these cases the property of the judgment-debtor was attached or he was arrested within the jurisdiction of the Court where the suit was instituted.

In this case it is true that no property of the plaintiffs had been attached within the jurisdiction of the Sylhet Court; but the defendant applied for execution of the decree and it was against the threatened execution that the suit was brought and an injunction was asked for. The Sylhet Court was entitled to issue an injunction and, in order to grant that relief, it had the power to go into the question whether the *ex parte* decree was obtained by fraud in which case it would be inoperative. [See the case of *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee* (6)].

In these circumstances, we are of opinion that the Sylhet Court had jurisdiction to entertain the suit.

The next question is, whether the Court below was right in holding that the decree was obtained by fraud. A number of cases have been cited before us; but we think, having regard to the findings arrived at by the Court of Appeal below, it must be held that the decree was obtained by fraud. The Judge has found that the summons were designedly suppressed and that the real facts were suppressed from Court. Now, if the present plaintiffs, who were the defendants in the Small Cause Court suit, were prevented by the contrivance of the plaintiffs in that suit from placing their case before the Court and the Court was misled into making a decree in favour of the plaintiffs in that suit, we think that the decree was a fraudulent one and that it is not a question of obtaining a decree by perjury.

We are accordingly of opinion that the decree of the lower Appellate Court is right, and that this appeal should be dismissed with costs.

N. H. *Appeal dismissed.*

VANCHINATHA AIYAR v. RAJAGOPALA AIYAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 402 OF 1920.

January 18, 1921.

Present:—Mr. Justice Spencer and Mr. Justice Ramesam.

VANCHINATHA AIYAR—DEFENDANT No. 1—APPELLANT

versus

RAJAGOPALA AIYAR AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Madras Hereditary Village Offices Act (III of 1895), s 21—Suit to recover emoluments of purohit *office in proprietary estate—Jurisdiction of Civil Courts—Pleadings—New plea in second appeal—Suit not triable by Civil Courts.*

Under section 21 of the Madras Hereditary Village Offices Act Civil Courts have no jurisdiction to entertain suits for recovery of *purohit maniams* in proprietary estates. [p 321, col 2.]

Kandappa Achary v. *Pathipati Vengama Naidu*, 20 Ind. Cas 634; 37 M. 548; 25 M. L. J. 42; 14 M. L. T. 146; (1913) M. W. N. 600, followed

Mavoulu Seetharam Naidu v. *Doddi Rami Naidu*, 5 Ind. Cas. 137; 33 M 208 at p. 210; 7 M. L. T. 181; 20 M. L. J. 91, distinguished

In this case a plea by the defendant that Civil Courts had no jurisdiction to try the suit was allowed to be raised for the first time in second appeal [p. 321, col. 2.]

Second appeal against a decree of the Court of the Temporary Subordinate Judge, Chingleput, in Appeal Suit No. 77 of 1919, presented against a decree of the Court of the Additional District Munsif, Chingleput, in Original Suit No. 229 of 1916.

Messrs. *T. R. Venkatarama Sastri* and *P. S. Narayanaswami Aiyar*, for the Appellant.

Mr. *C V. Anantha Krishna Aiyar*, for the Respondents.

JUDGMENT.—The plaintiffs brought this suit to recover three items of property in Siruvakkam and Kanerikuppam villages on the strength of their reversionary right as heirs to the late Samu Aiyar. This suit failed in the First Court on a finding by the District Munsif on the question of the plaintiff's father's adoption, but on appeal the Subordinate Judge found this point in their favour and gave them a decree for possession on payment of the amount spent by first defendant in redeeming the property from the hands of the mortgagees.

In second appeal the first defendant has, for the first time, raised the contention that the Civil Courts had no jurisdiction over the suit which was brought for the recovery of the emoluments of the office of *purohit* in a proprietary estate, and we have allowed him to argue this point of law, seeing that if he is right in his contention the decree obtained by the plaintiff cannot stand.

After the Full Bench decision in *Kandappa Achary* v. *Pathipati Vengama Naidu* (1), which supported *Mutyala Papayya* v. *Kosuri Muramallu* (2), and overruled *Veerabadran Achari* v. *Suppiah Achari* (3), it must be regarded as settled law that section 13 of Madras Act III of 1895 confers jurisdiction on Revenue Courts over suits for the recovery of the emoluments of hereditary offices falling under section 3, clause (4), one of which is the office of village *purohit* or priest in proprietary estates as well as in *ryotwari* villages. At the same time, section 21 ousts the jurisdiction of Civil Courts in respect of such suits.

Of course, a suit in which the plaintiff does not need to rely on his right to the office and its emoluments in order to succeed, such as would be the case in the instance cited in the words of Subramania Aiyar, J., at page 210* of *Mavoulu Seetharam Naidu* v. *Doddi Rami Naidu* (4), stands on a different footing. But this is not such a case. In the plaint in this suit the plaintiff mentions expressly the nature of the property he sues to recover, *viz.*, *purohit maniam*, and traces his descent by a genealogical tree to the previous office holders.

The plaintiff's suit must, accordingly, be dismissed in respect of the first two items, but without costs as the point of jurisdiction was taken at a late stage. This dismissal will be without prejudice to any suit that may hereafter be filed in the proper Court.

The third item in suit is an enfranchised *inam*. Mr. Venkatarama Sastri argues that the suit is barred by limitation in respect of it, as section 14 of Act III of 1895 prescribes a term of three years' limitation for suits under the Act, and more than three years had elapsed on the date of suit since the widow died in 1902.

(1) 20 Ind. Cas. 634; 37 M. 548; 25 M. L. J. 42; 14 M. L. T. 146; (1913) M. W. N. 600.

(2) 13 Ind. Cas. 322; 22 M. L. J. 156; 11 M. L. T. 11; (1912) M. W. N. 7.

(3) 5 Ind. Cas. 477; 33 M. 498; 7 M. L. T. 198.

(4) 5 Ind. Cas. 137; 33 M. 208 at p. 210; 7 M. L. T. 181; 20 M. L. J. 91.

* Page of 33 M.—[Ed.]

Act III of 1895, however, has no provision corresponding to section 28 of the Limitation Act which extinguishes the rights of persons who fail to sue in time. See *Pichuviyyan* v. *Vilakkudayan Asari* (5) and *Secretary of State for India* v. *Vira Rayan* (6).

The plaintiff had 60 years under Article 148 of the Limitation Act to sue for redemption from the date of the mortgage and 12 years to sue for possession from the date of the widow's death under Article 141.

His suit is, therefore, in time in respect of this item and as there is no other point, the lower Court's decree will be modified by excluding items Nos. 1 and 2 and retaining item No. 3, with costs throughout on the proportionate value of that item, the amount to be paid by the plaintiff being reduced from Rs. 146 to Rs. 21.

M. C. P. & N. H.

Decree modified.

(5) 21 M. 134; 7 M. L. J. 196; 7 Ind. Dec. (N. s.) 451.

(6) 9 M 175; 3 Ind. Dec. (N. s.) 519.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 146 OF 1919.

May 23, 1921.

Present:—Mr. S M. Robinson, Chief Judge, and Mr. Justice Duckworth.

MAUNG PO ZU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG PO KWA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Fraudulent transaction—Fraud—Burden of proof—Fraud effectuated—Court, duty of.

In a suit for a declaration that a registered deed of sale is a mere colourable transaction, and that no consideration passed, it is for the plaintiff to prove the fraud alleged and the want of consideration if he establishes circumstances pointing to the truth of the facts he alleges, the onus is shifted, and it is for the defendant to prove consideration [p. 323, col. 1.]

If in any transaction there has been a fraud and that fraud has been carried into effect to any material extent a Court will not aid either party to take advantage of his fraud but will let the estate lie where it falls. But where the fraud has not been carried out where nothing has been done under it, then the Court will aid the vendor to retain possession of his property and will not allow the vendee to take it, that is, to effectuate the fraud to which he was a party. [p. 323, col. 1.]

First civil appeal against a decree passed by the District Judge, Bassein.

Mr. *Leach*, for Appellant No. 1.

Mr. *Ba Dun*, for the Respondents.

JUDGMENT.—The parties to this suit are Karen Christians. The father of the family was U Tike Pyu. He had numerous sons and daughters. He owned two pieces of paddy land, a garden and a house. One of his sons Nyan Baw was anxious to be appointed Thugyi and to assist him to this end he desired to show himself as an owner of immoveable property. A petition was presented to the Revenue Surveyor to transfer the paddy lands and garden from the name of Tike Pyu to that of his son Nyan Baw, and this was done. We think there can be no doubt that it was done with Tike Pyu's consent and with the knowledge of the family. Nyan Baw was appointed Thugyi. On the 12th March 1914 he mortgaged the lands to U Shwe Thin for Rs. 4,000. On the 27th November 1914 another petition was presented to the Revenue Surveyor, and the lands were retransferred to the name of Tike Pyu. When U Shwe Thin became aware of the fraud that had been committed upon him, he took criminal action against Nyan Baw who was convicted of cheating on the 18th April 1916. As Tike Pyu was afraid that Shwe Thin might proceed against his property in execution of his mortgage, he executed a registered deed of sale of all his properties in favour of another son Po Zu present appellant. At least this is what the plaintiffs in this case allege. They sued for a declaration that this deed of sale was a mere colourable transaction entered into with this object and that no consideration passed. Tike Pyu died on 13th December 1917, and it is alleged that after his death Po Zu seized all the properties and hence this suit is brought for the administration of the estate.

MAUNG PO ZU v. MAUNG PO KWA.

The principal question involved is as to the party on whom the onus lies of proving that the deed of sale was a mere colourable transaction. Outwardly, the deed of sale, which is duly registered, purports to create a title in Po Zu, and, that being so, it is ordinarily not for him to prove the *bona fides* of the transaction, or that there was valid consideration. It is for the plaintiffs who allege that that was a fraudulent transaction to defeat a creditor to prove the fraud alleged and the want of consideration. But when they have established circumstances pointing to the truth of the facts they allege, the onus will become shifted and it will be for defendants to prove consideration. Plaintiffs are the children and grandchildren of Tike Pyu. They stand in his shoes, and the contest, therefore, is between the vendor and the vendee and the law as to the right and duty of the Court to interfere between parties guilty of a fraud is clear. If there has been a fraud—if the deed of sale was executed with the object of defeating any claim which Shwe Thin might bring—and that fraud has been carried into effect to any material extent, the Courts will not aid either party to take advantage of his fraud but will let the estate lie where it falls. But where the fraud has not been carried out—where nothing has been done under it, then the Courts will aid the vendor to retain possession of his property and will not allow the vendee to take it, that is, to effectuate the fraud to which he was a party.

It is, therefore, necessary to see what facts the plaintiffs have been able to establish as against this primarily valid deed of sale. There can be little or no doubt that the first mutation of names in favour of Nyan Baw was effected with the consent of Tike Pyu and with the knowledge of the family or at any rate of Po Zu. Indeed, that is not denied. It cannot be denied also that after Nyan Baw had falsely induced Shwe Thin to lend him Rs. 4,000 the property was retransferred back to Tike Pyu's name in order to defeat any suit that Shwe Thin might bring on his mortgage. It may be that Shwe Thin could not have proceeded against this land in execution of any mortgage-decree he may have obtained, although if Tike Pyu had allowed Nyan Baw to occupy the position of an ostensible owner it might be argued that he could not defeat Shwe Thin's claim. But, however, that may be, we have no doubt that the sale to Po Zu was made to defeat any claim which Shwe Thin might bring. If then there was no consideration paid for the sale, it is clear that the transaction must be regarded as a mere colourable transaction that was never intended by the parties to have any effect. As to the payment of consideration there is on the part of the plaintiffs only negative evidence. Po Zu alleges that the payment was made in two sums of Rs. 1,600 and Rs. 3,400. To prove the payment of Rs. 3,400 two witnesses are called. One went to buy a buffalo and took the other with him. By chance as they passed Tike Pyu's house they entered it to have a drink of water and they arrived at the opportune moment and saw the money paid and heard it stated to be the final payment. It is admitted that this evidence is extremely weak. The buffalo was of course not bought, and we have no hesitation in holding that there is no proof that Rs. 3,400 was paid. As regards the other sum of Rs. 1,600 the allegation is that Po Kwa, another son of Tike Pyu, had purchased a fishery license, and that that sum of money was required to pay for it. Po Zu alleges that he advanced that money to his brother. Nyan Baw and another man were said to have become sureties when the license was purchased. Two of the sons of Tike Pyu have given evidence as to it. Nyan Baw states that the amount had previously been deposited with Po Zu by Po Kwa and was merely taken back from him for the purpose of payment. The other brother Aung Nyein states that the money was borrowed from Po Zu but was repaid a few days later. This evidence is clearly entitled to no weight, but on the other side a headman is produced who deposes that happening to go into Tike Pyu's house he saw Tike Pyu paid Rs. 1,600 by Po Zu. The money, it was said, was to prevent auction of the license on account of revenue. Po Zu says that his father asked him to provide the Rs. 1,600 for his brother's license and that, therefore, he paid the money to his father. That he should have done so is improbable, and when we find that the only witness to prove it is a chance comer and is Po Zu's brother-in-law, it is obvious that it cannot be held that this amount was advanced Po Zu. According to Po Zu

credit for it was taken and Rs. 3,400 paid in cash to make up the purchase price. It is admitted that the property sold was the whole of the estate possessed by Tike Pyu, and Po Zu admits that it is worth between Rs. 6,000—7,000. The other children were thus deprived of all chance of inheritance, and the father accepts a sum which is considerably less than the amount he might apparently have obtained for his property.

After the deed of sale was executed possession was apparently allowed to remain with Tike Pyu. He and some of his children continued to live in the house, and Po Zu admits that he cultivated one of the two pieces of paddy lands and that his father cultivated the other. It is alleged that the sons who cultivated the other paid rent to their father. It has been said that the present suit had not been brought until four years had elapsed from the date of the deed of sale. Seeing that the position had not been in any way altered, that the cultivation of the lands continued as before, and that it was only after the death of Tike Pyu that Po Zu set up a claim to be the sole owner of the lands by virtue of his deed of sale, the delay is sufficiently accounted for.

Having regard, therefore, to the evidence and to the circumstances which led up to the execution of this deed of sale, we are of opinion that the plaintiffs have sufficiently discharged the onus that lay on them primarily and that Po Zu has failed to establish that the transaction was a genuine and not merely a colourable one. We are of opinion, therefore, that the lower Court was right in holding that the transaction was a *benami* one and in granting an administration decree. We should perhaps mention that a ground of appeal based on section 190 of the Succession Act was raised but that after considering the provisions of Act V.I of 1901 it was admitted that that contention could not be supported. We, therefore, dismiss the appeal with costs throughout.

W. C. A. & J. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 160 OF 1920.

October 29, 1920.

Present:—Mr. Macnair, A. J. C.

VITHOBA—APPLICANT

versus

SITARAM AND OTHERS—NON-APPLICANTS.

Contract Act (IX of 1872), s. 30—Wagering contract—Test—Agreement to pick cotton crop in exchange of certain khandis, *whether wagering contract.*

The essence of a gaming and wagering contract is that one party is to win and the other to lose upon a future event which, at the time of the contract, is of uncertain nature [p. 325, col. 1.]

Richards v. *Starck*, (1911) 1 K B. 296; 80 L. J. K. B. 213; 103 L. T. 813; 27 T. L. R. 29, followed.

An agreement by a tenant of a field to allow another to pick the cotton crop of the field in exchange for a promise to deliver certain *khandis* of cotton at the time of picking is not a wagering contract. [p. 324, col. 2.]

Application for revision of a decree of the Judge, Small Cause Court, Wardha, on the 14th of April 1920, in Civil Suit No. 191 of 1920.

Mr. *K. A. Potey*, for the Applicant.

ORDER.—The learned Small Cause Court Judge has given the plaintiff a decree on account of damages for breach of a contract. The only ground which is urged before me is, that the contract was a wagering contract. The tenant of a field agreed to allow another to pick the cotton crop of that field in exchange for a promise to deliver $2\frac{3}{4}$ *khandis* of cotton at the time of picking. I do not consider that this is a wagering contract. In *Richards* v. *Starck* (1) the definition of gambling and wagering, given by Cotton, L. J., is quoted:—

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which, at the time of the contract, is of an uncertain nature—that is to say, if the event turns out one way *A* will lose, but if it turns out the other way he will win."

The tenant did not stand either to lose or to win however the cotton crop might turn out. He was to get $2\frac{3}{4}$ *khandis* in either case.

(1) (1911) 1 K. B. 296; 80 L. J. K. B. 213; 103 L. T. 813; 27 T. L. R. 29.

There is another way in which I may look at the question. It seems obvious that the sale of a growing crop for cash is not gaming or wagering any more than the sale of a delicate calf which may or may not become a valuable cow. The fact that the consideration is to be paid at harvest and is in kind instead of in money cannot make the sale of the crop a wagering contract.

The decision in Civil Revision No. 149 of 1919, decided on 7th November 1919, has been brought to my notice: with the greatest respect, I must express my dissent from the reasoning in that decision.

The application for revision is dismissed without notice to the opposite party.

G. R. D. *Application dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 64 OF 1919.

January 12, 1922.

Present:—Mr. Justice Das and Mr. Justice Adami.

MATHURA PRASAD SAHU—

APPELLANT

versus

DASAI SAHU AND ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens, whether applicable to involuntary transfer—Execution sale and sale for non-payment of Government revenue, distinction between.

So far as the express language of section 52 of the Transfer of Property Act is concerned, it may seem to mean that it applies only to voluntary transfers and not to an involuntary transfer, but, having regard to the numerous cases decided on the point, it is impossible to hold that the doctrine of *lis pendens* as embodied in section 52 of the Act applies only to voluntary transfers and not to involuntary transfers. [p. 326, col. 1.]

Har Shankar Prasad Singh v. *Shew Gobind Shaw*, 26 C. 966; 4 C. W. N. 317; 13 Ind. Dec. (N. S.) 1218, followed.

There is no distinction between an execution sale and a sale for non-payment of Government revenue. [p. 326, col. 2.]

Appeal from a decision of the Subordinate Judge, Saran.

Messrs. *S. C. Mitter* and *Sambhu Saran*, for the Appellant.

Messrs. *Kulwant Sahai* and *Harnarain Prasad*, for the Respondents.

JUDGMENT.

DAS, J.—In my opinion the decision of the learned Subordinate Judge is right and ought to be affirmed. The facts, shortly, are as follows:—

In 1913 the present plaintiff instituted a suit, being Suit No. 144 of 1913, against one Badri Narain on the foot of three mortgages executed by Badri Narain in favour of the plaintiff. These three mortgages were executed on the 24th February 1905, 4th August 1906, and 21st August 1906, respectively. By the first bond a 13-annas share in Monepur Gambhir was mortgaged; by the second bond 9-annas 4 pies share in Manopur Gram was mortgaged, and by the third bond both the properties were mortgaged. On the 26th March 1914 the plaintiffs obtained a preliminary decree, and on the 27th February 1915 they obtained the final decree.

It appears that on the 4th June 1915 the residuary share in Manopur Gambhir was sold for arrears of Government revenue and was purchased by the defendant. It is conceded that by such purchase the defendant acquired the right, title and interest of the judgment-debtor, that is to say, Badri Narain. On the 10th February 1916 Manopur Gambhir was sold in execution of the mortgage decree and was purchased by the decree holder. The plaintiff obtained delivery of possession on the 28th May 1917 through Court but failed to obtain actual possession from the defendant who claimed title to Manopur Gambhir by virtue of his purchase at the sale for arrears of Government revenue.

We are in this appeal concerned with the question whether the plaintiff as the auction-purchaser is entitled to recover

possession of the property from the defendant who purchased the property at the sale for non payment of Government revenue.

The first point that has been urged on behalf of the appellants is this. That the doctrine of *lis pendens* does not apply, and accordingly there is still a right of redemption in the defendant. The learned Vakil for his argument relies on the express language of section 52 of the Transfer of Property Act. That section runs as follows :—

"During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

The argument of the learned Vakil is this. That section 52, by the express language which has been adopted by the Legislature, only applies to a voluntary transfer and not to an involuntary transfer such as that which has taken place in this case and by which the defendant has acquired title to the property. It may be conceded that, so far as the language of section 52 is concerned, it to some extent supports the contention of the learned Vakil; but, having regard to the numerous cases which have been decided on the point, it is plainly impossible for us to encourage this argument at the present day. The authorities are all collected in Dr. Ghose's Book on the Transfer of Property Act under section 52, and there is a case to which the learned Subordinate Judge refers, the case of *Har Shankar Prasad Singh* v. *Shew Gobind Shaw* (1), which is an express decision against the contention of Sorishi Babu. That case was argued on one side by Dr. Rash Behary Ghose and on the other side by Mr. Saroda Ch. Mitter. It may be assumed that whatever could be said was said and Mr. Justice Ghose, who delivered judgment in the case, assumed that the doctrine would apply to an involuntary sale. But the learned Vakil says that there is a distinction between an execution sale and a sale for non-payment of Government revenue. I am unable to appreciate the distinction. In my opinion, the view of the learned Subordinate Judge on this point is right and must be affirmed. The next argument is, that the decree which was obtained by the plaintiff in the suit to which I have already referred was not a mortgage-decree and that there was a right of redemption in Budri Narain and there is still a right of redemption in the defendant. The decree, however, is passed as a mortgage decree and it is impossible to hold now that the decree which was passed as a mortgage decree was in fact not a mortgage-decree : but the contention of the learned Vakil is this. That the plaintiff brought one suit in respect of three mortgages and that it was incompetent to the learned Subordinate Judge to direct all the properties to be sold in default of payment by Budri Narain of the aggregate sum of money that was due to the plaintiff on all the mortgages. Now, if that was so, I think that the only remedy which was available to Budri Narain at that stage was to appeal from that decree to the High Court, but that course was not adopted by Budri Narain. The Court was the only Court that could deal with the matter; it did deal with the matter and in my opinion, it cannot be suggested that the Court had no jurisdiction to pass the decree which in fact it did.

But the facts are not what they are stated to be by Sorishi Babu. We have looked into the decree which was passed by the learned Subordinate Judge and it seems to me that what the learned Subordinate Judge did in fact was, to give the plaintiff three decrees on the foot of three mortgage-bonds. The accounts were all directed to be taken separately; the mortgaged properties under each bond were specifically mentioned in the decree, and the learned Sub-

(1) 26 C. 966; 4 C W.N. 317; 13 Ind. Dec. (N. S.) 1218.

ordinate Judge directed that on default of payment by the mortgagor of the money due to the mortgagee on the taking of accounts, the mortgaged properties or a sufficient portion thereof should be sold. I take the decree to mean that, upon default on the part of the mortgagor to pay the money due in respect of each bond, the properties covered by that bond would be sold. That seems to me to be the plain meaning of the decree that was passed by the learned Subordinate Judge. If that be so, then the question is at an end and the decision of the learned Subordinate Judge must be correct.

The only other point is, that the property did not belong to Badri Narain. According to the contention of the defendant, Badri Narain was one of three brothers, the other brothers being Thakur Prasad and Ram Nath and that the property was in fact purchased by Thakur Prasad. According to Saroshi Babu there was a separation between the three brothers, and Badri Narain had no title to mortgage the properties to the plaintiff. The evidence has been dealt with by the learned Subordinate Judge and though it is quite true that upon the death of Thakur Prasad his widow, Rajo Kuer, was for the time being registered as the owner of the property in question, still we cannot altogether ignore the civil suit which was instituted by Badri Narain and Ram Nath against Rajo Kuer, nor can we ignore the consent decree which was passed by which Rajo Kuer admitted that the three brothers were joint and that the property belonged to the three brothers jointly. But it is urged that there was a subsequent suit by Rajo Kuer's daughter against Ram Nath and Badri Narain to recover possession of the property on the allegation that her father had purchased the property while he was separate from Ram Nath and Banwari Lall. That suit, however, was brought after the decree was in fact obtained by the plaintiffs in this suit against Badri Narain and the decree which was obtained by Rajo Kuer's daughter is dated the 28th June 1916. The learned Subordinate Judge holds, and I think rightly, that that was an entirely collusive suit in order to defeat the title of the plaintiff.

This appeal must be dismissed with costs.

ADAMI, J.—I agree.

J. P. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 189 OF 1921.

December 14, 1921.

Present:—Mr. Prideaux, A. J. C.

GOVIND AND ANOTHER—APPLICANTS

versus

DAJI AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 115—Order fixing valuation for Court-fees—Revision does not lie—Error of law, whether ground for revision.

No revision lies against a decision of a subordinate Court on a question of valuation determining the amount of Court-fee inasmuch as no case has been decided by that Court within the meaning of section 115, Civil Procedure Code. [p. 328, col. 2.]

Buddhoo Lal v. *Mewa Lal*, 63 Ind. Cas. 15; 43 A. 56; 19 A. L. J. 553 (F. B.), followed.

Vithal Krishna v. *Balkrishna Janardan*, 10 B. 60; 5 Ind Dec. (N. S.) 795 (F. B.), *Upadhya Thakur* v. *Persidh Singh*, 23 C. 723; 12 Ind. Dec. (N. S.) 481 (F.B.), *Wilayat Ali Khan* v. *Umardaraz Ali Khan*, 19 A. 165; A. W. N. (1897) 33; 9 Ind Dec. (N. S.) 103, referred to.

Amolakrao v. *Govindrao*, 49 Ind. Cas. 34; 15 N. L. R. 21 at p. 24, distinguished.

An error of law may be a good ground for second appeal, but it is not a ground for revision under section 115 of the Civil Procedure Code [p. 328, col. 2.]

Duri v. *Mohanlal*, 4 N. L. R. 184, followed.

Application for revision of an order of the Subordinate Judge, Chanda, dated the 3rd August 1921, in Civil Suit No. 22 of 1921.

Mr. *A. C. Roy*, for the Applicants.

Mr. *D. T. Mangalmurti*, for the Non-Applicants.

ORDER.—The plaintiffs in this case sued as hereditary *pujaris* of three temples situated at Ashaleshwar stating that they, having been ousted from the management of the temple by the defendants, civil litigation ensued, it being held therein that the committee composed of the defendants had no legal right to the management of the temples. The plaintiffs instituted the present suit for rendering of accounts of offerings and other income of the temples

GOVIND V. DAJI.

and for restoration of certain ornaments and jewellery said to be missing. They provisionally valued their claim at Rs. 4,000 offering to pay Court-fee in excess of this sum should a decree in excess be given them. The prayer clause of the plaint runs:—

"(*a*) Defendants be called upon to render accounts of all temple properties including jewels mentioned above and of all income realized by the defendants during their management from the year 1907 to 1913 both inclusive.

"(*b*) That preliminary decree be passed to the effect that defendants are liable to render accounts of all income and return all properties which they had taken over but failed to return.

"(*c*) That final decree then be passed regarding the liabilities of the defendants and decree be passed for such amount as would be found due after taking proper accounts against the defendants by this Hon'ble Court on plaintiffs paying additional Court fees on such amount.

"(*d*) Any other relief to which the plaintiffs will be entitled according to law."

The defendants contended *inter alia* that the suit was not properly stamped and that Court-fee should be paid on the value of the ornaments claimed as well as on the accounts demanded. These contentions led to the framing of the following preliminary issues:—

"(1) Should the plaintiffs have given the value of the ornaments and separate value for accounts?

"(2) Has the suit been properly valued?"

The Trial Court finds that plaintiffs must give an estimate of the value of the ornaments claimed and pay stamp-duty thereon as well as on the accounts asked for, and against that finding the present application for revision has been filed.

A preliminary objection has been taken that no revision lies. The applicants contend that it does and quote *Vithal Krishna* v. *Balkrishna Janardan* (1), a case which states that a decision by a Subordinate Court on a question of valuation, determining the amount of a Court-fee, is, notwithstanding its declared finality, subject to revision by the High Court under section 622 of the Civil Procedure Code. They also quote *Upadhya Thakur* v. *Persidh Singh* (2), and *Wilayat Ali Khan* v. *Umardaraz Ali Khan* (3). It seems to me that no revision lies against a decision of a subordinate Court on a question of valuation determining the amount of Court-fee inasmuch as no case has been decided by the Court below within the meaning of section 115 of the Civil Procedure Code. The preliminary issues have certainly been decided, but if the Court-fee demanded on the two distinct reliefs claimed is not paid, the plaint will be rejected and an appeal will lie against that rejection. I follow the Full Bench decision in *Buddhoo Lal* v. *Mewa Lal* (4). In *Amolakrao* v. *Govindrao* (5), Batten, A. J. C., held that, "a High Court will, however, interfere in revision even with an interlocutory order if such order goes to the root of the case and allows the continuation of litigation which the Court had no jurisdiction to allow to continue." But the present case does not come within the principle there enunciated.

Another aspect of the case is, that the decision complained of amounts only to an error of law, a good ground for second appeal but not a ground for revision under section 115 of the Civil Procedure Code: see *Duri* v. *Mohanlal* (6).

I am of opinion that no revision lies in the present case and, therefore, dismiss this application for revision. The applicants will pay their own and non-applicants' costs. I fix Pleader's fees at Rs. 15.

G. R. D.

Application rejected.

(1) 10 B. 610; 5 Ind. Dec. (N. S.) 795 (F. B.).

(2) 23 C. 723; 12 Ind. Dec. (N. S.) 491 (F. B.)

(3) 19 A. 165; A. W. N. (1897) 33; 9 Ind. Dec. (N. S.) 109.

(4) 63 Ind. Cas. 15; 43 A. 534; 19 A. L. J. 555 (F. B.).

(5) 49 Ind. Cas. 34: 15 N. L. R. 21 at p. 28.

(6) 4 N. L. R. 184.

RAGHUNATH BHAGAT v. AMIR BAKHSH.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE
No. 55 OF 1919.
January 11, 1922.

Present:—Mr. Justice Das and
Mr. Justice Adami.

RAGHUNATH BHAGAT AND OTHERS
—APPELLANTS
versus
AMIR BAKHSH—PLAINTIFF AND *Sheikh* MUHAMMAD LATIF *alias Sheikh* CHANDRA—DEFENDANT 1ST PARTY AND GURU PRASAD BHAGAT—DEFENDANT 3RD PARTY—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 58, 59—Mortgage, operation of—Conveyance or contract—Sale-deed executed after mortgage but before payment of full consideration—Priority.

A mortgage is a conveyance and not a contract. If there is nothing in a mortgage-deed to suggest that the mortgage is not to become effective until the consideration money is paid, the mortgage becomes operative as from the date of the execution of the mortgage-deed. A mere provision in the mortgage-deed that the mortgagor undertakes to make over the mortgage-deed to the mortgagee upon the payment of the full consideration money does not amount to a contract between the parties that the mortgage is not to take effect until the payment of the consideration money. [p. 330, col. 2; p. 331, col. 1.]

Tatia v *Babaji*, 22 B. 176; 11 Ind. Dec. (N. S.) 699, followed.

Therefore, a deed of sale executed by a mortgagor after the execution and registration of the mortgage-deed but before the payment of the full consideration money of the mortgage is not entitled to priority over the mortgage-bond when there is nothing in the contract which establishes that the title is not to pass to the mortgagee as and from the date of the execution of the mortgage-bond. [p. 331, col. 1.]

Appeal from a decision of the Subordinate Judge, Darbhanga.

Messrs. *Sultan Ahmad* and *Muhammad Hasan Jan*, for the Appellants.

Messrs. *P. Dayal* and *Bhagwan Persad*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of a suit instituted by the plaintiff-respondent to enforce a mortgage-bond executed by the defendants first party in his favour. The material facts are these.

On the 3rd of May 1913, the defendants first party executed a bond for Rs. 13,000 in favour of the plaintiff. This document was registered on the 5th May 1913. On the 7th May 1913 some of the properties which had been mortgaged by the defendant first party to the plaintiff were sold by the defendant first party to the defendants second party who are the appellants before us. The deed of sale was presented for registration on the 9th May 1913, but it appears that it was not in fact registered on that date and was compulsorily registered in August 1913. The defendants second party contest the claim of the plaintiff and rely upon their document which admittedly was executed subsequent to the mortgage upon which the plaintiff relies. Their case is that, although the document was executed on the 3rd of May 1913, the mortgage was not effective until the full consideration money had been paid to the defendant first party, and as the full consideration money or any portion thereof was not paid by the plaintiff till after the execution of the deed of sale in their favour, their deed of sale is entitled to priority over the mortgage-bond upon which the plaintiff relies.

On the question of fact, the learned Subordinate Judge has come to the conclusion that a portion of the consideration money was undoubtedly paid on the 6th of May by the plaintiff to the defendant first party and the balance which was payable under the terms of the mortgage by the plaintiff to the defendant first party was deposited in Court by the plaintiff on the 10th of May.

Now, Mr. Sultan Ahmad, on behalf of the appellants, concedes that if the payment was in fact made by the plaintiff to the defendant first party on the 6th of May as alleged by the plaintiff, then he must fail. But he argues before us that the evidence on the point is so unsatisfactory that the learned Judge in the Court below should not have accepted it.

Dealing, then, with the question of fact, I find very great difficulty in accepting the finding of the learned Subordinate Judge. The document states that Rs. 9,600 was due to the defendants second party and Rs. 1,201 was due to a judgment-creditor of the mortgagors, namely one Badhan Sahu, and the document provides that these two sums of moneys should be paid to the creditors and then the balance should be paid to the mortgagor, and that upon such payment the mortgagor should make over the mort-

gage deed to the plaintiff. That is the document.

Now, admittedly, Budhan Shau has never been paid by the plaintiff; admittedly, Rs. 9,600 due to the defendants second party was not deposited in Court until the 10th of May, but it is urged by the plaintiff that he had tendered that amount to the defendants second party on the 6th of May and that they refused to accept the money. The learned Subordinate Judge has not expressed any opinion on the evidence of the plaintiff that Rs. 9,600 was in fact tendered by the plaintiff to the defendants second party on the 6th of May. The evidence is conflicting on this point and it is difficult to say whether or not the tender was in fact made on the 6th of May. It seems to me that the point should have been established by the plaintiff beyond any doubt by the production of his account books. The plaintiff is a money-lender and is, presumably, in possession of account-books. If, as a matter of fact, the plaintiff paid to the defendant first party the money which he says he paid to him on the 6th of May, then the production of the account-books would have settled the question; but the account-books have not been produced in the case and in their absence it is difficult to accept the finding of the learned Subordinate Judge that the money was in fact paid by the plaintiff to the defendant first party on the 6th of May.

I will, then, assume that this money was not paid to the defendant first party by the plaintiff till after the actual conveyance in favour of the defendants second party, that is to say, it was not paid till the 10th of May. The question which I have now to consider is, whether it makes any difference to the rights of the parties that the money was in fact not paid to the mortgagor till after the conveyance of the property by the mortgagor to the defendants second party. In my opinion, it does not. The mortgage was executed on the 3rd of May 1913 and though it may be that the consideration money was not paid to the mortgagor till the 10th May, still upon payment to the mortgagor, whenever it may have taken place, the mortgage must have become effective on and from the 3rd of May 1913. The very definition of mortgage in the Transfer of Property Act supports the contention of the learned Vakil who has argued this appeal on behalf of the plaintiff. The definition of a mortgage is the transfer of an interest in specific immoveable properties for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The document itself shows that the money was to be paid on a future date. The parties contracted on the basis that the money was to be paid at a future date. The argument that the mortgage does not become effective until the money is actually paid, loses sight of the fact that mortgage is a conveyance and not a contract. That distinction was pointed out by Farran, C. J., in *Tatia* v. *Babaji* (1). That learned Judge said as follows in the course of his judgment in that case: "I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the Mofussil perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem to me to have been sufficiently borne in mind throughout the judgment." In this case there is no doubt that the mortgage became perfected by registration and the only question between the parties is, whether the consideration money was paid on the 6th of May as is alleged by the plaintiff, or on the 10th of May as is alleged by the defendants second party. I am of opinion that if there is nothing in the mortgage-deed to suggest that the mortgage was not to become effective until the consideration money was paid, the mortgage-deed became operative as from the date of the execution of the mortgage.

This brings me to the argument of Mr. Sultan Ahmad that the document in fact shows that the mortgage was not to become effective until the payment of the consideration money. He draws my attention to a passage in the mortgage which provides that the mortgagor undertook to make over the

(1) 22 B. 173; 11 Ind. Dec. (N. S.) 699.

mortgage deed to the mortgagee upon the payment of the full consideration money. In my opinion, this provision does not amount to a contract between the parties that the mortgage is not to take effect until the payment of the consideration money, and my ground is that the document itself says as follows: "In security and satisfaction of the said loan, principal with interest, I have mortgaged and hypothecated the entire and whole 8-annas *pothta*, etc" In other words, the mortgage and hypothecation was complete as and from the date of the execution of the mortgage-bond, but for his own protection the mortgagor provided that the mortgage-bond was not to be made over to the mortgagee until the payment of the full consideration money. In my opinion, then, there is nothing in the contract which establishes that the title was not to pass to the mortgagee as and from the date of the execution of the mortgage-bond; that being so, the mortgage was clearly prior in date to the deed of sale.

I must, therefore, affirm the decree passed by the learned Subordinate Judge though not on the grounds stated by him. So far as the cross-appeal is concerned, I am of opinion that the view of the learned Subordinate Judge is correct and must be affirmed. It may be that a tender was made by the plaintiff to the defendants second party on the 6th of May but if the plaintiff's case is to be believed the defendants second party unequivocally refused to accept the money; if that be so, then there was no obligation on the part of the plaintiff to deposit the money in Court. He should have offered to pay the money to the mortgagor if he wanted it. There was absolutely nothing in the contract to compel the plaintiff to pay the money into Court if the person in whose favour the deposit was to be made unequivocally refused to take the money.

Both the appeals must be dismissed and dismissed with costs.

ADAMI, J.—I agree.

J. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 132 B OF 1920.

December 22, 1920.

Present:—Mr. Kotval, A. J. C.

NILKANTH—JUDGMENT-DEBTOR—APPLICANT

versus

YESHWANT AND ANOTHER—AUCTION-PURCHASERS—DECREE-HOLDERS—NON APPLICANTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 92—Decree—Sale—Satisfaction admitted by decree-holder—Confirmation—Powers of Court.

The very foundation of the powers of a Court to execute a decree, *viz*, the existence of a decree capable of execution, disappears after a decree is admitted by the decree-holder to be satisfied and the Court's powers in execution also cease thereafter. Therefore, an auction sale held previous to the admission of the satisfaction of a decree cannot be confirmed after satisfaction is notified to Court, as the confirmation of a sale is a proceeding in execution. [p. 332, col. 1]

Khushalchand Premraj Marwadi v. *Nandram Sahebram Marwadi*, 2 Ind. Cas 672: 13 Bom L. R. 977; 36 B. 516, *Mul Chand* v. *Mukta Prasad*, 10 A 83; A. W. N. (1887) 287: 6 Ind. Dec. (N. s.) 56, followed.

Application for revision of an order of the Second Additional District Judge, Amraoti, dated the 30th April 1920, in Miscellaneous Appeal No. 2 of 1920.

Mr. *Atmaram Bhagwant*, for the Applicant.

Mr. *G. V. Kukde*, for the Non-Applicants.

ORDER.—In execution of a money decree against the applicant some immoveable property of his was sold by auction after attachment and was purchased by the non-applicant on the 3rd November 1919. Before the sale was confirmed, the decree holder on the 17th November 1919 deposited 5 per cent. of the purchase money for payment to the auction purchaser and applied to the Court for the dismissal of his execution application stating that he had received a part of the decretal amount and had allowed two months' time from the date to the applicant for payment of the balance. On the 5th December 1919, when the application came on for hearing, the decree holder informed the Court that the balance had been paid to him on the 25th November 1919 and that his decree was fully satisfied and prayed that the sale be set aside and the property released. The Court granted the application and did not confirm the sale.

RAM CHANDRA v. KRISHNA LAL.

The lower Appellate Court reversed the first Court's order and confirmed the sale. It held that the Civil Procedure Code gave no option to the decree-holder or the judgment-debtor to defeat the rights of an auction-purchaser by any settlement between themselves and that under rule 89 of Order XXI, of that Code, although the payment to the decree-holder may be treated as a deposit in Court, yet as the application to set aside the sale and the deposit of the 5 per cent. of the purchase-money were not made by a person who had an interest in the judgment-debtor's property, that rule had no application and the sale had to be confirmed under rule 92, Order XXI.

The view taken by the lower Appellate Court is, perhaps, technically correct, although it may be argued that such an application on the judgment-debtor's part was implied from what actually took place; but leaving that question aside the decision of the lower Appellate Court cannot be supported from another point of view. Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution. The very foundation of the powers of a Court to execute a decree, namely, the existence of a decree capable of execution, having disappeared, the Court's powers in execution also cease and the confirmation of the sale, which is a proceeding in execution, could not be ordered: *Vide Khushalchand Premraj Marwadi* v. *Nandram Sahebram Marwadi* (1) and *Mul Chand* v. *Mukta Prasad* (2).

The application is allowed with costs. The order of the lower Appellate Court confirming the sale is set aside. Pleader's fee Rs. 15.

G. R. D. *Application allowed.*

(1) 12 Ind. Cas. 572; 13 Bom. L. R. 977: 35 B. 516.
(2) 10 A. 83; A. W. N. (1887) 287; 6 Ind. Dec. (N. S.) 56.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 42 OF 1921.
January 17, 1921 (1922).
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Jwala Prasad.

RAM CHANDRA MARWARI—APPELLANT
versus
KRISHNA LAL MARWARI AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), ss. 39, 42, O. XXI, r. 22—Execution—Application to send decree to another Court for execution—Step-in-aid of execution—Court passing decree, if ceases to have jurisdiction after ordering decree to be transferred to another Court—Jurisdiction.

An application for a certificate to execute a decree in a Court other than that by which it was passed is a step-in aid of execution as it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. [p. 332, col. 1.]

Where an application to send a decree to another Court for execution is granted but for some reason or other the decree is not sent to that Court the Court which passed the decree does not cease to have jurisdiction in the matter. [p. 333, col 2.]

Quære:—Whether a Court having made a decree ceases to have jurisdiction in execution proceedings where it has once sent a copy of the decree and the other papers to another Court for execution. [p. 334, col. 1.]

Letters Patent appeal from a decision of Mr. Justice Ross dated the 23rd May 1921.

Mr. *J. Prasad*, for the Appellant.

Messrs. *R. G. S. Prasad* and *R. T. N. Sahai*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal on behalf of the judgment-debtor from a decision of Mr. Justice Ross, dated the 23rd May 1921.

The respondent obtained a decree against the appellant on the 23rd May 1911 in the Court of the Munsif at Bhagalpur. Within three years of that date, *viz.*, on the 1st May 1914, the decree holder applied for a certificate to execute the decree in Monghyr where it appeared the judgment-debtor had certain property. At the same time he asked for issue of a notice under Order XXI, rule 22 of the Civil Procedure Code. The issue of such a notice at that stage of the proceedings was not necessary. However, the application

was allowed and the notice was issued and the certificate he asked for was granted. The matter, however, was not in fact transferred to the Monghyr Court and no further steps were taken in that application. On the 22nd November 1916, that is, about two years and six months later, the decree holder again applied for the same relief and both his prayers were allowed. He again failed to take any further steps. On the 3rd September 1919, that is, within three years of the last application, the decree holder applied a third time and on this occasion the judgment debtor objected that his application was time-barred.

The first point made by the appellant, whose objection was not allowed either by the Munsif or the District Judge or by the Judge of this Court; is that the applications made on the 1st May 1914 and again in 1915 were not steps taken in aid of execution and were not in themselves applications for execution within the meaning of the 182nd Article of the Limitation Act. We are not concerned to enquire whether applications of the nature referred to were applications in execution. The better view appears to be that they are not. I have no doubt whatever, however, that such an application is a step-in-aid of execution and it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. In fact there are certain decisions to the effect that such an application is a step in-aid of execution, whereas the learned Vakil for the appellant has been unable to put before us any case in which the contrary view has been expressed. I should have thought myself that there could be no question upon this point.

The next point urged by the appellant is that the Bhagalpur Court had no jurisdiction to issue a notice under Order XXI, rule 22 of the Civil Procedure Code. The Court did in fact issue such a notice but it was not necessary at that stage of the proceedings and it is not contended that any other notice was necessary. Whether the Court issued such a notice or not and whether it had jurisdiction to do so or not does not seem to me to be a matter of any consequence in this appeal.

The third point and the substantial point made by the appellant was that the Bhagalpur Court having once purported to act under section 39 of the Civil Procedure Code had ceased to have any further jurisdiction in the matter and could not then make any further order which would be binding upon the parties and that such order, if made, could be treated as a mere nullity and that, therefore, it could not be contended that any step had been taken between the 1st May 1914 and the 3rd September 1919 when the third application was made, and that more than three years having elapsed the decree-holder's right to have his decree executed was barred by limitation. Assuming, without deciding, that where a Court issuing a decree has made an order under section 39 of the Civil Procedure Code and has in fact transmitted a copy of the decree to the Court in which the decree is to be executed, it ceases to have any further jurisdiction in the matter, that was not the case which arose here All that was done in the present instance was that an application was made by the decree holder and that application was granted. But the copy of the decree was never sent to the Monghyr Court and certainly never received by that Court. If that had been so the Monghyr Court undoubtedly would have had jurisdiction to execute the decree against the property of the judgment-debtor within its jurisdiction. But the Monghyr Court never in fact, in my opinion, got jurisdiction to do anything at all and that seems to me to be obvious upon considering what the effect of section 42 of the Civil Procedure Code is. That section says: "The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself." In the present case the decree was never sent to the Monghyr Court. The decree-holder having obtained his order, for some reason or other best known to himself, either because he was not satisfied as to the existence of the property or for some other reason, never carried out the order which he had obtained and the decree was never in fact sent. It seems, therefore, clear that no jurisdiction was ever transmitted from the Bhagalpur Court to the Monghyr Court and, in my opinion, this appeal fails.

It is not necessary in this case to decide

whether a Court having made a decree ceases to have jurisdiction in execution proceedings where it has once sent a copy of the decree and the other papers to another Court for execution, and I merely wish to state that it is not my intention that anything I have said in this judgment should lead to the conclusion that I consider the Court which made the decree would, in such circumstances, lose all jurisdiction in the matter.

The appeal is dismissed with costs.

JWALA PRASAD, J.—I agree.

J. P. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 17-B OF 1919.

July 7, 1921.

Present:—Mr. Kotval, A. J. C.

DRAUPADI BAI—APPLICANT

versus

GOVINDSINGH AND OTHERS—NON-APPLICANTS.

Provincial Insolvency Act (III of 1907), ss. 16 (2) (a), 36—Property situate in foreign territory, vesting of—Annulment of transfer of such property—Court, power of.

The property of an insolvent though situated in foreign territory vests in the Court under section 16 (2) (a) of the Provincial Insolvency Act. [p. 335, col. 1.]

A Court has no jurisdiction to annul the transfer by an insolvent of property situated in a foreign territory under section 36 of the Provincial Insolvency Act. [p. 335, col. 1.]

Application for revision of an order of the Additional District Judge, East Berar, Amraoti, in Transfer Miscellaneous Appeal No. 12, of 1918 decided on the 6th December 1918.

Messrs. *W. R. Puranik* and *D. W. Kathalay*, for the Applicant.

Mr. *S. Y. Deshmukh*, Messrs. *S. B. Tambe* and *Atmaram Bhagwant*, for the Non-Applicants.

ORDER.—Govindsingh, the husband of the applicant, was adjudged insolvent by the Court of the Subordinate Judge, Ellichpur, in its insolvency jurisdiction. One of the creditors applied for the annulment of the transfer of a village made by the insolvent in favour of the applicant within two years before the date of the adjudication. The Subordinate Judge annulled the transfer and his order was confirmed in appeal by the District Judge. The applicant files this petition for revision under the proviso to section 46 (1), Provincial Insolvency Act, Act III of 1907, as applied to Berar.

It is urged by the applicant and admitted by the non-applicants that the village transferred is situated in Betul, Central Provinces, which, so far as Berar is concerned, is foreign territory. It is contended by the applicant that as the Act applies to Berar alone, only property of the insolvent within Berar can vest in the Court under section 16 (2) (*a*) and the Court cannot annul under section 36 a transfer of property which is situated outside Berar and which cannot vest in the Court. Section 16 (2) (*a*) provides:—

"On the making of an order of adjudication the whole of the property of the insolvent, save in so far as it includes such particulars (not being his books of account), as are exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree, shall vest in the Court or in a Receiver as hereinafter provided and shall become divisible among the creditors."

The village, if not transferred, would, as a part of the insolvent's property, have vested in the Court and become divisible among the creditors. There is nothing to prohibit the state from enacting a law directing the vesting of immoveable property in foreign territory in its own Courts. In fact, the English Bankruptcy Act includes such property in the property divisible among the bankrupt's creditors and vesting in the trustee: sections 20 and 168, Bankruptcy Act, 1883. The law may have no practical effect, for immoveable property is always governed by the *lex loci rei sitæ* which may not recognise the order of adjudication which has the effect of vesting the property in the Court. However there may be some practical effect in that, if the property is still in the ownership of the insolvent, the Court may order him under section 43 of the Local Act to transfer it to itself or to the Receiver according to the form required by the law of the country where the

property is situated. I hold, therefore, that property of the insolvent, though situated in foreign territory vests in the Court under section 16 (2) (*a*).

Besides property which was the insolvent's at the time of the adjudication, property which had ceased to be his by transfer within 2 years before adjudication may also be made to vest in the Court and become divisible among the creditors by an order of annulment under section 36. The annulment has the effect of divesting the transferee and vesting the property again in the insolvent. It then vests under section 16 (2) (*a*) in the Court. The question is, has the Court power to annul the transfer and divest the transferee of property situated in foreign territory? It seems to me that the Legislature cannot have intended to give the Court any such power. The Court of the foreign territory would not recognise the annulment of a transfer of immoveable property situated therein and validly effected according to the form acquired by its own law. Could the transferee, if suing in a Court of his country on the strength of the transfer to him, be successfully met with the defence that the transfer had been annulled by the Berar Court? How is the Berar Court to enforce its order to take possession or realise the property for the purposes of distribution among the creditors? No action under section 43 against the insolvent can be taken or would be useful in such a case. It cannot be supposed that the law intended to give authority to the Court to pass orders which the State could not enforce.

I, therefore, hold that the order of the Court annulling the transfer was without jurisdiction and I hereby set it aside. The application is allowed with costs. Pleader's fee Rs. 25. Non-applicants No. 3 and 8 will get no Pleader's fee.

L. S. R. D *Application allowed.*

PATNA HIGH COURT.

FULL BENCH.

MISCELLANEOUS CIVIL APPEAL NOS. 97 AND 3 OF 1921.

January 16, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Das and Mr Justice Adami.

IN M. A. No. 97 OF 1921

JUGESHAR MISRA AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

NATH KOERI—JUDGMENT-DEBTOR—RESPONDENT.

IN M. A. No. 3 OF 1921

SUNDER MOHAN PANIGRAHI—APPELLANT

versus

GHANA ROUT—RESPONDENT.

Occupancy holding, non-transferable—Decree-holder not landlord, whether can sell portion of holding—Landlord money-decree-holder, whether can sell holding.

A decree-holder, not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord, of which there is no evidence, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree, even where there is no local custom of transferability. [p. 337, col. 2.]

Sadari Kunwari v. *Palknath Rai*, 33 Ind. Cas. 937; 1 P. L. J. 257; 3 P. L. W. 104, overruled.

Dayamoyi v. *Ananda Mohan Roy*, 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52, *Agarjan Bibi* v. *Panaulla*, 6 Ind. Cas. 452; 37 C. 687 at p 69 ; 14 C. W. N. 779; 12 C. L. J. 169, *Dwarka Nath Misser* v. *Hurrish Chunder*, 4 C. 925; 4 C. L. R. 130; 2 Ind. Dec. (N. S.) 585, *Bhiram Ali* v. *Gopi Kanth Shaha*, 24 C. 355; 1 C. W. N. 356; 12 Ind Dec. N. S.) 90; and *Neelkanth Roy* v. *Casheenauth Ghose*, (1834) Sudder Dewany 68, referred to.

A landlord who has sued his tenant and obtained against him a money decree can in execution thereof sell the non-transferable occupancy holding of his tenant without the latter's consent [p 338, col. 1.]

Chandra Benode Kundu v. *Ala Bux Dewan*, 58 Ind. Cas. 353; 48 C 184; 31 C. L. J. 610; 24 C. W. N. 518 (S. B), followed.

MacPherson v. *Debi Bhushan Lal*, 42 Ind. Cas. 36; 2 P. L. J. 530, overruled.

Appeals from an order of the District Judge, Muzaffarpur.

IN M. A. No. 97 OF 1921.

Messrs. *K. Sahai* and *B. Prasad*, for the Appellant.

Mr. *N. N. Singh*, for the Respondent.

JUDGMENT.

[MISCELLANEOUS APPEAL NO. 97 OF 1921.

MILLER, C. J.—These two appeals were referred to the Full Bench for final determination and were ordered to be heard together.

The questions for determination are similar, though not precisely the same, in each case.

Miscellaneous Appeal No. 97 of 1921 arises out of an order of the District Judge of Muzaffarpur affirming an order of the Munsif passed in execution proceedings and allowing the judgment-debtor's objection to the sale of a portion of his non-transferable occupancy holding in execution of a money-decree passed in favour of the appellant who is not his landlord.

The Munsif and the District Judge who considered that the case was governed by the decision of this Court in *MacPherson* v. *Debi Bhushan Lal* (1) allowed the objection and dismissed the execution proceeding.

On appeal a Division Bench of this Court referred the case to the Full Bench for determination and ordered it to be heard together with Miscellaneous Appeal No. 3 of 1921 which had previously been referred.

The point which arises for determination in Miscellaneous Appeal No. 97 of 1921 is, whether the decree-holder, not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord, of which there is no evidence, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money decree, there being no local custom of transferability.

The case of *MacPherson* v. *Debi Bhushan Lal* (1) does not directly determine the question arising in this appeal. The question there was between landlord and tenant, the landlord seeking to execute the money decree against his tenant's holding and not against a portion only. The precise point, however, arose and was decided against the decree-holder in the earlier case of *Sadari Kunwari* v. *Palknath Rai* (2). So far as I am aware, it has never been directly decided that an occupancy holder cannot transfer an interest in a part of his holding to another even without his landlord's consent, provided he does not abandon or relinquish the whole holding. Such a transaction does not create a new tenancy between the purchaser and the landlord without recognition but it is binding between the tenant and the purchaser and the latter has a subsisting right notwithstanding the absence of recognition by the landlord. It may be a precarious right dependent largely on the good will of the tenant but the transaction affords no ground for ejectment under section 25 of the Bengal Tenancy Act. Moreover, the case of *Dayamoyi* v. *Anandi Mohan Roy* (3) upon which the respondent relies, lays down in clear terms that the transfer of the whole or a part of the holding is operative against the tenant where it is made voluntarily and that where the transfer is of a part only of the holding the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy.

The question, therefore, arises whether the tenant can be made to do involuntarily at the instance of his creditor that which he can do voluntarily. In *Agar an Bibi* v. *Panaulla* (4), which was also relied on by the respondent, the power of voluntary transfer was said to be the measure of the power of involuntary alienation. Exactly the same view had been expressed some 30 years earlier in *Dwarka Nath Misser* v. *Hurrish Chunder* (5) where it was laid down that there was no ground for distinguishing a voluntary sale from a sale in execution. In *Agarjan Bibi's case* (4) it was, however, held that the purchaser of a portion of a non-transferable *raiyati jote* could not obtain joint possession without the landlord's consent and that the tenants other than the vendor in possession of a portion of the *jote* could question the validity of the transfere. The interests of the co-sharers of the *jote* were involved in that case which should not be lost sight of. Assuming, however, that *Dayamoyi's case* (3) is good law in so far as it denies the landlord's right to question a voluntary transfer of a portion of the holding except under special circumstances not arising here it is difficult to see why that which the tenant can alienate at his will cannot be the subject of a sale in execution of a decree against him. But *Dayamoyi's case* (3) further laid down with regard to involuntary transfers of the whole or a part of the holding that they are valid as against the *raiyat* only where the

(1) 42 Ind. Cas. 36; 2 P. L. J. 530.
(2) 33 Ind. Cas. 937; 1 P. L. J. 257; 3 P. L. W. 104.
(3) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971 20 C. L. J. 52.
(4) 6 Ind. Cas. 452; 37 C. 687 at p. 693; 14 C. W. N. 779; 12 C L. J. 169.
(5) 4 C. 925; 4 C. L. R. 130; 2 Ind. Dec. (N. S.) 585.

raiyat with knowledge fails or omits to have the sale set aside. In so deciding the Full Bench was merely applying to sales of a whole or a part of the holding the principle embodied in *Bhiram Ali* v. *Gopi Kanth Shaha* (6) which was to the effect that an occupancy holding was not saleable at the instance of the occupancy *raiyat* or of any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. *Bhiram Ali's* case (6) was decided in 1897 and for the first time laid down the proposition there broadly stated. It excluded the case of a landlord seeking to sell in execution of a money-decree but up to that time there had been no decision to the effect that the holding could not be transferred in execution where the landlord was a consenting party. Indeed, from 1834, when the Sudder Dewanny Adaulat in the case of *Neelkanth Roy* v. *Casheenauth Ghose* (7) issued Construction No. 890, up to 1897 the power of transfer with the landlord's consent appears not to have been questioned. *Bhiram Ali's* case (6) was generally, though not consistently, followed by the Calcutta High Court until 1920 when the whole question of the transferability of occupancy holdings was elaborately discussed and the authorities from the earliest times, as well as the Statutes relating to the subject, were considered by the Special Bench of the Calcutta High Court in *Chandra Benode Kundu* v. *Ala Bux Dewan* (8). The view presented on behalf of the tenant in that case was, that the right of occupancy was a personal right or privilege and not an interest in land capable of transfer, and that the only incidents attaching to the right were those conferred by the Rent Acts of 1859 and 1869 and the Bengal Tenancy Act of 1885 as subsequently amended. It was sought to explain the cases where a voluntary transfer of the whole or a part of the holding had been upheld as against the tenant, of which many instances might be cited, as founded on the doctrine of estoppel or the rule that the transferor cannot derogate from the grant, and it was argued that involuntary transfers might be explained on the ground of waiver. It is difficult, however, to see how these doctrines could apply so as to validate a transfer in a case where, *ex hypothesi*, there was nothing that could be transferred. The Special Bench, consisting of the Acting Chief Justice and six other Judges, unanimously decided that the case of *Bhiram Ali* v. *Gopi Kanth Shaha* (6) was wrongly decided and overruled that and subsequent decisions based upon it. It further decided that the proposition laid down in *Dayamoyi* v. *Ananda Mohan Roy* (3), which related to the transfer of occupancy holdings apart from local usage, required modification, and that the first proposition there laid down should be stated thus: "The transfer of the whole or a part is operative as against the *raiyat* whether it is made voluntarily or involuntarily." This decision, by establishing the validity as against the *raiyat* of all cases of transfer of a whole or a part of the holding, recognised the test formulated by Jackson, J., in *Dwarka Nath Misser* v. *Hurrish Chunder* (5) in 1879, that the measure of the liability to involuntary alienation is the power of voluntary alienation, and removed all difficulty which might arise in the application of section 60 of the Civil Procedure Code which renders saleable in execution all property of the judgment debtor over which he has a disposing power. It further decided that the right of an occupancy holder is an interest in land and not merely a personal right.

We have been asked by the learned Vakil for the respondent to dissent from the views expressed by the Special Bench in *Chandra Benode Kundu's* case (8), and the arguments addressed to us have been along the same lines as those there advanced. In my opinion, that case correctly expresses the law and the contrary view expressed by this Court in *Sadari Kunwari* v. *Palknath Rai* (2), which followed that part of *Dayamoyi's* case (3) which was dissented from by the Special Bench, should no longer be followed. I would answer the point of law above formulated in the affirmative. The appeal is accordingly decreed and the application for execution allowed with costs in all Courts including the costs of this reference.

MISCELLANEOUS APPEAL No. 3 OF 1921.

This appeal raises nearly the same question but the facts are somewhat different,

(6) 24 C. 355; 1 C. W. N. 396; 12 Ind. Dec. (N. S.) 966.

(7) (1834) Sudder Dewany 268.

(8) 58 Ind. Cas. 358; 48 C. 184; 31 C. L. J. 510; 24 C. W. N. 518 (S. B.).

In this case the landlord is the decree holder and his tenant is the judgment debtor. The decree is a money decree. The landlord sought to execute his decree by attachment and sale of his tenant's occupancy holding. It must be conceded in such a case that the landlord consents to the transfer. The Munsif and the District Judge dismissed the application for execution being bound by the decision of this Court in *Mac Pherson* v. *Debi Bhushan Lal* (1) In view of the recent decision of the Special Bench of the Calcutta High Court in *Chandra Benode Kundu* v. *Ala Bux Dewan* (8) the case was referred on appeal to this Court for decision by a Full Bench. The question for determination is, whether a landlord who has sued his tenant and obtained against him a money-decree can in execution thereof sell the non-transferable occupancy holding of his tenant without the latter's consent.

This question is precisely that which arose for determination in *Chandra Benode Kundu's case* 8) and with which I have already expressed my concurrence in the above judgment. I would, therefore, answer the question in the affirmative and hold that *MacPherson* v. *Debi Bhushan Lal* (1) was wrongly decided. The appeal should be decreed and the application for execution allowed with costs in all the lower Courts including the costs of the appeal to the High Court but not of this reference in which the parties did not appear.

DAS, J.—I agree.

ADAMI, J.—I agree.

J. P. *Appeal decreed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 214 B OF 1920.

July 23, 1921.

Present:—Mr. Kotval, A. J. C.

BHUDMAL SHEOLAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ZUNKARI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for deceased's estate—Omission to sue for one bond—Second suit for that bond not maintainable.

Z., as heir of her father-in-law, *K*, obtained a decree against a debtor on a bond executed by him in favour of *K*. Meanwhile *B*. and others filed a suit against *Z*. for the estate of *K*. on the ground that they were *K*'s heirs and *Z*. was in unlawful possession of *K*'s estate. They then knew of the bond but omitted to sue for it. In a subsequent suit for a transfer to them of the decree on the bond against the debtor

Held, on appeal, that the suit was barred under Order II, rule 2 of the Civil Procedure Code. [p. 339, col. 1.]

Appeal against the decree of the District Judge, Amraoti, decided on the 8th April 1920, in Civil Appeal No. 187 of 1919.

Mr. *B. W. Joshi*, for the Appellants.

Mr. *T. V. Brahma*, for the Respondent.

JUDGMENT.—The defendant-respondent Zunkari obtained on the 14th May 1913 a succession certificate entitling her to collect certain debts due to her deceased father-in-law Kastureband. On the 27th June 1913 she obtained, on the strength of the certificate, a decree against Zingraji on a bond executed by the latter in favour of Kastureband. The plaintiffs had filed Suit No. 3 of 1913 against Zunkari on the 31st January 1913 for the estate of the deceased Kastureband on the ground that they were his heirs and Zunkari was in unlawful possession of the estate. It is admitted that the plaintiffs then knew of the existence of Zingraji's bond but omitted to sue for it. They now sue for a transfer to them of the decree against Zingraji. The lower Appellate Court has confirmed the decree of the Trial Court dismissing the suit on the ground that Order II, rule 2, Code of Civil Procedure, bars the suit.

It is argued on the plaintiffs' behalf that though the right to get the bond is barred yet as soon as the defendant obtained a decree on it she became a trustee for the plaintiffs and a fresh cause of action arose in their favour. It is urged that the two causes of actions are wholly distinct and unconnected The question is, are they such? If they are not, then the plaintiffs' suit is barred under Order II, rule 2. The cause of action in the previous suit was that the plaintiffs were the persons entitled to Kastureband's estate and the defendant had wrongfully

taken possession of it. The relief of possession of the bond, if obtained, was a relief which would have placed the plaintiffs in a position to secure the relief now sought, *viz.*, the decree and the question is, having forgone the former relief can they now ask for the latter? In my opinion, it would be inconsistent with the principle underlying the provision of Order II, rule 2 to allow the plaintiffs to claim the decree. I do not see how the cause of action in the present suit is different from the cause of action in Suit No. 3 of 1913. The defendant could not have come to hold the decree but for the same wrongful act as was alleged in the suit against her. It is true that the decree did not exist at the time the former suit was filed but the bond which was omitted to be sued for was the thing without which the decree could not have come into existence. The plaintiffs admit they knew of the existence of the bond when the former suit was filed against the defendant. They then knew that a decree could be obtained on the bond and it was open to them to sue for the bond or claim such compensation for its being withheld as would completely satisfy their claim in respect of it. The fact that the defendant is in the position of a trustee cannot free the plaintiffs from the application of Order II, rule 2, Code of Civil Procedure. I hold that the claim is barred under that rule.

The appeal fails and is dismissed with costs.

G. E. D. & J. P. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 23 OF 1921.

May 27, 1921.

Present:—Mr. Daniels, J. C.

LACHHMAN PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PRAN NATH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Arbitration without intervention of Court—Reference to several arbitrators—Majority, decision by, no provision as to—Refusal of any arbitrator to arbitrate, effect of—Award of majority, whether good—Suit with regard to matter referred to arbitration, whether barred.

Where a reference to the arbitration of several persons is made without the intervention of a Court, and the reference provides for a decision by all the arbitrators appointed by the parties to the reference and not merely by a majority of them, the refusal of any of the arbitrators to take part in the arbitration invalidates the award, and the submission to arbitration also does not remain in force and does not bar a suit subsequently filed in Court with regard to the matter referred to arbitration. [p 339, col. 2; p 340, col. 1.]

Gur Bakhsh Singh v. *Chutta Singh*, 47 Ind. Cas. 969; 5 O. L. J. 471, referred to.

Appeal from a decree of the Third Additional District Judge, Lucknow (at Sitapur), dated the 1st December 1920, reversing that of the First Subordinate Judge, Sitapur, dated the 3rd May 1918.

Messrs. *O. F. S. O'shme* and *Ali Uddin Ahmad*, for the Appellants.

Mr *A. P. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for a one ninth share in the village of Pipri. The defense to the suit, so far as it is now material, is that the parties had agreed to refer their dispute to arbitration and an award had been made by the arbitrators assigning the share in question to the defendants. It has now been definitely found and is not in dispute that, apart from this arbitration, the plaintiffs are entitled to the share which belonged to the deceased brother of the plaintiffs and the first defendant, the three forming a joint family. It has been found and is not in dispute that a reference to the arbitration of four persons was made by the parties. The lower Appellate Court has, however, found that one of the arbitrators, Mohan Lal, refused to arbitrate and that no meeting of the arbitrators was held. The reference provides for a decision by the four arbitrators whom the parties

appointed and not merely by a majority of them. In similar circumstances, it was held by a Judge of this Court in *Gur Bakhsh Singh* v. *Ohutta Singh* (1), that the refusal of any of the arbitrators to take part in the arbitration invalidates the award. That decision is applicable to the facts of the present case and, following it, I agree with the lower Court that no valid award was made.

The appellants' learned Counsel, however, contends that this does not dispose of the case. He says that the submission to arbitration still remains good and that this submission is a bar to the suit. This contention does not appear to have been raised in either of the Courts below. The case of the appellants there was not that the Court should stay the suit and direct the parties to refer the matter to arbitration but that there was a completed award assigning the share in dispute to the appellants. Quite apart from this, the simple answer to the appellants' contention is that the submission to arbitration no longer remains in force. That submission was a submission to arbitration by four particular arbitrators, of whom it appears that three were relations and that Mohan Lal who refused to arbitrate was the only independent member. The carrying out of this submission having been rendered impossible by the refusal of Mohan Lal to arbitrate, the submission no longer remains in force and cannot be pleaded as a bar to the suit.

The appeal, therefore, fails and I accordingly dismiss it with costs.

J. P. *Appeal dismissed.*

(1) 47 Ind. Cas. 980; 5 O. L. J. 471.

ALLAHABAD HIGH COURT.

APPLICATION IN PRIVY COUNCIL APPEAL No. 8 OF 1921.

December 3, 1921.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

DEBI RAI AND OTHERS—APPLICANTS

versus

PRAHLAD DAS AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XLV, r. 7—Privy Council Appeal—Application to deposit security money made within time—Order made beyond time—Deposit, validity of—Limitation and Code of Civil Procedure Amendment Act (XXVI of 1920), s. 3 (1), applicability of—Decree passed before but application to deposit security made after its operation

An application was made by the appellant within the time allowed by Order XLV, rule 7, of the Civil Procedure Code that the security amount might be received. The order made on the application was "Lay before the Bench concerned." At the next sitting of the Bench an order was made that the money be received but that order was made after the period allowed by law had expired:

Held, that as the applicant was ready with money within time and could not deposit as the proper Bench was not sitting to make an order the deposit must be deemed to have been made in time. [p. 341, col. 1.]

The provisions of the Limitation and Code of Civil Procedure Amendment Act, 1920, as regards a deposit of security in case of an appeal to the Privy Council do not apply where the decree appealed from is one passed prior to the coming into force of the said Act; even though the application for the deposit of security is made after it comes into operation. Such a case is governed by the provisions of the Civil Procedure Code of 1908. [p. 341, col. 1.]

Application for revocation of certificate granted by the High Court for an appeal to the Privy Council.

Mr. *Iqbal Ahmad*, for the Appellants.

Mr. *Nihal Chand*, for Mr. *Girdharilal Agarwala*, for the Respondents.

JUDGMENT.—Debi Rai and others, who are the appellants in this matter, had a decree passed against them on the 9th of December 1920. On the 7th of June 1921 they made an application that Rs. 4,000, then in existence in cash, might be received and War Bonds or Government Security Notes might be purchased in the names of the petitioners. The order that was made on that application, which was, it is to be noticed, within six months from the date of the decree, was "lay before the Bench concerned." At the next sitting of the Bench concerned an application was made

that this money might be received and the order was made. That order was made five days beyond the period of six months from the date of the decree. It should be stated that in the intervening period, namely, on the 22nd of April 1921, the appellants obtained a certificate which fulfilled the requirements of the law. On the 21st of November 1921 the respondents lodged an objection to the admission of the appeal and prayed that the certificate of the 22nd of April 1921 might be revoked. The grounds on which they asked that this should be done is, that the appellants were out of time on the 14th of June 1921 when they made the payment into this Court. To obtain an order on this objection it is necessary for Mr. Nibal Chand, who appears on behalf of the respondents, to show that this case is governed by Act No. XXVI of 1920. Mr. Iqbal Ahmad has put a very short answer which is this; he maintains that his decree being of the year 1920 one must look at the provisions of the Act of 1908 and Order XLV, rule 7 as it was in its unamended state in the year 1920; and he claims that by virtue of the decree having been made on the 9th of December 1920, he is entitled as of right to six months from that date within which to make the deposit. He then points out that he attended here on the 7th of June which admittedly is within six months, ready and willing to comply with the terms of the rule and that it was only by the circumstance that the proper Bench was not sitting on that date, or on the 8th or 9th June, that he was unable to obtain an order from the Bench which would permit his depositing the money. We think that this application is governed by the Act of 1908. There is no need for Mr. Iqbal Ahmad to bring himself within any of the provisions of the Act of 1920, and indeed if he had come within that Act he would have been out of time. In these circumstances, we are of opinion that the objection cannot prevail and that the application on the part of the respondents that the certificate may be revoked must be dismissed with costs.

J. P.

Application dismissed.

PATNA HIGH COURT.
CIVIL REVISION No. 366 OF 1921.
January 10, 1922.
Present :—Mr. Justice Coutts,
and Mr. Justice Ross.
AJODHYA MAHTON AND ANOTHER—
PETITIONERS
versus
Musammat PHUL KUER—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151, O IX, r. 13—Limitation Act (IX of 1908), Sch. I, Art. 164—Ex parte decree—Refusal to set aside—Appeal—Application to set aside ex parte decree—Inherent power of Court to extend time.

No appeal lies from an order purported to have been passed under section 151, Civil Procedure Code, refusing an application under Order IX, rule 13, Civil Procedure Code, to set aside an *ex parte* final decree in a mortgage suit. [p 342, col. 1.]

A Court is not entitled by purporting to act under section 151 of the Civil Procedure Code to extend the period prescribed by Article 164 of Schedule I to the Limitation Act for an application to set aside an *ex parte* decree. [p 342, col. 1.]

Gadi Neelaveni v Narayana Reddi, 53 Ind Cas. 847; 43 M. 94; 37 M L J 509; 26 M L T 377; 10 L. W. 606; (1920) M. W. N. 19, referred to.

Application for revision of an order of the District Judge, Gaya.

Mr. *Atul Krishna Roy*, for the Petitioners.

Mr. *Bimola Charan Sinha*, for the Opposite Party.

JUDGMENT.

ROSS, J.—This is an application for revision of an order passed by the learned District Judge of Gaya allowing an appeal from an order passed by the Subordinate Judge by which he rejected an application under Order IX, rule 13, to set aside an *ex parte* final decree in a mortgage suit. It appears that in this application, which was made long after the time limited by Article 164 and which was expressed to be an application under Order IX, rule 13, two grounds were taken: (1) that no notice had been served on the applicant, and (2) that the application for final decree was barred by time. The latter ground is not appropriate to an application under Order IX, rule 13, and would not provide a reason for the Court to exercise its power under that rule. Apparently, for this reason there is no reference to that part of the application in the decision of the Subordinate Judge. He deals only with the question of the service of notice and finding that this service

was proved he dismissed the application on the merits. The District Judge, while agreeing with the finding of the Subordinate Judge as to the service of notice, acted under section 151 of the Code and set aside the *ex parte* decree on the ground that when it was passed it was barred by time.

Now, if it is taken that there was an application before the Subordinate Judge under section 151 of the Code then his judgment must be read as having refused that application and against that refusal no appeal lay to the District Judge. But there is authority for the view that section 151 of the Code cannot be used in this way *Gadi Neelaveni* v. *Narayana Reddi* (1).] Moreover, a definite period of limitation has been prescribed by Article 164 of Schedule I to the Limitation Act for an application to set aside an *ex parte* decree and the Court would not be entitled, by purporting to act under section 151, in effect to extend that period. I would, therefore, allow this application with costs, set aside the order of the District Judge and restore the order of the Subordinate Judge. Hearing fee two gold *mohurs*.

COUTTS, J.—I agree.

J. P.

Application allowed.

(1) 53 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 606; (1920) M. W. N. 19.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 56 OF 1921.

May 31, 1921.

Present:—Mr. Dalal, A. J. C.

Babu HAZARI LAL—PLAINTIFF—APPLICANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH DEPUTY COMMISSIONER, LUCKNOW—DEFENDANT—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 72 (2)—Risk Note, form of, effect of—Consignor, position of—Price of consignment lost, suit for—Neglect or theft by Railway Administration—Burden of proof.

The responsibility of a Railway Company in carrying goods is limited under section 72 (2) of the Railways Act in accordance with the terms of the Risk Note filled up and signed by the consignor. [p. 343, col 1.]

Toonya Ram v. *East Indian Railway Company*, 30 C. 257; 7 C. W. N. 370, referred to

In a suit for price of a consignment belonging to the plaintiff and lost after transit in the Parcel Office of the Railway Company and in respect of which Risk Note Form B has been filled up, if the case comes within the exception mentioned in the Risk Note, the burden of proving wilful neglect or theft by the Railway Administration or its servants lies on the plaintiff [p. 343, col 1.]

East Indian Railway Company v. *Nathmal Behari Lal*, 39 Ind Cas. 30; 39 A 418; 15 A. L. J. 321 and *Bombay Baroda & Central India Railway Company* v. *Ranchhodlal Chhotalal and Company*, 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779, referred to.

Application against a decree of the Judge Small Cause Court, Lucknow, dated the 25th February 1921.

Mr. *H. K. Ghosh*, for the Applicant.

The Government Pleader, for the Opposite Party.

JUDGMENT.—This is an application in revision from an order of the learned Judge of the Court of Small Causes at Lucknow dismissing the plaintiff's suit against the Oudh and Rohilkhand Railway Company for price of a consignment belonging to the plaintiff and lost, after transit, in the Parcel Office of the Railway Company here. The plaintiff is bound by the terms of what is known as "Risk Note Form B." It has been repeatedly held that the responsibility of a Railway Company is limited under section 72 (2) of the Railways Act in accordance with the terms of this Risk Note. This point was carefully considered in 1902 by the Calcutta High Court in *Toonya Ram* v. *East Indian Railway Company* (1). The learned Judges considered all the case-law on the subject up to that date and pointed out that the consignor paid a special reduced rate, instead of the ordinary tariff rate chargeable for the consignment in question and it was in consideration of his being allowed to pay special reduced rate that he undertook to hold the Railway Company harmless and free from all responsibility for any loss, destruction, deterioration or damage of the said consignment. In that case also

(1) 30 C. 257; 7 C. W. N. 370.

as here the whole consignment was missing. The learned Counsel for the applicant pointed out that in the ruling quoted above the further words of the Risk Note were not considered. Those words are "except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or due to the wilful neglect of its servants." It was argued on behalf of the applicant that his case came within the exception. If it came within the exception the burden lay on him to prove that the loss was caused by theft or by the wilful neglect of the Railway Administration or its servants. There is no such proof on the record. It was pointed out that the plaintiff a stranger could not possibly obtain such proof, but such are the terms of his contract and he is bound by them. In *East Indian Railway Company* v. *Nathmal Behari Lal* (2) the Allahabad High Court held that the burden of proving wilful neglect or theft by the Railway Administration or its servants lay on the plaintiff. This was approved by the Bombay High Court in a case reported as *Bombay Baroda & Central India Railway Company* v. *Ranchhodlal Chhotalal and Company* (3). The learned Counsel for the plaintiff quoted various rulings which deal with the first clause of section 72 of the Railways Act and not with the second clause under which a contract in terms of Risk Note B was validated. The law on the subject is very clear and the lower Court's finding is based thereon. I dismiss this application with costs.

J. F. *Application dismissed.*

(2) 39 Ind. Cas. 180; 39 A. 418; 15 A. L. J. 321.
(3) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 780 OF 1920.

August 23, 1921.

Present :—Mr. Justice Krishnan.

NARAYANASWAMY IYER—PLAINTIFF—PETITIONER

versus

DORAISAWMY PATHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Ex parte *decree—Defendants, several—Decree not joint or indivisible—Decree, whether can be set aside against all defendants on application by some—Civil Procedure Code (Act V of 1908), O. IX, r. 13, proviso, applicability of.*

Where in a suit to obtain possession of separate items of property from separate sets of defendants, an *ex parte* decree is passed which is not joint and indivisible, a Court is not justified in setting aside the decree against all the defendants merely upon an application by some of them.

In order to render the proviso to rule 13 of Order IX of the Civil Procedure Code applicable, the guiding factor is the nature of the decree passed, and not the fact that there were one or more issues in the suit common to all defendants.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Third Additional Subordinate Judge, Tanjoreat Mayavaram, in I. A. No. 333 of 1920 in Original Suit No. 31 of 1919, dated the 9th October 1920.

Mr. *C. A. Seshagiri Sastri*, for the Petitioner.

Messrs. *K. Bhashyam Iyenger* and *T. K. Vijiaraganulu Naidu*, for the Respondents.

JUDGMENT.—The point taken in this revision petition is that the *ex parte* decree should not have been set aside against those defendants who did not engage Mr. Sitarama Sastrigal as their Vakil, as the reason for setting aside the *ex parte* decree against his clients, *viz.*, his illness, will not apply in their case. The point is obviously correct, but the lower Court has apparently acted under the proviso to Order IX, rule 13, Civil Procedure Code, in setting aside the whole decree against all the defendants. It seems to me this is not a case that falls within the proviso. The suit was one to obtain possession of separate items of properties from separate sets of defendants and the *ex parte* decree was not a joint and indivisible decree. The fact that one or more common issues arose in the case in which all the defendants were interested is not the guiding factor for the applicability of the

proviso, but the nature of the decree itself that is passed.

The decree should not, therefore, have been set aside against defendants Nos. 14, 16, 17, 41, 47, 52, 60 and 61. It is possible those defendants may apply hereafter and show cause themselves why the *ex parte* decree should be set aside in their favour but, till they do so, the decree must be maintained against them.

The civil revision petition is allowed and the order of the lower Court varied as stated above; petitioner will have his costs of this Civil revision petition from the respondents.

M. C. P.
W. C. A. & N. H. *Petition allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 102 OF 1921.

August 17, 1921.

Present :—Mr. Wazir Hasan, A. J. C.

Musammat SHAHIDAN AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

JAGAN NATH AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Jurisdiction, determination of—Plaint allegations to be looked at—Compensation, suit for—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii).

The jurisdiction to try a suit must *prima facie* be determined with reference to the allegations contained in the plaint. [p. 344, col. 2.]

Where a suit is brought for compensation on account of such alleged unlawful acts of the defendants as would constitute an offence punishable under Chapter XVII, Indian Penal Code, the case falls within Article 35 (ii), Schedule II of the Provincial Small Cause Courts Act, and is not cognizable by a Small Cause Court. [p. 345, col. 1.]

Ram Prosad Pramanik v. *Sricharan Mandal*, 41 Ind. Cas. 276; 21 C. W. N. 1109; 27 C. L. J. 594, referred to.

Application against the order of the Munsif, Bilgram, sitting as Judge, Small Cause Court, dated 9th April 1921.

Mr. *Wasi Hasan*, for the Applicants.

Mr. *Ghulam Hasan*, for the Opposite Party Nos. 1 6.

JUDGMENT.—This is an application under section 25 of Act IX of 1887 from the decision of the Munsif of Bilgram dated 9th of April 1921. The application arises out of a suit brought by the appellants for recovery of a certain amount of compensation on account of the unlawful acts of the defendants in cutting down certain trees belonging to the applicants.

The suit was registered in the Register of Civil Suits and proceeded with as such up to the 6th of February 1921. On that date, in the presence of the Pleaders for the parties, the learned Munsif recorded an order that the case be tried on the Small Cause Court side of his Court. After this, both parties produced evidence and the learned Munsif, by his order of the date already mentioned, dismissed the plaintiff's claim.

It is argued before me that the suit was not cognizable by a Small Cause Court and should have been concluded, as it was commenced, on the Ordinary Civil Side Jurisdiction of that Court. The suit would be cognizable by a Small Cause Court under section 15 of Act IX of 1887, if it were not to fall under one or the other of the Exceptions in the Schedule.

It is contended that it does fall under Article 35, clause (*ii*), of the Schedule to that Act, and in support of the contention reliance is placed upon a decision of a Bench of the Calcutta High Court in the case of *Ram Prosad Pramanik* v. *Sricharan Mandal* (1).

It is settled law that the jurisdiction to try a suit must *prima facie* be determined with reference to the allegations contained in the plaint. In the present case paragraph 3 of the plaint stated that the defendants "in the month of July 1919 without the permission of the plaintiffs" cut down the trees and "appropriated them towards their use." In paragraph 4 it was stated: "That by this unlawful act of the defendants the damage and injury to the rights of the

(1) 41 Ind. Cas. 276; 21 C. W. N. 1109; 27 C. L. J. 594.

plaintiffs is obviously deemed, hence the necessity for instituting the suit arose."

There can be no doubt that the acts alleged to have been committed by the defendants and set forth in paragraphs 3 and 4 of the plaint would constitute an offense of mischief or theft both of which are punishable under Chapter XVII of the Indian Penal Code. This being so, the case would seem to fall within clause (ii) of the Article already mentioned. I should have hesitated to take this view of the case but for the authority already referred to.

I, therefore, allow the application, set aside the judgment and the decree of the 9th of April 1921, and direct that the case be tried on the Civil Side of the Court of the Munsif, Bilgram. In view of the conduct of the applicants in having agreed to produce their own evidence and cross-examined the witnesses produced on behalf of the defendants I do not think they are entitled to any costs. I would, therefore, make no order as to costs in this Court.

J. P. *Application allowed.*

MADRAS H GH COURT.
CIVIL APPEAL No. 273 OF 1920.
September 22, 1921.
Present :—Mr. Justice Spencer and
Mr. Justice Ramesam.
MALLADI VENCATARAMAYYA—
PLAINTIFF—APPELLANT
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR AND GOVERNMENT AGENT, GODAVARI DISTRICT
—DEFENDANT—RESPONDENT.

Godavari Agency Rules, Rule III, cls. (2), (3). Agent acting under, decree of—Suit to set aside, whether maintainable.

An Agent when acting under clauses 2 and 3 of rule III of the Godavari Agency Rules acts as a Court, and no suit lies against him for what he does as such Court.

Ramachandra Rao v. *Secretary of State for India*, 31 Ind. Cas. 310; 39 M. 808, distinguished.

Appeal against a decree of the Court of the Government Agent, Godavari District, Dis. No. 325 Ag. of 1920, dated the 2nd September 1920, rejecting the plaint presented by appellant against respondent.

Mr. *P. Narayanamurthi*, for the Appellant.

Mr. *O. Madhavan Nair* (Government Pleader), for the Respondent.

JUDGMENT.—The Agent when acting under clauses 2 and 3 of rule III of Godavari Agency Rules acted as a Court and no suit lies against a Court for what it does as such Court.

Ramachandra Rao v. *Secretary of State for India* (1) was a decision which dealt with a suit for a declaration that the act of a Deputy Collector, who, in excess of his powers, debarred a person from being appointed under section 24 of Act I of 1889 (The Madras Village Courts Act) to appear for a party in a Village Munsifs Court was void. There the Deputy Collector had no powers, either as a Court or otherwise, to issue such orders, and, consequently a suit for a declaration lay under section 42 of the Specific Relief Act. The decision does not apply to the facts of this case.

The appeal fails and is dismissed with costs.

M. C. P.
N. H. *Appeal dismissed.*

(1) 31 Ind. Cas. 310; 39 M. 808.

OUDH JUDICIAL COMMISSIONER'S COURT.
FIRST CIVIL APPEAL No. 30 OF 1921.
August 10, 1921.
Present :— Mr. Daniels, J. C.
GOKUL PRASAD *alias* GOPI NATH
— DEFENDANT—APPELLANT
versus
KAILASH NATH—PLAINTIFF—
RESPONDENT.

Evidence Act (I of 1872), s. 17 — Admissions,

GOKUL PRASAD v. KAILASH NATH.

evidential value of—Joint family, member of, suit for possession by, against another member— Decree, proper form of—Mesne profits—Plea not raised—Consent

Admissions are always evidence against the party who makes them but they are evidence which varies very much in value according to the circumstances and a Court is quite at liberty to reject them if it is satisfied from other circumstances that they were untrue. [p. 347, col. 2.]

Chandra Kunwar v. *Chaudhri Narpat Singh*, 29 A. 184; 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A L. J. 102 (P. C.) and *Dharam Kunwar* v. *Balwant Singh*, 15 Ind. Cas. 673; 34 A. 398; 23 M. L. J. 200; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; 1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 39 I. A. 142 (P. C.), explained.

Where the plaintiff sues as a member of a joint family to recover joint family property from the defendant, another member of the joint family, who claims to hold it adversely, the proper decree to pass is a decree for joint possession of an undivided share in the property, without mesne profits. [p. 348, col. 2; p. 349, col. 1.]

Failure to raise a plea is not equivalent to consent. [p. 349, col. 1.]

Appeal from a decree of the Subordinate Judge, Lucknow, dated the 23rd May 1921.

Messrs. *Bisheshwar Nath Srivastava*, *Mahesh Prasad* and *Makund Behari Lal*, for the Appellant.

Mr. *Brij Nath Shargha*, for the Respondent.

JUDGMENT.—This was a suit for possession as reversioner of the property of Sham Lal, deceased, on the death of Sham Lal's widow, *Musammat* Ganga Dei, which occurred in 1918. Sham Lal himself died in 1879. A pedigree is given in the lower Court's judgment. The original plaintiff, Lachhmi Narain, was the father of the contesting defendant Gokul Prasad. Gokul Prasad was living with *Musammat* Ganga Dei and he took possession of the property on her death. Lachhmi Narain died on 29th May 1920 soon after the case was instituted leaving two sons Kailash Nath and the defendant Gokul Prasad *alias* Gopi Nath A separation has taken place in the family as was alleged in paragraph 4 of the plaint and admitted by the defendant. On Lachhmi Narain's death Kailash Nath was substituted as his legal representative in respect of half the property; the other half devolved on the defendant. The substantial defence to the suit was that the defendant was the adopted son of Sham Lal and as such entitled to the entire property. The learned Subordinate Judge finds that no such adoption took place and has decreed the suit. The defendant now appeals.

Three issues have been argued in this appeal.

1. Is Gokul Prasad the legally adopted son of Sham Lal?

2. Was the original plaintiff Lachhmi Narain estopped from questioning the adoption?

3. Is the suit unmaintainable on the ground that it is a suit for partial partition?

Although, apart from the plea of estoppel, the appelant's whole case rests on the alleged adoption he has not been at all certain what kind of adoption he should allege. He has varied between an adoption made by Sham Lal in his lifetime, which was the case which he first put forward, and an adoption made by *Musammat* Ganga Dei to Sham Lal after Sham Lal's death. At least three inconsistent cases have been put foward in his Court:—

(1) An adoption by Sham Lal at the time of the defendant's birth in November 1876.

(2) An adoption by *Musammat* Ganga Dei in 1883 or 1884 under express authority given by Sham Lal before his death.

(3) An adoption made by Ganga Dei under the implied authority of Sham Lal.

It has also been suggested that the adoption may have been made by Sham Lal in 1879 leaving it to Ganga Dei to perform the religious ceremonies afterwards.

The written statement was so absolutely vague as to when the adoption took place as to suggest that the defendant had not yet decided what story to adopt. At the oral examination of the parties he had to commit himself to a definite story, but even then he was as vague as he could be. The case then stated was that the adoption was made by Sham Lal himself in 1876 or 1877, the defendant having been born in November 1876. It was said that it was made informally and the ceremonies were afterwards performed by *Musammat* Ganga Dei. There is no suggestion in this statement of any authority having been given by Sham Lal to *Musammat* Ganga Dei to adopt after his death. On the contrary, it is said that the property vested in the defendant immediately on Sham Lal's death and that the explanation of Ganga Dei being recorded in the revenue papers as owner was that the defendant was a minor. As the trial pro-

seeded it became evident that the case of adoption by Sham Lal would fail and, finally, when both parties had concluded the evidence in support of their respective cases and the second of the plaintiff's three rebutting witnesses was being examined, the defendant's Pleader made a statement in these terms:—"The adoption was not done by Sham Lal but it was done by Ganga Dei under the verbal directions of Sham Lal after his death." He adds:—"Some time after the birth of Gopi Nath, Sham Lal took this boy from Lachhmi Narain as his own child, and brought him up as his own child. When he was going to Benares he directed the widow to perform all the ceremonies of adoption which were performed by her some time in 1883 or 1884. Even if proof of these ceremonies fails I would contend that the adoption by Sham Lal was a valid adoption."

This throws overboard altogether the case as to adoption at birth. Sham Lal went to Benares in 1878 or 1879, three years after the defendant, according to his own account, was born. The adoption, if made by Sham Lal at all, is said to have been made on the latter date, the main case being that it was made by Ganga Dei in 1883 or 1884 under authority given by Sham Lal. This state of the pleadings is alone almost sufficient to stamp the defendant's case as false. It is idle to say that he was an infant when these events took place and, therefore, could not have personal knowledge of them. His own statement is that he was living with the adoptive mother all his life and if the adoption really took place and if he has been separated from his natural family and owner of Sham Lal's property ever since, it is impossible that he should not have heard from her the story of the adoption or not known whether it was made in Sham Lal's life or after his death. Of course, there must be something to serve as a foundation on which to build up a case of this sort. The foundation in this case consists of three statements made by Lachhmi Narain in 1880 or 1881 shortly after Sham Lal's death. There is ample evidence both oral and documentary that Lachhmi Narain filed a partition-suit and a suit for account against Sham Lal in which, among other things, he accused Sham Lal of embezzlement. This was just about the time that Lachhmi Narain is alleged to have given his son in adoption to Sham Lal. After Sham Lal's death the enmity continued with *Musammat* Ganga Dei, and Lachhmi Narain tried to get hold of Sham Lal's property by setting up an adoption of his son Gokul Prasad, at that time an infant, by Sham Lal. The case then set up was that the defendant was placed in Ganga Dei's lap and adopted by Sham Lal immediately after his birth in November 1876. The state of feelings existing between the parties at the time when this allegation was put forward may be judged by the fact that, though Ganga Dei stood to Lachhmi Narain in the position of aunt he publicly accused her of unchastity. His attempt to secure the property failed, mutation was effected in the name of Ganga Dei and she continued to be the recorded owner till her death nearly forty years later. That strained relations existed between Lachhmi Narain and Sham Lal and that the estrangement was continued after the latter's death between Lachhmi Narain and the widow has been admitted fully by one of the defendant's witnesses. It is not rebutted by the fact that Sham Lal in 1877 bought Lachhmi Narain's share in the family house in satisfaction of a decree which he held against him and that he afterwards leased the share to Lachhmi Narain in order, as he himself said, to prevent the latter becoming rebellious.

Under these circumstances, it is ridiculous to suggest that the learned Subordinate Judge was not at liberty to set aside these admissions of Sham Lal as having been falsely made for a particular purpose or that he was bound to treat them as *prima facie* proof of the defendant's case. The Privy Council * never laid down any such proposition as this. Admissions are always evidence against the party who makes them, but they are evidence which varies very much in value according to the circumstances and a Court is quite at liberty to reject them if it is satisfied from other circumstances that

*See *Chandra Kunwar* v. *Chaudhry Narpat Singh*, 29 A. 184; 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102 (P. C.), and *Dharam Kunwar* v. *Balwant Singh*, 15 Ind. Cas. 673; 34 A. 398; 16 C. W. N. 676; 9 A. L. J. 780; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 23 M. L. J. 200; 39 I. A. 142 (P. C.)—[*Ed.*]

they were untrue. Apart from these admissions, there is no evidence of the alleged adoption by Sham Lal.

The foundation of the alternative case and of the plea of estoppel is a transaction which took place between Ganga Dai and Lachhmi Narain in January 1884. At that time they had made up their differences and a registered deed, Exhibit A-1, was executed between them by which (1) Ganga Dei was recognised as owner of property, (2) she acknowledged having adopted Gokul Prasad as her son, she was at liberty to give any part of the property to religious purposes or to make a Will or transfer any part of the property to Gokul Prasad, (3) Lachhmi Narain renounced all claims as reversioner. This document represents a genuine transaction but it is very far from supporting the defendant's case. It never mentions Sham Lal nor does it say anything about *Musammat* Ganga Dei having received any authority from her husband to adopt or having adopted the boy as heir to her husband so as to displace herself from the ownership of the property. This, no doubt, is why nothing was heard of the alternative case until it was developed in the course of the evidence, which was not recorded till nine or ten months after the written statement was filed. (This is an illustration of the evils that arise when cases are not decided promptly). The document is manifestly inconsistent with any adoption to Sham Lal.

This disposes of the plea of estoppel which is based on this document. Lachhmi Narain could not be estopped from denying what he never asserted. I need say very little regarding the oral evidence of the defendant. The learned Subordinate Judge has discussed it fully. It is full of falsehoods and inconsistencies. One illustration will suffice. Mendi Lal, D. W. No. 2, had rashly asserted that Lachhmi Narain was not present when the adoption by Ganga Dei took place. It had to be brought to his recollection by a cleverly put question that this would not do. Being reminded what were the essentials of a valid adoption, he would at once recollect that the first of them is giving by the natural father. He then proceeded to contradict his former statement and made an explicit statement as to Lachhmi Narain having brought the boy in his arms and placed him in the lap of Ganga Dei asserting that he was giving him in adoption. The impression which the evidence produces on my mind is that it had been made up for the occasion. The fact that the events occurred long ago, to which reference has been made, merely confirms that impression. In many places the evidence is too definite to be the result of genuine memory. I have no doubt whatever that the learned Subordinate Judge has come to a correct conclusion on the facts of the case.

The plea that the suit was one for partial partition and, therefore, not maintainable was rejected by the learned Subordinate Judge on the ground that it was not taken until the time of arguments. Lachhmi Narain died quite early in the case and this defence, if Gokul Prasad wished to take it, could have been put forward then and made the subject of an issue. The appellant points out in extenuation that during the latter part of the time during which the case was pending *Musammat* Sita, the widow of Lachhmi Narain, was also a party to the suit as one of his legal representatives. She claimed the whole property under a Will and as against her this plea could not be taken. On the day before the case was decided she compromised the case with both parties, both the plaintiff and the defendant agreeing to allow her maintenance. This explanation does not cover the whole ground as *Musammat* Sita was not brought on the record till 5th August 1920. As, however, the point has been considered by the learned Subordinate Judge and the difficulty is apparent on the face of the record I cannot refrain from considering it.

The difficulty arises from the fact that the plaintiff has never asserted that there has been any disruption in the joint family consisting of Lachhmi Narain and his sons. The defendant, no doubt, said that he had separated from the family, but only on the ground of his adoption as the son of Sham Lal which has been found to be false. The plaintiff in paragraph 18 of his replication asserted that the ancestral property had all along remained in the joint possession of the plaintiff and his sons. One of the plaintiff's rebutting witnesses, Shadi Lal, says explicitly that Gopi Nath was not separate from his father. If Kailash Nath is suing to recover joint family property against the defendant who claims to hold it adversely it is difficult

to see how he can get more than a decree for joint possession. The respondent's learned Pleader has suggested that because the defendant did not raise the plea as to the nature of the decree till the close of the suit he should be treated as having agreed to a partial partition, but failure to raise a plea is not equivalent to consent. It appears to me that the proper decree to pass in the case is a decree for joint possession of an undivided half share in the property.

The lower Court, in the view which it took of the case, has given a decree for mesne profits. The appellant contends, and it seems to me rightly, that where the plaintiff as a member of a joint family claims possession of joint family property which is in possession of another member of the family, even though that member claims to hold it adversely, no decree for mesne profits should be passed. In this view the cross-objection filed by the respondent as to the amount of mesne profits need not be considered. The respondent has also questioned the lower Court's decree in respect of costs but on this ground also there appears to be no reason to interfere.

The result is that the appeal is allowed to this extent that the decree for mesne profits is set aside and in lieu of a decree for possession of an eight-annas share will be substituted a decree for joint possession of an undivided half share. As the main grounds of appeal have failed and as the point on which the lower Court's decree is being modified was not taken until the conclusion of the case, I allow the respondent his costs of the appeal. The appellant will bear his own costs. The cross-objections are dismissed but without costs.

J. P. *Appeal partly allowed.*

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 775 AND 776 OF 1920.

January 19, 1922.

Present:—Mr. Justice Adami and Justice Sir John Bucknill, Kt.

Kumar MADHEVA SURENDRA SAHI AND ANOTHER—APPELLANTS

versus

AWADH M SSIR AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 30 (b), 105, 188—Enhancement of rent—Non-joinder of parties—Receiver appointed by mortgagee of one co-sharer's property not necessary party—Appeal, second, maintainability of—Receiver, position of.

Where a Receiver appointed in respect of an eight-annas share of one of the two landlords in a Mouza at the instance of a mortgagee to ensure the re-payment of a mortgage-debt was not made a party to a proceeding under section 105 of the Bengal Tenancy Act for enhancement of rent under section 30 (*b*) of the Act but both the landlords who alone were shown by the Record of Rights to have title as landlord were parties to the proceeding:

Held, that it might have been well to allow the Receiver to be added as a plaintiff but his absence did not vitiate the trial and that the provisions of section 188 of the Bengal Tenancy Act were complied with in joining the two landlords as plaintiffs. [p. 350, cols. 1 & 2.]

No second appeal lies from the decision of a Special Judge settling fair and equitable rent under the Bengal Tenancy Act but a second appeal lies from the decision of such a Judge regarding the maintainability of suits under section 105 of the Bengal Tenancy Act. [p. 350, col. 2.]

A Receiver is entitled to be represented in a suit the result of which may be to affect the property in *custodia legis*. Though the appointment of a Receiver may in many cases operate to change possession it has no effect whatever on the title of the party to the property which is placed in the possession of the Receiver. [p. 350, cols. 1 & 2.]

Appeals from a decision of the Special Judge, Saran.

Messrs. *P. Dayal, A. P. Upadhaya, Harnandan Sahay* and *Bhagwan Prasad*, for the Appellants.

Mr. *P. N. Sinha*, for the Respondents.

JUDGMENT.

ADAMI, J.—These two second appeals arise out of suits instituted by the co-sharer landlords of Mauza Mahmadpur against certain of their tenants under section 105 of the Bengal Tenancy Act, 1885, read with section 30 (*b*), and sub-section (1), clause (*a*), of section 52 of the Act.

It appears that 10 or 12 years before the suit, at the instance of a mortgagee, a

Receiver was appointed by the Court in respect of the eight-annas share in the Mauza owned by the father of plaintiff No. 2, who is now proprietor of the share. The two co-sharer landlords joined in the institution of the suit as required by section 188 of the Bengal Tenancy Act, but did not join with themselves the Receiver, who, however, filed a petition asking to be made a plaintiff on the 10th August 1918, four months after the institution of the suit. No order was passed on the petition and the Receiver did not appear at the hearing.

In both the lower Courts the objection was raised by the defendants that the failure to join the Receiver as a plaintiff in the suit was a bar to the maintainability of the action.

The Assistant Settlement Officer overruled the objection and settled fair and equitable rents. On appeal the Special Judge set aside the order of the lower Court holding that the suits were not maintainable, as the Receiver was a necessary party to the applications.

It is contended before us that, in the circumstances of the case, the Receiver was not a necessary party and I am of opinion that the contention is sound.

There was nothing before the lower Courts to show what were the powers and duties of the Receiver under the order of the Court which appointed him; ordinarily, his function would be to collect rents and otherwise safeguard the property in the interest of the mortgagee; and in the absence of evidence on the point the Trial Court was fully justified in rejecting the objection. There can be no doubt that if the Receiver had been appointed in the course of a suit in which the title of the co-sharer landlord to a share in the estate was in dispute, it would have been absolutely necessary to join him as a party to the proceedings under section 105 according to the requirements of section 188, but in the present case there was no dispute as to the title of plaintiff No. 2; the Receiver was appointed merely to ensure the re payment of a mortgage-debt. The Receiver had no title to the property nor interest in it; though appointed long before the final publication of the Record of Rights, his name is not entered in the record as having any interest at all in the estate. The recorded proprietor landlords are the plaintiffs.

The Receiver is entitled to be represented in a suit the result of which may be to affect the property in *custodia legis*, but here no attempt has been made to interfere with the right of the Receiver to the property entrusted to his care. Though the appointment of a Receiver may in many cases operate to change possession it has no effect whatever on the title of the party to the property which is placed in the possession of the Receiver.

Section 188 of the Bengal Tenancy Act requires that all the co sharer landlords should be joined as parties in proceedings authorised to be taken by a landlord under the Act, and, in my opinion, the provisions of the Act have been complied with in joining the two plaintiffs who alone are shown by the Record of Rights to have title as landlord. It might have been well to allow the Receiver to be added as a plaintiff but his absence does not vitiate the trial.

It has been urged by the respondents that no second appeal lies from the decree of the Special Judge in appeals from decisions settling fair and equitable rents. In the present cases, however, the second appeals are not from decisions settling fair and equitable rents, but from decisions regarding the maintainability of the suits, and second appeals do lie from decisions of this nature.

The appeals must be allowed with costs. The decrees of the lower Appellate Court are set aside, and it is directed that the appeals be re-heard by the learned Special Judge on the merits and be decided according unto law.

BUCKNILL, J.—I agree.

J. P.

Appeal allowed.

RAMCHANDRA FATE v. SRIDHAR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No 99 OF 1921.

December 20, 1921.

Present:—Mr. Hallifax, A. J. C.

RAMCHANDRA FATE—DEFENDANT No. 1 —APPLICANT

versus

SHRIDHAR AND OTHERS—PLAINTIFF AND DEFENDANT No. 3—NON-APPLICANTS.

Specific Relief Act (I of 1877), s. 9, applicability of —Ouster of co-owners—Joint possession with trespasser —Parties—Civil Procedure Code (Act V of 1908), s. 115 —Other remedy open—Revision—Powers of High Court.

Section 9 of the Specific Relief Act applies to the case of a co-owner of property seeking to be restored to possession jointly with a trespasser of property from which the latter has ousted his co-owners along with him, even though these co-owners do not claim possession of their shares. [p. 352, col. 1.]

Hari Narain (Nama) Das v. *Elemjan Bibi (Sheikh Naju)*, 23 Ind. Cas. 618; 19 C. W. N. 120; 19 C. L. J. 117, not followed.

Atiman Bibi v. *Sheikh Reasat*, 28 Ind. Cas. 570; 19 C. W. N. 1 17, referred to.

A co-owner not joining in a suit for possession under section 9 of the Specific Relief Act is not a necessary party to the suit [p. 352, col. 1.]

Revision should ordinarily not be granted even in a case in which no appeal lies, if some other remedy is provided which can be called reasonably efficacious in respect of the circumstances of the particular case. But in cases where some other remedy is provided, if the decree is wrong and the slower remedy by regular suit will still leave the person suffering injustice and undue hardship, the revisional powers of a High Court should be exercised in favour of the person suffering injustice. [p. 351, col. 2.]

Revision of an order of the First Munsif, Nagpur, dated the 19th January 1921, in Civil Suit No. 65 of 1920.

Mr. *G. R. Pradhan*, for the Applicant.

Mr. *V. N. Bapat*, for the Non-Applicants.

ORDER,—The plaintiffs were in possession of the whole of the field in dispute. Their possession of a two-thirds share was on their own account and of the remaining one-third was on behalf of one Saku Bai, a relative of both parties. They were dispossessed by the first defendant, and within six months of that dispossession filed a suit under section 9 of the Specific Relief Act claiming to be restored to possession of the whole field. Saku Bai refused to join them in bringing the suit and they impleaded her as a defendant. In that capacity she pleaded that the field had been divided between the parties about the time of the alleged dispossession, half being given to the first defendant, one-third to the two plaintiffs jointly and one-sixth to her, and that since the partition each share was in the separate possession of the party to whom it had been allotted. She declared that the suit was entirely false and refused to have anything to do with it. The first defendant took the same pleas of fact, which, however, were found to be untrue. The learned Munsif held that the plaintiffs and Saku Bai were in exclusive possession of the field within six months of the institution of the suit, and passed a decree ordering that the first defendant was to put the plaintiffs and Saku Bai in joint possession of it. The first defendant has applied for revision of this decree.

A preliminary objection was taken on behalf of the non-applicants that this Court ought to refuse to grant revision because another remedy by regular suit is open to the applicant. This objection is based on the analogy of section 115 of the Civil Procedure Code which allows revision only in favour of an aggrieved party who has no remedy by way of appeal. I agree in the proposition that revision should not ordinarily be granted, even in a case in which no appeal lies, if some other remedy is provided which can be called reasonably efficacious in respect of the circumstances of the particular case. But here, if the decree is wrong, the slower remedy by regular suit will still leave the applicant suffering injustice and undue hardship, and this is sufficient to call for the exercise of the revisional powers of this Court in his favour.

It is perfectly clear that the plaintiffs are not entitled to possession of Saku Bai's share, and that she cannot be forced to take possession of that share against her will. It appears that they have been put in possession of the whole field, a third share being held by them on behalf of Saku Bai, at least nominally. It is not easy to see how this could be done unless Saku Bai joined in the application for execution, though compelling her to take possession through the plaintiffs is perhaps no more difficult to understand than forcing a decree for possession on her. What has in effect been done is to remove the first defendant from possession of her share,

which he held with her consent, and to put in the plaintiffs to hold her share on her behalf, not only without her consent but against her expressed wishes. The position is impossible, and the plaintiffs must at least restore Saku Bai's third share to the position in which it was before the execution of their decree, which is that of the first defendant. If Saku Bai is content to leave it there, the plaintiffs have certainly no right to prevent her doing so.

It is further urged on behalf of the first defendant that no decree at all should have been passed and the suit should have been dismissed for the reason that section 9 of the Specific Relief Act contemplates only a suit for exclusive possession by the plaintiffs, not one for joint possession by them with one or more of the defendants or some third party. The plaint does in fact pray for exclusive possession of the whole field to be given to the plaintiffs. This is, of course, incompatible with the admission in the same document that Saku Bai was in joint possession through and with them of a third share and that she refused to join in the suit, and the lower Court would perhaps have been justified in dismissing the suit on the ground that the plaintiffs had failed to show that they were entitled to the relief they claimed. Such a decree, however, would certainly not be proper at this stage, and the suit must be regarded as one for joint possession with both or either of the defendants of a two thirds share in the field.

In *Hari Narain (Nama) Das* v. *Elemjan Bibi (Sheikh Naju)* (1) the three plaintiffs sued for joint possession of land, but in the course of the suit the third plaintiff, who according to the plaint was entitled to a half share in the property withdrew from the suit, leaving the other two claiming joint possession with the defendants of the remaining half share. In discussing the question whether the possession of which section 9 of the Specific Relief Act speaks includes joint possession, Stephen and Chatterjee, JJ., said: "We have to decide it without the assistance of any authority. Looking at the words of the section as they stand, we are of opinion that they refer to exclusive possession and the Court had no jurisdiction to grant joint possession under the section. We have treated the case as being one where a party seeks possession of his share only of property from which he himself and his co-sharers have been dispossessed and it is incompetent for the Court to give possession of the whole of the property in such a case."

Mr. Justice Chatterjee was also one of the two Judges who decided the case of *Atiman Bibi* v. *Sheikh Benat*(2) just two years later. That has been cited as propounding the contrary view to that taken in the case previously mentioned. The earlier case is, however, mentioned and distinguished in the later on the ground that in the former dispossession was of the whole and possession was claimed in respect of a part only, but in the latter dispossession was of a part only and possession was claimed of that part, as it was a suit by one co-owner against all the others, who had ousted him from his share. These two cases are the only judicial authority I have been able to find on the point.

The facts in *Hari Narain (Nama) Das* v. *Elemjan Bibi (Sheikh Naju)* (1) are exactly similar to those of the present case, except that the co-owner with the plaintiffs in that case was not a party to the suit at all, and the co-owner with them here is a co-defendant with the trespasser. I find myself, however, with the greatest respect, unable to follow this ruling. Reading the words of section 9 of the Specific Relief Act with anxious care, I have failed to find anything in them that would suggest that they are not meant to provide for one co-owner wrongfully ousted from possession by a stranger obtaining redress unless the co-owners who have been ousted along with him joined in the suit. The others may not wish to claim possession for a variety of reasons, but that ought not to deprive the one who does of his remedy. A stranger might hold a decree against one of two co-owners for possession of his half share in certain property. If he took forcible possession of the whole property otherwise than in due course of

(1) 28 Ind. Cas. 616; 19 C. W. N. 120; 19 C. L. J. 117.

(2) 28 Ind. Cas. 570; 19 C. W. N. 1117.

law, it would not be worth the while of the person against whom he held the decree to join in a suit for restoration of possession under section 9 of the Specific Relief Act, but the interpretation put upon that section by the Calcutta High Court would deprive his co-owner of that remedy against an obvious wrong which, it seems to me, the section was specially designed to provide.

I fail also, if I may say so with due respect, to follow the distinction drawn between the two cases. In effect it seems to me to come to this, that if one of several co owners is ousted from possession of his share of property by a person who thereby gets the whole property into his possession, he can only claim to be restored to possession of his own share under section 9 if the other person has a good title to the remainder; that section will not help him if the other person is a trespasser on the remainder as well as on his share. It may well be said also that with Saku Bai as a defendant and denying the claim, the case is more nearly analogous to the second of the two cases mentioned than to the first. She can be regarded as in possession of her own one-third share through the first defendant, whom she supported, and the plaintiffs claimed possession of their two-thirds share against the first defendant who had ousted them but had left Saku Bai undisturbed.

I hold that the cases to which section 9 of the Specific Relief Act refers include the case of a co owner of property seeking to be restored to possession, jointly with a trespasser, of property from which the latter has ousted his co owners along with him, even though those other co-owners do not claim possession of their shares. In this view the decree of the lower Court must be set aside and a fresh decree must issue ordering the first defendant to put the plaintiffs in joint possession with himself of two thirds of the field in dispute. I am of opinion that Saku Bai was not a necessary party to the suit, but in any case it would have to be dismissed against her. The plaintiffs must, therefore, pay all the costs incurred by her in the lower Court. Against the first defendant they have succeeded to the extent of two thirds of their claim. They will, therefore, pay one-third of all the costs incurred in the lower Court other than those of Saku Bai, and the first defendant will pay the remainder. They will also pay the whole of the costs of the proceedings in this Court, in which the Pleader's fee will be Rs. 15.

Application allowed.

G. R. D. & J. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 994 OF 1919.

November 29, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

BASARAT SARKAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HIRU PRAMANIK AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Minor—Guardian de facto, statements of, do not bind minor.

A *de facto* guardian under the Muhammadan Law has no power to bind the minor by his statements or to affect his interest in the property. The statements made by such a person may, however, be taken into consideration by a Court as any other evidence [p. 354, col. 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Pabna, dated the 23rd of January 1919, modifing that of the Munsif, First Court at Pabna, dated the 12th of September 1918.

FACTS appear from the judgment.

Babu *Krisna Kamal Motra*, for the Appellants.—The plaintiff is the appellant. The appeal arises out of a suit for *khas* possession on declaration of plaintiff's title thereto. One Khalabali was the ancestor of the parties. He had four sons, Jaharuddin, Barbal, Hiru (defendant No. 1) and Ekram, (defendant No. 2). Jahar had three sons, Jamir, Jaifat and defendant No. 10

BASARAT SARKAR v. HIRU PRAMANIK.

Plaintiff No. 1 is Julfat's son and plaintiff No.2 is Julfat's widow. When Julfat died plaintiff No. 1 was a minor. He has now attained majority. The question is as to the power of a *de facto* guardian to bind the minor by his admission. Birbal had amongst others a son named Sormanulla. He was the *de facto* guardian. He made admissions to the effect that the properties were ancestral. The First Court held that the minor was not bound by the admissions of Sormanulla. On appeal the lower Appellate Court has reversed that decision and has held that the minor must be bound by the admissions of his *de facto* guardian. Refers to *Imambandi* v. *Mutsaddi* (1). The mortgage-bond was found to be inadmissible in evidence. It has been proved by a boy below 12 years of age. Refers to *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhury* (2). *Ramani Pershad Narain Singh* v. *Mahanath Adaiya Gossain* (3). In the present case the lower Appellate Court has proceeded wholly on the admissions of the guardian. I would pray for a remand.

Babu *Dinesh Chandra Hay*, for the Respondents.—The learned Judge proceeds to discuss whether the properties were acquired with joint funds or not. My submission is that the appeal is concluded by findings of fact. The Judge has considered the *kobala* itself. I submit the Judge was not influenced by the admissions or other evidence either.

Babu *Krisna Kamal Moitra* replied briefly.

JUDGMENT.—The question involved in the suit out of which this appeal arises, was whether the property in dispute was the self-acquired property of one Julfat, father of the plaintiff, or whether it belonged to the family of which Julfat was a member.

The Court of first instance came to the conclusion upon the evidence that the property was acquired by Julfat alone. The learned Subordinate Judge on appeal came to a different conclusion and accordingly gave a decree to the plaintiff in respect of only 1-12th share of the property.

The plaintiffs have appealed to this Court. The learned Subordinate Judge has found that the consideration for the *kobala* in favour of Julfat consisted of money due under a mortgage-bond to the family and a sum of Rs. 40 which was paid on behalf of the family to the vendor. The learned Subordinate Judge, therefore, comes to a finding that the consideration was paid by the family. He further goes on to consider certain other documents which contain some statements made by one Sarmanulla who is said to have been the *de facto* guardian of the plaintiffs when they were minors. He says that the plaintiffs must be bound by the statements made therein and further on says: "In all these documents, the ownership of the plaintiffs and defendants has been admitted." Then he comes to the following finding "in these circumstances, I find that the *jote* was acquired with joint funds and was treated as such by plaintiffs and defendants. That being so, the plaintiffs have only 1-12th share in it."

Now, a *de facto* guardian under the Mahammadan Law has no power to bind the interest of the minor by his statements or to affect his interest in the property. The statements made by such a person may be taken into consideration as any other evidence. But the learned Subordinate Judge says that the plaintiffs *must be bound* by the statements made in the petition. Although, therefore, the learned Judge has come to the conclusion that the consideration for the *kobala* was supplied by the family, it cannot be said that he had not taken into consideration the other documents referred to above in arriving at the conclusion that the property was acquired with joint funds and treated as such by the plaintiffs and defendants.

That being so, the case must go back to the lower Appellate Court in order that the Judge may come to a fresh finding on the point without treating the statements made by the *de facto* guardian as binding on the plaintiffs, and dispose of the appeal according to law.

Costs will abide the result.

B. N. *Case sent back.*

(1) 47 Ind. Cas. 518; 45 C. 878 at pp. 895, 903; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 60; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

(2) 7 C. 293; 8 Ind. Dec. (N. S.) 737.

(3) 31 C. 380 at p. 384.

RAMKISHUN DAS v. BENI PROSAD.

PATNA HIGH COURT.
CIVIL REVISIONS NOS. 306 AND 318 OF 1921.
January 7, 1922.
Present:—Mr. Justice Das and
Mr. Justice Adami.
IN C. R. No 305 OF 1921.
Mohant RAMKISHUN DAS—PETITIONER
versus
Babu BENI PROSAD AND OTHERS—
OPPOSITE PARTY.
IN C. R. No. 318 OF 1921.
Mohant RAMKISHUN DAS—PETITIONER
versus
DAULATRAM—OPPOSITE PARTY.

Withdrawal and dismissal of suit, distinction between—Withdrawal of suit after examination of plaintiff's witnesses—Dismissal—Costs—Civil Procedure Code (Act V of 1908), s. 115—Misconstruction of rules—Revision—Jurisdiction—Patna High Court Rules for Subordinate Courts, rr. 37-B, 40, 41.

No distinction on principle can be drawn between the withdrawal of a suit and the dismissal of a suit for default, but where a suit is withdrawn after witnesses have in fact been examined on behalf of the plaintiff, such withdrawal cannot be said to operate as a dismissal for default, and the opposite party is entitled to full costs. [p. 355, col 2; p. 356, col. 1.]

Nanhilal Agrari v. *Secretary of State for India*, 5 Ind. Cas. 770; 11 C. L. J. 217, distinguished.

A misconstruction of certain rules by a Subordinate Court with respect to Pleader's fees is not revisable under section 115 of the Civil Procedure Code. [p. 356, col. 1.]

Appeal from an order of the Subordinate Judge, Patna.

Messrs. *P. N. Sinha* and *N. C. Ghosh*, for the Petitioner.

Mr. *Siveswar Dayal*, for the Opposite Party.

JUDGMENT.

DAS, J.—These applications are directed against the order of the learned Subordinate Judge of Patna, by which he has calculated the fees payable to two sets of defendants on the whole value of the suit under rule 35. The facts are these:

The plaintiffs brought a mortgage action against the defendants. The question as between the plaintiffs and defendants Nos. 3 to 5 was one of priority; defendants Nos. 3 to 5 claimed to be the prior mortgagees, and the plaintiffs case was that they were the prior mortgagees. So far as the defendant No. 9 is concerned the controversy between the plaintiffs and him was as to a particular property which had been purchased by defendant No. 9, the case of defendant No. 9 being that he had acquired a title to the property before the mortgage in favour of the plaintiffs.

When the case came up before the learned Subordinate Judge, the plaintiffs withdrew the case as against defendants Nos. 3 to 5. The question arises whether the learned Subordinate Judge was right in assessing costs payable to defendants Nos. 3 to 5 on the whole value of the suit.

Mr. Parsendu Narain Sinha appearing on behalf of the plaintiffs argues that the Court was wrong, and he relies upon rule 37-B. That rule provides that: "If the suit be dismissed for default, the amount of the fee to be paid to the defendant's Pleader shall be left to the discretion of the Court, provided that such fee shall not exceed the moiety of the fee calculated on the whole value of the suit under rule 35." According to Mr. Parsendu Narain Sinha the amount of the fee payable to the Pleader of defendants Nos. 3 to 5 should not have exceeded the moiety of the fee calculated on the whole value of the suit. The learned Vakil appearing on behalf of defendants Nos. 3 to 5 urges that rule 37, paragraph (*b*) has no application inasmuch as the suit was not dismissed for default, but as against this Parsendu Babu relies upon the case of *Nanhilal Agrari* v. *Secretary of State for India* (1). In that case, which was a case that arose on certain land acquisition proceedings, the claimant applied to withdraw the case and the District Judge allowed him to do so but directed him to pay full costs to the Government. Mr. Justice Mukerjee and Mr. Justice Teunon came to the conclusion that full costs should not have been allowed. But there is this distinction between the case upon which Parsendu Babu relies and this: that it does not appear from the facts recited in the judgment of Mr. Justice Mukerjee that the case was withdrawn after witnesses had in fact been examined on behalf of the petitioner. The opposite party has filed an affidavit in this Court in which he swears that the petition of withdrawal of the suit was not filed until the witnesses had been examined on behalf of the petitioner. I quite agree that no distinction on principle can be drawn between the withdrawal of a suit and the dismissal of a suit for default, but I am unable to say that

(1) 5 Ind. Cas. 770; 11 C. L. J. 217.

where a suit is withdrawn after witnesses had in fact been examined on behalf of the petitioner that such withdrawal operates as a dismissal for default. I am of opinion, therefore, that so far as the order granting full costs to defendants Nos. 3 to 5 is concerned that order is right and ought to be affirmed.

I have now to consider whether the learned Judge was right in awarding full costs to defendant No. 9. The learned Subordinate Judge relies upon rule 40, but Parnendu Babu argues before us that rule 41 was the rule that applied in this case, and he says that the value of the property in which defendant No. 9 was interested being Rs. 50, the fees awarded to the Pleader of defendant No. 9 should have been calculated with reference to that value.

Now the learned Vakil appearing on behalf of defendant No. 9, argues first, that if there is any error in the order passed by the learned Subordinate Judge of Patna that error arose out of a misconstruction of the rules relating to Pleader's fees and this Court ought not to revise such an order as the learned Subordinate Judge had complete jurisdiction to misconstrue these rules. Alternatively he argues that it is not established that Rs. 50 was the value of his property. I am of opinion that these arguments are entitled to succeed. The question was a question of construction of rules 40 and 41. Both these rules were placed before the learned Subordinate Judge and he came to the conclusion, erroneously in my opinion, that rule 40 applied to this case. But I am unable to say that that order is revisable under section 115 of the Civil Procedure Code.

On the next point which has been argued by the learned Vakil I am of opinion that the document by which the defendant No. 9 purchased the property does not establish the value of the separate interest of the defendant in the property at the date of the suit. There is no evidence before us as to what the value of the separate interest of the defendant was at the date when the learned Subordinate Judge passed his order. On the whole I am of opinion that we cannot interfere with the order passed by the learned Subordinate Judge.

These applications must be refused but in the circumstances without costs.

ADAMI, J.—I agree.

J. P. *Applications refused.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 1 OF 1918.

April 25, 1921.

Present :—Mr. Kennedy, J. C., and Mr Raymond, A. J. C.

RAIS HAMBIRKHAN—DEFENDANT APPELLANT

versus

MURIJMAL AND OTHERS—PLAINTIFF —RESPONDENTS

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 10A Sale-deed—Oral agreement to prove transaction to be mortgage, admissibility of—Kabuliyat *and lease, unregistered, effect of.*

Where at the time of execution of a sale-deed there was an oral agreement that the nominal purchaser should re-convey on payment and that payment should be by instalments, and in consequence of that agreement *kabuliyats*, and afterwards a lease, were passed providing for the payment of interest and capital but were not registered:

Held, that the *kabuliyats* did not constitute the agreement but were ancillary to it, and that the fact that they could not be proved as they were not registered did not stand in the way of the vendor proving that the transaction was only a mortgage, as under section 10A, Dekkhan Agriculturists' Relief Act, a contemporaneous oral agreement could be proved even though it had subsequently been embodied in a document which was inadmissible in evidence. [p. 358, col. 2]

Abaji Annaji v. *Laxman Tukaram*, 8 Bom. L. R. 553; 30 B. 4 6, referred to.

Appeal from the decision of the Joint Judge, Sukkur.

Mr. *Futehchand Assudomal*, for the Appellant.

Mr. *Tolasing Khushalsing*, for Respondent No. 1.

JUDGMENT.

RAYMOND, A. J. C.—The facts of the case out of which this appeal arises may be briefly set out as follows:—Plaintiff-respondent filed a suit for separate possession by partition of the undivided share of the appellant Hambir Khan in certain family property. He alleged that on the 26th February 1913, by a registered sale-deed, the appellant sold him an undivided share of one anna six pies in the estate, and that on the 24th September 1913 by another registered sale-deed he sold him his remaining share of eight pies in the said estate. On the 18th July 1914 respondent leased out the whole two annas two pies share to the appellant for a period of two years. In March 1915 the appellant went under the protection of the Manager of the Encumbar-

ed Estates. On the 3rd August 1916 respondent called upon the manager by a written notice to give him possession of the lands which he had purchased, but as no reply was received he filed his suit.

Appellant pleaded that the transaction in question was not a sale but a mortgage. There was an account between him and the respondent and as the latter apprehended that the appellant may take refuge under the Manager, he induced him to execute what were ostensibly sale deeds without any settlement of the account. Further at the time of execution of the sale-deeds there was a contemporaneous agreement that the respondent would receive the produce of the land and credit it against the loan, and as this produce proved insufficient he had a lease deed executed by the appellant by which the latter was to pay a rent of Rs. 600 to cover the interest on the loan.

Respondent denied that the transactions were mortgages but admitted that one *kabuliyat* had been executed by which he agreed to reconvey the property to the appellant on receiving, the purchase money within three years. Admittedly these two *kabuliyats* were not registered, and the lower Court held that the appellant was precluded from giving oral evidence of its contents, as in its view any oral agreement arrived at between the parties in respect of the transaction was embodied in the *kabuliyats* according to appellant's written statement, and as they were unregistered, they were void and of no effect. It, therefore, came to the conclusion that the transactions were sales and that the respondent was entitled to a preliminary decree for partition.

Now by his plaint the respondent described appellant as an agriculturist. Admittedly after the execution of the sale deeds the lands remained in the possession of the appellant. Admittedly also, no actual payment was made at the time of the execution of the sale-deeds, though they recited the amount of the consideration, and equally the account between the parties was not settled when the sale-deeds were executed. The market value of the land in suit is described as Rs. 15,000.

In paragraph 12 of his written statement on which the lower Court has mainly relied appellant stated that in consideration of the amount due by him on the dealings he had with the respondent, the latter approached him through others to execute a conditional sale-deed in his favour which would remain as a mortgage-deed in force. Accordingly the plaintiff, without settling any account, got a deed executed by the defendant as alleged in the plaint. In order to make the defendant sure of his mortgage two agreements were also executed at the time of the document I am inclined to the view that the inducement for the appellant to execute the sale-deed was some contemporaneous oral arrangement arrived at between the parties and even if this oral agreement were embodied subsequently in the two *kabuliyats* referred to, that would not prevent the appellant from giving evidence of it, and this is clearly recognized by section 10-A of the Dekkhan Agriculturists' Relief Act. In the case of *Abaji Annaji* v. *Laxman Tukaram* (1) Sir Lawrence Jenkins made the following observations. "The frequency of the complaint that agriculturists are entrapped into the execution of documents of sale in the belief that the right to redeem still remains with them, leads us to express the hope that there may be early legislation which will enable the Courts, at least where an agriculturist is concerned, to investigate and determine the real nature of the transaction, unfettered by section 92 of the Evidence Act, and to award such relief as the justice of the case may require." This suggestion has been embodied in section 10 A of the Dekkhan Agriculturists' Relief Act, which empowers a Court notwithstanding the provisions of section 92 of the Evidence Act to inquire into and determine the real nature of a transaction in cases like the present one. If, therefore, as the appellant alleges, he was told that the document which is in form a sale deed would not be enforced as such against him, and on the strength of that representation he executed the sale-deed, it cannot be enforced as against him as a sale-deed; and where further, admittedly no cash consideration passed at the time of the execution of the sale-deed, the case is pre-eminently one where the appellant being an agriculturist, the Court should enquire into the real nature of the transaction. The present case is very similar to Illustration (*c*) to section 10A. The lower Court was of the opinion that it could not permit the appellant to give oral

(1) 8 Bom. R. 553; 30 B. 426.

evidence of the terms of the *kabul yat* inasmuch as according to paragraph 12 of the written statement, there was no oral argeement apart from the *kabuliyats*, which would be the only documents possessing any evidentiary value. This argument does not appear to me to give a correct interpretation of the appellant's written statement for he asserts in addition to what the lower Court has referred to that he was induced to execute the sale deed on the representation that it would take effect only as a mortgage. And not only ought the appellant to have an opportunity to explain the circumstances under which he executed the sale-deed, but there is a duty cast upon the Court to examine him as a witness. The lower Court has apparently recorded no evidence in this case. In my opinion the case ought to be remanded to the lower Court for the purpose of recording a fresh finding, after hearing evidence on Issue No. 4 that was framed by it. Question of costs will be reserved.

KENNEDY, J. C.— Under section 10A, Dekkhan Agriculturists' Relief Act, a contemporaneous agreement may be proved. The Joint Judge found that the contemporaneous agreement set up in the present case should not be proved because he supposed it to be contained in certain *kabuliyats* which were not registered and were, therefore, inadmissible in evidence.

But it is not set up in the pleadings and nowhere stated (till the memo. of appeal) that the *kabuliyats* constituted the contemporaneous agreement. What is stated is that there was an agreement that the nominal purchaser should reconvey on payment and that payment should be by instalments, and in consequence of that agreement *kabuliyats* and afterwards a lease were passed providing for the payment of interest and capital. The *kabuliyats* obviously, therefore, do not constitute the agreement but are ancilliary to it. The fact, therefore, that they cannot be proved does not stand in the way of the defendants proving that the sale-deed set up by the plaintiff is not such.

Then it was objected that as the agreement together with the sale deed if proved would turn the transaction into a mortgage the agreement as well as the sale deed must be in writing and registered. It is not necessary to consider whether if the parties were litigating on the combined sale-deed and oral agreement the party wishing to treat the sale deed as evidence of a mortgage would fail owing to the non registration of the agreement to reconvey. That is not the nature of the present litigation. Plaintiff is suing for a relief which he can only get if there has been an out-and-out sale of defendants' interest to him. It is sufficient for defendants to prove that there was not an out and out sale and that he can do that in the present case is clear from 10A, Example C.

All that is necessary now is to find whether there was a contemporaneous agreement as set up. This is a matter of evidence. There are certain well known *indicia* by which the real nature of the transaction can be gathered. Such are the existence of previous relations of creditor and debtor, whether the consideration was such as the apparent seller would have been likely to accept in consideration for an out and out sale, whether the seller remained in possession and if so, whether the rent reserved was apparently calculated not on the economic rent but on the basis of interest paid on the nominal sale price and so forth.

The Joint Judge has decided the case purely on questions of law. The case must, therefore, be remanded for further trial on the fourth issue. Both parties to be at liberty to call evidence. Return in three months. Cost to abide result.

J. P, *Case remanded.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 144 OF 1921.

November 8, 1921.

Present : Mr. Justice Ryves and Mr. Justice Gokul Prasad.

RAM BRIJBH RAI—JUDGMENT-DEBTOR—APPELLANT

versus

DEOO TEWARI—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), s. 182 (5)—Execution

RAM BRICHH RAI v. DHOO TEWARI.

decree—Decree consisting of mortgage-decree and mple-decree—Execution of mortgage-decree—Application to execute simple decree within three years of first execution, whether within time.

In a suit on a mortgage executed by two members of a family, who only were adults at the time, it was found that a certain portion only of the money lent was required for legal necessity, and a decree for that portion was passed against all the members of the family stipulating that if the sum was not paid within the stated time the family property or a sufficient portion thereof shall be sold; and for the balance a simple money-decree was passed against the two executants only. An application to execute the decree by sale of the mortgaged property was made and the mortgaged property was sold. Within three years of that application an application was made to execute the simple money decree against one of the executants by his arrest. On an objection being raised that this decree was really two decrees, although written on one piece of paper and that the execution of the mortgage-decree could not keep alive the simple money-decree:

Held, that this was really one decree for the whole of the mortgage money and that the second application was not barred as it was made within three years of the first application to which the executants were also parties. [p. 860, col. 1.]

Dhirendra Nath Sarkar v. *Nischintapore Company*, 36 Ind Cas. 398; 26 C. L. J. 118; 22 C. W. N. 192, distinguished.

Execution second appeal from a decree of the District Judge, Ghazipur, dated the 14th of July 1920.

Mr. *M. Ishaq Khan*, for the Appellant.

Mr. *S. N. Mukerji*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. The predecessor-in-title of the decree holder (respondent here) advanced a sum of money to Ram Brichh Rai, the appellant, and another member of his family, who were adults at the time, on a mortgage of their joint family property. The money not having been re paid, a suit was brought against the two executants of the mortgage-bond and the remaining members of the joint family consisting of their sons and grandsons. The Court found that a certain portion only of the money lent was required for legal necessity and it passed a decree against all the defendants, including the present appellant, for re-payment of the mortgage-money, passing an ordinary mortgage-decree for that amount, stipulating that if the sum was not paid within the stated time, the family property or a sufficient portion thereof should be sold to recover it. For the balance of the money lent a simple money-decree was passed against Ram Brichh Rai and the other executant only. Admittedly within three years of that decree that portion of the decree which related to the family property was made final, and execution was taken out and the property was sold. Admittedly again, within three years of the date of the application for execution by sale of the family property, this application was made to execute the simple money decree against Ram Brichh Rai by arresting him. Ram Brichh Rai objected on the ground that the decree had become time barred as against him. This objection was overruled by both the Courts; hence this appeal.

It is strenuously argued by Mr. Ishaq Khan that this decree really was two decrees, although written on one piece of paper, and it was argued that execution of the mortgage-decree could not keep alive the simple money decree against the appellant; and great stress was laid on the case of *Dhirendra Nath Sarkar* v. *Nischintapore Company* (1) and apparently nowhere else. It seems to us however that that case is really quite different. There the plaintiff brought a suit to recover from the defendant three separate sums of money due on three separate contracts of tenancy and he obtained a decree formally awarding him separate amounts with regard to the three tenancies. The plaintiff, in executing his decree, first of all applied to recover the specified sum awarded with regard to one particular tenancy. Subsequently he applied, after three years of the original decree, to execute his decree with regard to the money decreed with respect to another tenancy, and it was held that that application was time barred, the reason being that in fact there were three separate suits consolidated and tried together and the result expressed on one piece of paper, but that in reality there were three separate decrees, each capable of execution quite independently of the others. Now in this particular case, as we have pointed out, all the defendants were included in the mortgage-decree. All the defendants were, therefore, bound

(1) 36 Ind. Cas. 398; 26 C. L. J. 118; 22 C. W. N. 192.

SUKHRAJ BAHADUR v. DEBI BUKHSH.

to pay that amount, and on failure to do so the family property which belonged to all of them was liable for sale. The remainder of the money was found due from two only of the defendants, who were liable not only for this amount but also for the amount which had been borrowed for legal necessity. This circumstance seems to us to distinguish this case altogether from the Calcutta case already quoted, and the other cases, also, of this Court, which have been referred to in argument. In all of them the decrees were passed against separate individuals. In this case the decree was passed against all the defendants with regard to part of the mortgage money and this, too, with regard to the same property. It seems to us that this was really one decree for the whole of the mortgage-money, and this second application having been made within three years of the first application in which these persons were also parties, keeps the decree alive. We, therefore, think that the decision of the Courts below must be affirmed but as we do not agree entirely with the reasons given by the learned District Judge we make no order as to the costs of this appeal.

J. P.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISION No. 381 OF 1921.

January 7, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Ross.

SUKHRAJ BAHADUR AND ANOTHER—PETITIONERS

versus

DEBI BUKHSH, MINOR UNDER *Musammat* MUNI KOER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, O. XXI, r. 67—Revision—Valuation on sale proclamation cannot be fixed before date fixed—Jurisdiction.

A Court has no jurisdiction to fix the valuation on a sale proclamation before the date fixed for the hearing of the matter.

SHEOAMBAR KHAN v. BALKARAN SINGH.

Appeal from an order of the Subordinate Judge, Gaya.

Mr. *Kailashpati*, for the Petitioners.

JUDGMENT.

COUTTS, J.—This is an application in revision against an order fixing the valuation on sale proclamation. It appears that time was granted until the 30th of July 1921 for hearing the parties as to the proper valuation but on the 16th of July 1921 the valuation was fixed. It is clear that having fixed the 30th of July 1921 for the hearing of the matter the Judge acted without jurisdiction in fixing the valuation on the 16th of July. His order and his subsequent order declining to review this order must be set aside. The application is allowed.

ROSS, J.—I agree.

P. D. *Application allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 386 OF 1920.

June 22, 1921.

Present:—Mr. Dalal, A. J. C.

SHEOAMBAR KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALKARAN SINGH—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Sale—Reversioner party to sale—Legal necessity—Presumption—Vendee, position of.

The fact that a reversioner was one of the parties to a sale transaction effected by a Hindu widow and was present at the time the consideration-money was paid to her, does not give rise to a presumption that the payment was made for legal necessity. The vendee must prove that the presence of the reversioner at the time of the payment made him believe that this money was required by the widow for legal necessity and that for this reason he did not trouble to make any further enquiry. [p. 66, col. 1.]

Appeal from a decree of the District Judge, Rai Bareli, dated the 19th August 1920, modifying that of the Subordinate Judge, Partabgarh, dated the 4th June 1920.

SHEOAMBAR KHAN *v.* BALKARAN SINGH.

Messrs. *Muhammad Wasim* and *Niamat ullah*, for the Appellants.

Pandit *Gokaran Nath Misra* and Mr. *Muhammad Sibtain*, for the Respondent.

JUDGMENT.—The points at issue in this appeal can be put in a very small compass. A sale-deed was executed in favour of the defendant by a Hindu widow *Musammat* Ramuna along with another widow and other male members of her deceased husband's family. On her death one of the two reversioners, Balkaran Singh, brought a separate suit for the setting aside of the sale with respect to the half share of Sital Singh, husband of *Musammat* Ramuna. He and one Udit Singh were reversioners in equal degree and they brought separate suits each to set aside the transfer of half the share of Sital Singh. From the decree passed in the case of Udit Singh there is no appeal brought to this Court. From the decree passed in the case of Balkaran Singh an appeal was taken to the Court of the learned District Judge and on the dismissal of that appeal by him a second appeal has been brought here. The items of the sale consideration with which *Musammat* Ramuna was concerned are half of Items Nos. 1 and 3 of Rs. 500 and Rs. 590 respectively and one-third of an item of Rs. 1,289 alleged to have been previously paid to the vendors, and one third of an item of Rs. 516 paid at the time of execution. In second appeal we are not concerned with Items Nos. 1 and 3 because the plaintiff has been directed by the First Court to pay his share of the liability under those two sums. The issues in this Court arise with respect to the two items of Rs. 1,289 and Rs. 516.

As regards the item of Rs. 1,289 both the lower Courts have recorded a concurrent finding that that sum was never paid by the vendee to the vendors; such is the statement of a plaintiff's witness Randhir Singh (P. W. No. 4). The defendants produced no proof of the payment of any portion of that sum. The explanation given by Randhir Singh appears to be probable that this sum was fictitiously entered to round off the real sale consideration to a sum of Rs. 5,000 in order to put off pre-emptors. The finding of fact is binding on this Court and is also supported by evidence. No legal point arises with respect to that finding and I uphold that finding.

As regards the sum of Rs. 516 it appears from the testimony of the same witness Randhir Singh in his examination as modified by what is stated in his cross-examination that *Musammat* Ramuna received one-third of this sum of Rs. 516. It was argued on behalf of the appellant purchaser that Balkaran Singh plaintiff himself having been present at the time of this payment it ought to be presumed that the payment was made for legal necessity. For one thing, there is no such ground in the grounds of appeal where the appeal is based only on the ground of estoppel in ground of Appeal No. 2. If the point be considered included in ground of Appeal No. 3 the answer is that the defendants have not stated on oath that the presence of Balkaran Singh at the time of payment made him believe that this money was required by the widow for legal necessity and that for such a reason he did not trouble to make any further inquiry. A case in the First Court ought to be properly conducted and little matters of this nature brought on the record if such an argument is to be raised in the Appellate Court. These little points are not remembered in the Trial Court where parties are examined at haphazard, and on the basis of the record before me it is not possible to draw the presumption that the presence of Balkaran Singh induced the defendants to believe that the money was taken by the widow for legal necessity. As regards the plea of estoppel there is the same flaw in the defence evidence. There is no ground work on which an argumentative structure can be raised. I am of opinion that both the lower Courts were correct in not allowing to the defendants any portion of the sum of Rs. 516 though the plaintiff was one of the parties to the sale transaction.

The appellant's learned Counsel desires to advance a new plea here that when the First Court had held a far larger portion of the consideration as relating to the widow to have been for legal necessity the sale with respect to her share ought not to have been set aside. I shall not consider that argu-

ment because it is not one of the grounds raised in second appeal.

I dismiss this appeal with costs.

J. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 77-B OF 1920.

December 23, 1921.

Present:—Mr. Dhobley, A. J. C.

MAROTI—DEFENDANT—APPELLANT

versus

LAXMAN—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Estate received before adoption, whether divested—Wife of person adopted, whether can claim her husband's estate in natural family—Adoption, principle of.

When a male owner takes a full and distinct interest in property and the property vests in him absolutely, it cannot be divested by his subsequent adoption into another family. [p. 363, col. 2.]

Behari Lal v. *Kailas Chunder Laha*, 1 C. W. N. 121, *Sri Raja Venkata Narasimha Appa Row* v. *Sri Raja Rangayya Appa Row*, 29 M. 437 at p. 452; 16 M. L. J. 178, *Dattatraya Sakharam* v. *Govind Sambhaji*, 34 Ind. Cas. 423; 40 B. 429; 18 Bom.L.R. 258, referred to.

The theory of adoption involves the principle of a complete severance of the boy from the family in which he is born and his substitution into the adopter's family as if he was born in it. The adoption operates as birth of the boy in the family of adoption and as civil death in the family of birth, with all the legal consequences incidental thereto. [p. 363, col. 2.]

Birbhadra Rath v. *Kalpataru Panda*, 1 C. L. J. 388 at p. 400 and *Ramchandra* v. *Manubai*, 52 Ind. Cas. 695; 43 B. 774; 21 Bom. L. R. 774, referred to.

A wife of a person adopted ceases along with her husband to belong to the natural family of the husband. She cannot, therefore, succeed to the estate of her husband which belonged to him while he continued to be in his natural family and which became divested because of his adoption. [p. 365, col. 1.]

Appeal against a decree of the Additional District Judge, West-Berar, Akola, dated the 9th January 1920, in Civil Appeal No. 142 of 1919.

Messrs. *D. W. Kathalay* and *W. R. Puranik*, for the Appellant.

Messrs. *V. Bose* and *P. N. Rudra*, for the Respondent.

JUDGMENT.—There is no dispute about the facts of this case. The plaintiff and the defendant are brothers, they being the sons of one Ganpat Kunbi. They lived joint till about 25 years ago when they separated and divided the paternal property between themselves At that partition the field in suit fell to the defendant's share. In May 1899, the defendant let out the field to one Shaligram, who continued in possession till the expiry of the lease, which was in May 1919. The defendant then took back possession from his lessee. Sometime after the execution of the lease the defendant was adopted by one Sakharam as his son. At that time the defendant was already married. On these facts the plaintiff claimed the field on the ground that the defendant had lost his right to it by his adoption and that the plaintiff had become entitled to its possession on the expiry of the lease. There was no question about the validity of the defendant's adoption, as according to both the parties the defendant was validly adopted by Sakharam and had ceased to belong to his natural family. The First Court held that the defendant had not by his adoption lost his right to the property he had got on partition and thus dismissed the plaintiff's claim. The learned Additional District Judge took, however, a different view and gave the plaintiff a decree.

The correctness of this view is questioned for the appellant who also contends that the plaintiff's claim was in any case time barred, as his cause of action had accrued when the adoption took place, which was admittedly more than twelve years prior to the suit. It is also contended that even on the theory that the defendant's adoption amounted to his civil death, the proper heir to get his property would be his own wife, and not the plaintiff who was his separated brother.

It will be convenient to consider the last two contentions first. The appellant's argument is that according to the plaintiff's own case he became entitled to the property when the defendant was adopted and that he should have, therefore, brought his

suit for possession within twelve years of that event. The possession of the lessee which was said to be the possession of the defendant himself was thus claimed to be adverse to the plaintiff. It is no doubt true that possession of a tenant is that of his landlord, see *Secretary of State for India* v. *Krishnamoni Gupta* ( ), but in the present case, the defendant was an absolute owner of the property before his adoption and he could lease out the field for any period he liked. The plaintiff could not question the lease and his cause of action accrued only when the defendant became entitled to take possession from the lessee, According to the case put forward by the plaintiff, he became entitled to the property as it existed at the defendant's adoption and at that time the field was burdened with a lease. So he took it subject to the lease and became entitled to possession on the expiry of its term. The plaintiff's claim was not thus time barred.

The other contention that the legal heir was the defendant's wife and not his separated brother must also fail. By the adoption, the natural relationship between the parties ceased to exist and the defendant ceased to belong to his family of birth. The case was different with the wife. She still continued to be the defendant's wife and went with him as his wife to the family of his adoptive father. She too, therefore, ceased to belong to the natural family of the defendant. If the view of law on which the plaintiff's claim is based be correct, the plaintiff, and not the defendant's wife, becomes entitled to the property.

The question that remains to be decided and on which much learned argument was addressed is whether the defendant has by his adoption lost his right to his natural father's property, which he had got on partition and of which he had before his adoption become an absolute owner. The reported cases in which this point was directly involved are limited and these show that there is a sharp difference of opinion between the Madras and Bombay High Courts. The earliest case in which this point directly arose was *Behari Lal* v. *Kailas Chunder Laha* (2) and in it it was held that when a male owner took a full and distinct interest in property, and when once the property had vested in him, it could not be divested by his subsequent adoption into another family. It was, however, a case under the Dayabhaga and cannot be accepted as an authority in a case governed by the Mitakshara, though many of the reasons on which that decision was founded are applicable to the present case. In the case of *Sri Raja Venkata Narasimha Appa Row* v. *Sri Raja Rangayya Appa Row* (3) it was on a consideration of all the authorities on the subject held that under Hindu Law the adoption into another family of a person, in whom the family property had already solely and absolutely vested, did not operate to divest him of his rights in such estate. The Bombay High Court has, however, in *Dattatraya Sakharam* v. *Govind Sambhaji* (4) taken a different view and held that in a case like the present one the adopted boy loses at his adoption all the rights previously acquired by him to the property of his natural father, including the property of which he had already become an exclusive and absolute owner. This decision was founded upon a certain original express text, which will be presently cited and it was observed that "the text should be so read as to give effect to the fundamental idea underlying an adoption, *viz.*, that a boy given in adoption gives up the natural family and every thing connected with the family, and takes his place in the adoptive family, as if he had been born there, as far as possible." The theory of adoption involves the principle of a complete severance of the boy from the family in which he is born and his substitution into the adopter's family, as if he was born in it. The adoption operates as birth of the boy in the family of adoption and as civil death in the family of birth, with all the legal consequences incidental thereto, see *Birbhadra Rath* v. *Kalpataru Panda* (5) and *Ramchandra* v. *Manubai* (6).

(1) 29 C. 518; [29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 557; 8 Sar. P. C. J. 269 (P. C.).

(2) 1 C. W. N. 121.
(3) 29 M. 437 at p. 452; 16 M. L. J. 178.
(4) 34 Ind. Cas. 423; 40 B. 429; 18 Bom. L. R. 258.
(5) 1 C. L. J. 388 at p. 400.
(6) 52 Ind. Cas. 695; 43 B. 774; 21 Bom. L. R. 776.

This theory of civil death in the natural family and of birth in the family of adoption cannot be carried too far. If an adoption is a civil death, the whole of the property exclusively owned by the adopted boy, whether received by him as his share in the paternal estate or acquired by himself, must be left by him where it is and he must go to the adopter's family without any property whatsoever as a new born babe. The whole of his property would be taken by his natural relations on the theory that he was dead and that at the time of his death there were no heirs except themselves. One may acquire property at or after his birth but he cannot at his birth bring property along with him. On this theory no distinction can be made between the property received by him at partition of the paternal estate, and his self-acquired property. But it is conceded that he is entitled to take with him his self-acquired property to the family of his adoptive parents. Therefore, we must see if the original text makes any distinction between these two classes of property. After the partition, the son becomes the full and exclusive owner of the property assigned to him as his share and that property cannot by any stretch of reasoning be called his father's property. It will no doubt be ancestral property so far as his son is concerned, but as between him and his father, it is his property and not the father's.

The text referred to above is verse 142 of Chapter IX of Manu Samhita and it runs thus :—

Gotra rikhte Janayi toorn hrireddatribhat kwachit, Gotrarikhta nugah pindo vyapaiti dadatah swadhya.

In Sacred Books of the East (Volume XXV page 355) the above verse has been thus translated:—

"An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate; the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)."

A great importance is attached to the word *haret* in the above verse, which literally means "may take away." In the Mitakshara where this verse is quoted the word used is *Bhajet* (may enjoy), but as observed by Shah, J., in the case of *Dattatraya Saharam* v. *Govind Sambhaji* (4) cited above, this word does not make any difference in the meaning of the verse. In any case we must interprat the verse as it is written in the text and not as quoted in other works. As already stated the literal meaning of the verb *har* is "to take," "to take away" "to carry away." Another word in the verse to the meaning of which a great importance is attached is *rikth*. It is translated as "estate.' It is used in the sense of an estate for inheritance. This is not the only verse in which these words occur. There are many verses in this Chapter in which these words have been used (see for instance, verses, 130 to 132, 141, 144, 155 and 185). Though the literal meaning of the verb *har* is to take away, the Sanskrit writers of law have used it in the sense of inheriting or getting by inheritance. In Manmath Nath Dutt's English Translation of Manu Samhita (Volume III) the word has been so translated. The discussion on the subject of inheritance being from verse 104 and from the context and the place where verse 142 occurs it would be clear that the author intended to lay down a prohibition against a son inheriting the property of his natural father after his adoption in another family. The general purport of the verse is:—An adopted son cannot take the family title (*Gotra*) and the estate of his natural father, because the rule is that the funeral cake (*pinda*) follows, the family title and the estate; it follows, therefore, that who has given away his son in adoption, his obsequies fail, so far as that son is concerned A man obtains and is an heir to the wealth and family title of him unto whom he offers *shradh* oblations (*pinda*).

On reading the whole Chapter in original and also its different translations in English and on an earnest and careful study of the subject I come to the conclusion that the sage had not in view a case like the present one, where the property had already become vested in the boy before his adoption. In arriving at this conclusion I have not omitted to give due weight to the opinions of the learned Judges deciding the Bombay case. If the adoption takes place when the family is joint, there is no disturbance in the family or in the family estate; all that happens is that the adopted boy simply leaves the family

which remains undisturbed. He may have had a vested interest in the family property but till actual partition his share cannot be defined or fixed and under the strict principles of Hindu Law, no member has a control over his undefined share in the joint family property. The case is quite different when the adoption takes place after the partition. The other members have no share or interest in the property assigned to him at the partition and he has an absolute power of disposal over it. The defendant could in this case make a free gift of it to any body he liked before his adoption without any let or hindrance from the plaintiff. He could have executed a deed of gift of the field in favour of his adoptive father before his adoption and got it back from him afterwards. He could have sold away the field and thrown away the purchase money into a well and the plaintiff would not have been able to say a word against. It seems, therefore, inconsistent that he should not be able to take away the property with him to the family of his adoptive father. The case of a Hindu widow is different, as she is not an absolute owner but has only a life interest in her husband's property. Her power of disposal is also restricted. It is, therefore, that on her re-marriage and on her ceasing to belong to the husband's family, she has to leave the property where it is. This cannot be said of the defendant, who had an absolute power of disposal over the property and could take it away with him wherever he wanted.

In Sarkar's Tagore Law Lectures on Adoption, the same view was expressed and it was remarked that there appeared to be no reason why a person given in adoption should be divested of property of which he was an absolute owner at the time of adoption though his subsequent right of inheritance was extinguished by such adoption. The learned author subsequently changed his opinion, which is to be found in the addenda attached to the Tenth Lecture. (Sarkar's Hindu Law of Adoption, Second Edition page 390 and pages 419*a*, 419*b*, 419*c*). I have considered the reasons given by him for his changing his original opinion, but it appears to me that his original opinion was more sound. With the utmost respect to which the learned author is on account of his learning and experience entitled, I have to submit that his original view was more consistent with equity, justice and good conscience than the view which he subsequently took. The view I am taking also finds support from the opinion expressed by Dr. Gour. The learned author discusses the subject in section 47 of his Hindu Code.

In my opinion the defendant is entitled to retain the field in suit and the plaintiff cannot get it from him. The appeal is allowed, the decree of the lower Appellate Court is set aside and that of the First Court dismissing the plaintiff's suit is restored. The plaintiff shall pay the defendant's costs in all the three Courts and bear his own.

G. R. D.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 65 OF 1918.

November 4, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Ryves.

Babu LACHMI NARAIN AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

DURG BIJAI SINGH, AND OTHERS— DEFENDANTS—RESPONDENTS.

U. P. Court of Wards Act (IV of 1912), s. 54—Notice—Estate under Court of Wards—Notice delivered to Special Manager, validity of.

A notice under section 54 of the U. P. Court of Wards Act left at the office of the Special Manager in immediate subordinate charge of an estate under a Collector as the Court of Wards, is valid, and is properly delivered to or left at the office of the Collector within the meaning of the section. [p. 396, col. 2]

First appeal from the decision of the Subordinate Judge Ghazipur, dated the 2nd of January 1918.

The Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *Motilal Nehru*, *Lalit Mohan Banerji* and *Radha Kant Malviya*, for the Appellants.

Mr. *C. E. O'Conor*, for the Respondents.

LACHMI NARAIN v. DURG BIJAI SINGH.

JUDGMENT.—This appeal arises out of a suit brought by the next reversioner and his assignee of a portion of his reversionary rights in the property in suit which originally belonged to one Beni Prasad.

The circumstances under which plaintiff No. 1 comes to sue as next reversioner, and the array of parties, are fully and accurately detailed in the lower Court's judgment. A genealogical table has been annexed to the plaint which gives the relationship of the various branches of the family of which Beni Prasad was a separated member.

The case for the plaintiffs is that Beni Prasad died in 1855 leaving surviving him two widows, *Musammat* Latkan Koer who died in 1865, and *Musammat* Bijai Koer who, the plaintiffs assert, died on the 21st of January 1904. The alienations in suit which it is sought to contest are described in the schedule annexed to the plaint and were made by *Musammat* Bijai Koer under circumstances which will afterwards be stated, in the year 1873.

Broadly put, the claim of the plaintiffs is that these alienations were made by *Musammat* Bijai Koer without legal necessity and were inoperative after her death, and that they, as the next reversioners, are entitled to resume possession of them from the hands of the persons in whose possession they now are.

The suit was filed in the Court of the learned Subordinate Judge of Ghazipur on the 17th of March 1913. At that time the estate of one of the defendants was under the Court of Wards and accordingly a notice as required by section 54 of Act IV of 1912 of the Local Council, was left at the office of the late Mr. Fox who was the General Manager of the estate under the charge of the Collector of Ghazipur. This notice was left at the office of Mr. Fox on the 17th of January 1916. According to section 54 the period of two months which is required under that section may be taken into account so as to extend the ordinary period of limitation fixed for suits. It was stated in the plaint that *Musammat* Bijai Koer died on the 21st of January 1904. It is, therefore, clear that excluding the two months under section 54, the suit was filed practically on the very last day of limitation, which is in such cases, 12 years from the date of the death of the widow.

Various defenses were raised to this suit. We need only consider three. First, that the notice as given did not fulfil the requirements of the Act and, therefore, was inoperative to extend the time; secondly, that as a matter of fact *Musammat* Bijai Koer did not die on the 21st of January 1904 but at an earlier date; and thirdly, on the merits, that the alienations made by Bijai Koer were justified under Hindu Law as having been made for legal necessity.

The learned Subordinate Judge found all these points against the plaintiffs and dismissed the suit.

The plaintiffs come here in appeal and these are the three substantial pleas which they have taken.

With regard to the first plea as to the sufficiency of the notice, the learned Subordinate Judge held that under section 54 of the Act it was necessary that the notice should have been given to the Collector of Ghazipur. "A notice to the Special Manager cannot be treated as a good notice as required by law". On this point we are not prepared to accept the view taken by the lower Court. What section 54 requires is that notice in writing should be delivered to or left at the office of the Collector or other person in charge of the property. It is an admitted fact that the late Mr. Fox was the Special Manager in immediate subordinate charge of the estate in the Ghazipur district under the Collector of the district and we are satisfied that the notice, otherwise perfectly valid, was properly delivered to or left at the office of the Collector within the meaning of the section when it was taken to and left at the office of the Special Manager.

[*Note.*—The rest of the judgment is not material for the purposes of this report.—*Ed.*]

J. P. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 524 OF 1921.

December 1, 1921.

Present:—Mr. Justice Suhrawardy and Mr Justice Cuming.

SITAL PROSAD PODDAR AND OTHERS—PLAINTIFFS—PETITIONERS

versus

KAIFUT SHEIKH AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Hindu Law—Mitakshara—*Debt due to deceased father—Suit by son—Succession Certificate, whether necessary—Co-parceners added as plaintiffs after limitation, effect of—Limitation Act (IX of 1908), s. 22.*

In the case of a family governed by the Mitakshara Law a Succession Certificate is not necessary for a son to bring a suit for a debt due to his deceased father.

A suit by a Hindu son for a debt due to his deceased father is not necessarily barred if some of the co-parceners are made plaintiffs after the expiry of period of limitation, as in such a case it has to be seen if the added plaintiffs are necessary parties to the suit and if not whether the suit can proceed without them.

Thakurmani Singh v. *Dai Rani Koeri*, 33 C. 1079, *Kishen Parshad* v. *Har Narain Singh*, 9 Ind. Cas. 739; 33 A. 272 15 C. W. N. 321; 8 A. L. J. 256 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A 45 (P. C.); *Guruvayya Gouda* v. *Dattatraya*, 28 B. 11; 5 Bom. L. R. 618, referred to.

Rule against an order of the Judge of the Court of Small Causes at Lalbagh.

FACTS appear from the judgment.

Babu *Apurba Charan Mukerjee* for Babu *Khitish Ch. Chakraverty*, for the Petitioners.—The question is whether a Sucsession Certificate is necessary before a decree is given. The lower Court says such a certificate is necessary. I submit no such certificate is necessary as the family is one which is governed by Mitakshara Law. As regards Succession Certificate reference is made to *Gur Pershad Singh* v. *Dhori Rai* (1) and *Bissen Chand Dhulhuria* v. *Chatrapat Singh* (2). I further submit that addition of other heirs after time is not fatal to the suit, see *Thakurmani Singh* v. *Dai Rani Koeri* (3), *Lutchmanan Chetty* v. *Siva Prokasa Moodeliar* (4) held that it is the active members of a Mitakshara family who can bring a suit.

No one for the Opposite Party.

JUDGMENT.—This Rule is directed against the order of the Munsif of Lalbagh exercising Small Cause Court jurisdiction dismissing the plaintiff's suit on two grounds: first, that the debt was owing to the plaintiff's father and, therefore, the suit is not maintainable without a certificate under Act VII of 1889, and secondly, that as some of the plaintiffs have been made parties after period of limitation the suit is barred under section 22 of the Limitation Act.

With regard to the first point it is now beyond controversy that in the case of a family governed by Mitakshara Law as the plaintiff's family appears to be Succession Certificate is not necessary before bringing a suit of this nature.

As regards the second point the learned Munsif says: "The co parceners were made parties on 6th June 1921. The suit was on that date clearly barred." This finding, in our opinion, is not sufficient to hold the suit barred. There may be circumstances, as existed in various cases (See the cases of *Thakurmani Singh* v. *Dai Rani Koeri* (3); *Kishen Parshad* v. *Har Narain Singh* (5) and *Guruvayya Gouda* v. *Dattatraya* (6)) in which addition of parties subsequently brought on the record may not be essential and may be merely for the protection of the defendant. It is, therefore, desirable that the learned Munsif should come to a finding as to whether the added plaintiffs who, we are told, are minors are necessary parties to the suit and if not whether the suit can proceed without them.

We, therefore, make the Rule absolute, set aside the decree of the Munsif of Lalbagh exercising Small Cause Court jurisdiction dated the 13th June 1921, and send back the case for re-trial in accordance with the above observations. We pass no order for costs.

J. P.

Rule made absolute.

(1) 7 Ind. Cas. 806; 15 C. W. N. 49; 13 C. L. J. 203; 38 C. 182.

(2) 1 C. W. N. 32.

(3) 33 C. 1079.

(4) 26 C. 349 at p. 354; 3 C. W. N. 190; 13 Ind. Dec. (N. S.) 826.

(5) 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45 (P. C.).

(6) 28 B. 11; 5 Bom. L. R. 618.

MOHAMAD JUSUF *v.* PIRMOHAMAD.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 654 OF 1919.

December 15, 1921.

Present:—Mr. Dhobley A. J. C.

MOHAMAD JUSUF—PLAINTIFF—APPELLANT

versus

PIRMOHAMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Companies Act (VII of 1913), s. 4 (2)—Partnership—Agreement—Use of words "partners" and "partnership"—Test of partnership—Master and servant—Admission by party to suit—Estoppel.

The use of the words "partners" and "partnership" in an agreement does not necessarily show that there is a partnership. The parties may call themselves partners but if it appears that one of them is to do nothing more than to advance money to the other, and is to be repaid by a share of the profits, they must be treated as creditor and debtor. [p. 369, col. 2.]

Bhaggu Lal v. *DeGruyther*, 4 A. 74; A. W. N (1881) 122; 6 Ind Jur. 433; 2 Ind. Dec. (N. S.) 648, *Bipul Chandra Gupta* v *Hazi Nasib Ali*, 1 Ind. Cas. 655; 13 C. W. N. 638, referred to.

An admission made by a party in a previous suit, compromised at a very early stage without any decision on that point by the Court, is not conclusive, and the party is not in any way estopped from showing in a subsequent suit that his statement in the previous suit, however, dishonestly made, was as a matter of fact untrue. [p. 369, col. 1.]

An agreement provided:—"It is settled that I should receive as pay for my labour ten annas six pies share of the profits. I shall go wherever you send me and shall do whatever you ask me to do. Without your permission I shall not go to my native place. If I go to my native place without your permission I shall not take any share of the profits of the company. If the Company suffers any loss, which God may forbid, I shall pay the same. I shall go to my native place after disposing of the goods entrusted to me and realising the price of goods advanced on credit. If there be any deficit I shall make good the same. You may appoint another man in my place. The expenses you incur, the damages in respect of the goods and the unrealized amounts will be paid by me from my private property. If you find any fault with me you can dispense with my services and I shall have no right to any share in the profits."

Held, that the person entering into the agreement could not be a partner but was a mere servant though paid by a share in the profits, and that the liability to pay losses was in respect of the losses occasioned by neglect or default, and that he was concerned only with the business entrusted to him and had nothing to do with the shop itself or with the business done by other servants engaged on similar terms. [p. 370 col. 1.]

Appeal against a decree of the District Judge, Wardha, dated the 10th November 1919, in Civil Appeal No. 23 of 1919.

Messrs *M. B. Kinkhede* and *G. S. Lule*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondents.

JUDGMENT.—The plaintiff's suit was for the recovery of the price of the goods purchased from his shop by Taj Mahommad, who was the original defendant in the suit, and on whose death, the present respondents were made defendants as his legal representatives. The defence, which prevailed in the Courts below, was that there were more than twenty partners in the plaintiff's shop and, that as it was under section 4 (2) of the Indian Companies Act, 1913, an unlawful partnership, no suit could be maintained on its behalf. The plaintiff's reply was that the persons who were considered to be his partners in the shop were in reality his creditors or servants, getting a certain share in the profits in lieu of the interest on the amount advanced or of wages for the services to be rendered. As stated above, both the Courts below were of opinion that the relationship between the plaintiff and these persons was that of partners in the shop. They, therefore, concurred in dismissing his claim.

As observed in paragraph 4 of the judgment of the lower Appellate Court, the agreements fall into two classes.

(1) between the persons who were to work in the shop as servants, and

(2) between those who had advanced money for it.

It will be convenient to consider these two classes of agreements separately. Before proceeding further it has to be stated that in a certain previous suit brought by one of the persons advancing money for the shop against the plaintiff, the latter had taken the same defence as has now been taken against him by the defendants. Naturally, therefore, a great importance has been attached by the Courts below to the attitude taken by the plaintiff as the defendant in the previous suit and as taken by him now. These are inconsistent and for this inconsistency he has come in for a good share of criticism at the hands of the lower Appellate Court. He has been described as "blatantly blowing hot and cold," and considering the

stand taken up by him in the present suit, it cannot be said that the criticism was undeserved. It must, however, be borne in mind that, however, inconsistent the statements made by him in the two suits may be, we have to find out the truth. Of course, we shall have to take into consideration and give due weight to the plaintiff's own account as given in the previous suit, but the decision in the present suit must be based on its records and not solely on his previous statement. In this connection it has to be mentioned that the previous suit was compromised at a very early stage and that the question was not decided by the Court. The admission then made is not conclusive and the plaintiff is not in any way estopped from showing that his statement in the previous suit, however, dishonestly made, was as a matter of fact untrue. I do not believe him when he says that that statement was made by him under an honest mistake. He had made it with a dishonest intention and we must, therefore, exercise caution before we accept his present statement as true. He has shown himself unreliable, but for all that the case has to be judged on the materials before us.

Taking the creditor's agreement first, the finding of the two Courts is that they were entitled to certain shares in the profits of the business and were also responsible for losses according to those shares. The oral evidence in the case does not support this conclusion. On the other hand it goes directly against it. The Courts below drew this conclusion on the strength of the written agreements entered into between the creditors and the plaintiff and also on the probabilities and the surrounding circumstances of the case. It is, therefore, to be seen whether written agreements support this conclusion. It is admitted for the respondents that in the agreements (Exhibits P.3, P.5 and P 6) there was no express and specific agreement that the persons advancing the money for the shop were to share in the losses, but it is said that reading each document as a whole, an agreement to share in the losses as well as to share in the profits of the business could be presumed. The fact that all these persons were Muhammadans and that amongst them no interest is charged on loans advanced has, it appears, escaped the attention of the lower Courts. These money lenders generally accept a share in the profits in lieu of interest, but are not liable for losses in the business for which the advances are made by them. There is one more important circumstance and it is that these persons had no right to take any part in the running of the plaintiff's shop or to question his account-books. The plaintiff was to run the shop solely. Shares in the profits were given to those creditors not at any particular rate but at rates which the plaintiff thought proper The rates or shares are mentioned in annas and pies, one rupee of sixteen annas being taken as the full profits. The fact that the total amount to be given to those persons as their shares in the profits comes to considerably over one rupee would show that their shares were not to be calculated on the profits of the whole business. The present case is very similar to that of *Bipul Chandra Gupta* v. *Hozi Nasib Ali* (1). As in that case, the agreements were not executed by all the alleged partners in favour of all of them, but these were between the plaintiff on one side and the alleged partners on the other. The others were not directly interested in the management of the plaintiff's shop either personally or through their agent. Though the agreement was written on one piece of paper, it amounted to individual and separate contracts between the plaintiff on one side and each of the creditors on the other. There was no agreement of any kind between the creditors *inter se* and there was no mutuality between them. I have thus to differ from the lower Courts and to hold that the relationship between the plaintiff and these persons was not that of partners, but that of debtor and creditors. The use of the word "partner" or "partnership" in the agreements does not necessarily show that there was a partnership. The parties may call themselves partners, but if it appears that one party is to do nothing more than advance money to the other, and is to be repaid by a share of the profits, they must be treated as creditor and debtor, see *Bhaggu Lal* v. *De Gruyther* (2).

(1) 1 Ind. Cas. 655; 13 C. W. N. 638.
(2) 4 A. 74; A. W. N. (1881) 122; 6 Ind. Jur. 468; 2 Ind. Dec. (N.S.) 648.

Now coming to the agreements executed by the servants, there is no doubt a clause in them to the effect that they would be responsible for the losses too, but the context and the place where the clause occurs would show that they were to be liable for losses only in the case these were the result of their negligence. The important portion of the agreement is as follows.

"It is settled that I should receive as pay for my labour Re. 0-10-6 ten annas six pies-share of the profits. I shall go where ever you send me and shall do whatever you ask me to do. Without your permission I shall not go to my native place. If I go to my native place without your permission I shall not take any share of the profits of the Company. If the Company suffers any loss, which God may forbid, I shall pay the same. I shall go to my native place after disposing of the goods entrusted to me and realising the price of goods advanced on credit..... If there be any deficit I shall make good the same.....You may appoint another man in my place. The expenses you incur, the damages in respect of the goods and the unrealized amounts will be paid by me from my private property. If you find any fault with me you can dispense with my services and I shall have no right to any share in the profits.....;"

These conditions will show that the person entering into this agreement could not be a partner, but a mere servant, though paid by a share in the profits. His liability to pay the losses is clearly in respect of the losses occasioned by his neglect or default.

The servants so engaged were it seems to sell the goods entrusted to them and were to be paid their wages in the shape of a certain share in the profits in the business done by them. Each servant was concerned only with the business entrusted to him and had nothing to do with the shop itself or with the business done by other servants engaged on similar terms. That this was the arrangement between the plaintiff and the servants is clear from the shares assigned to them. One servant was assigned ten annas six pies share; the other one, six annas the third three annas. It could not have been the intention that the servants were to receive these shares in the profits of the whole business, as the total profits of the whole business can be represented by sixteen annas. It is thus clear that the anna proportion made in the agreements of the servants was of the profits in the business done by them individually.

I have thus to differ from the Courts below and to hold that the plaintiff had no partners in his shop and that the persons held by the lower Courts as being his partners were either his creditors or servants. His suit was not tried on merits, but was dismissed on the preliminary ground that for the reason already mentioned it was not tenable. This appeal is allowed and the decrees of the Courts below are set aside and the case is sent back to the First Court for its trial on merits. The plaintiff shall get a refund of the Court fees paid by him on the memoranda of appeals presented in this Court as well as in the Court of first appeal. All the costs of these two Courts will be paid by the defendants.

Appeal allowed.

J. P.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 59 OF 1921.

April 2, 1921.

Present :—Mr. Daniels, J. C.

BHUDHAR SINGH—PLAINTIFF—APPELLANT

versus

BHIKHAM SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal, second—Oral evidence, weight of, whether matter for second appeal.

The weight to be attached to oral evidence is not a matter for second appeal. [p. 371, col. 1.]

Appeal from a decree of the Additional District Judge, Lucknow at Sitapur, dated the 27th November 1920, upholding that of the Subordinate Judge, Sitapur, dated the 8th April 1918.

Mr. *Kanhaiya Lal*, for the Appellant.

JUDGMENT.—The only question in this appeal is whether the appellant has succeeded in establishing a custom by which nephews were entitled to inherit jointly with uncles in the case of property inherited from a childless person. The learned Judge in appeal has found against the custom. He points out that it is not mentioned in the *wajib-ul-arz* of either of the villages concerned and that one *wajib-ul-arz* was actually signed by the grandfather of the appellant. It is pleaded before me that the learned Judge did not give sufficient weight to the large amount of oral evidence produced by the appellant. The learned Judge has discussed all the instances put forward and finds that only one instance is proved. In any case the weight to be attached to oral evidence is not a matter for second appeal. The judgment of the learned Judge is not open to attack and I dismiss the appeal under Order XLI, rule 11.

J. P. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 12 OF 1921.

November 9, 1921.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

MATHURA PRASAD—DEFENDANT—APPELLANT

versus

RAMESHWAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 158—Rent-free grant in favour of idol—Priest, whether grantee—"Successor to original grantee," meaning of—Appeal—New point—Misconstruction of document.

In case of a rent-free grant of land in favour of an idol worshipped in a shrine the particular priest who for the time being may be in charge as manager of the affairs of the temple in question, or of the worship of the idol as conducted therein cannot be regarded as himself the grantee within the meaning of section 158 of Act II of 1901, nor can any priest who from time to time may succeed to the office be treated as a successor to the original grantee within the meaning of that section. [p. 373, col. 1.]

In order to maintain in second appeal or in a Letters Patent appeal in a rent-free grant case that the use of the word "*shankalap*" as a description of the nature of the grant involves a transfer of proprietary rights in the land it is incumbent on the person raising it to plead, and to show from the record, that documentary evidence establishing his contention of fact has either been disregarded by the Court of first appeal or misinterpreted. [p. 372, col. 2.]

Bharat Das v. *Nandrani Kuar*, 42 Ind. Cas. 818; 39 A. 689; 15 A. L. J. 769, distinguished.

Letters Patent Appeal from a judgment of Justice Sir George Knox, confirming a decree of the District Judge, Cawnpore, who modified a decree of the Assistant Collector, First Class, Fatehpur.

Mr. *P. L. Banerji* and *Bhagwati Shankar* for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—These are two connected appeals arising out of two connected suits which have been litigated together throughout. The appeals may be disposed of by a single judgment. The suits were filed in the Court of an Assistant Collector. The plaintiff, as Lambardar and proprietor of two specified plots of land, sued the defendant as a rent-free grantee of the same and, admitting himself not to be entitled to resume the grant, claimed assessment of rent on the same. The written statement, as is often the case, was somewhat loosely drawn up, but beyond all question the substantial defence on the facts was that the defendant, being a rent-free grantee of the land in question, had held the same as such for more than fifty years and through at least two successors to the original grantee and was, therefore, entitled to be declared proprietor of the same and to be assessed to revenue but not to rent. This refers, of course, to the provisions of section 158 of the Tenancy Act (Local Act II of 1901). The Assistant Collector, who tried the two suits, accepted this defence as established in fact and in law and framed his decrees accordingly. On first appeal the District Judge reversed the finding of the First Court on this precise point. He held that the defendant, however long he may have been in possession of the plots of land in suit, had certainly not held the same through two successors to the original grantee. He remitted issues on the question of the rate of rent payable and finally decreed the plaintiff's suit, assessing rent on the two plots of land on the basis of the rent paid by tenants, without right of occupancy, in respect of similar plots

of land in the neighbourhood. The defendant appealed to this Court. His memorandum of appeal raises various points, but he did beyond question challenge the finding of the lower Appellate Court with regard to the applicability of section 158 of the Tenancy Act. He also pleaded that, in any event, the rent assessed should have been on the basis of a finding that he had at least a right of occupancy in respect of the land in suit. The judgment of the learned Judge of this Court who disposed of the two appeals shows that the arguments before him wandered over a somewhat wide field and that the essential points in dispute had become somewhat overlaid and thrust out of sight by the time he came to deliver judgment. It seems to have been contended before him that the suits in question were not cognizable by a Rent Court, a contention which he had no difficulty in repelling. Obviously the suits as brought were suits under Chapter X of the Tenancy Act and cognizable by a Rent Court only. The plaintiff had to make out the essential facts alleged by him in order to bring the suits within the operation of that Chapter. If he failed to do this the suits would be dismissed upon the findings of fact but the suits as brought were unquestionably cognizable by the Court which tried them.

Finally, the learned Judge of this Court affirmed the decision of the District Judge and, after remitting further issues regarding the rate of rent, passed orders the effect of which was to dismiss the appeal. The memorandum of appeal before us again raises the two principal points which have been already referred to. There is, however, a further plea which may be said to raise once more in a slightly modified form the question which was discussed by the learned Judge of this Court as one of jurisdiction. The argument laid before us on this point may be stated in two slightly different forms. Firstly, it was contended that the original grant in favour of the defendant was not the grant of a rent-free holding, but a gift of the proprietary rights in the land itself. In our opinion there is no basis for this contention, either in the pleadings, or in the findings of fact recorded by the lower Appellate Court. The suggestion is that the description of the land in the revenue papers and the use of the word '*shankalap*' as a description of the nature of the grant in favour of the defendant, necessarily involve a transfer of the proprietary rights in the land itself in favour of the latter. In order to maintain such a contention in second appeal, and even more so in an appeal under the Letters Patent it would be incumbent on the person raising it to plead, and to show from the record, that documentary evidence establishing his contention of fact had either been disregarded by the Court of first appeal or misinterpreted. There has never been any pleading to this effect from first to last. Moreover, the defendant's written statement in the Trial Court, fairly interpreted, amounts to an admission of the fact that his position was that of a rent-free grantee and nothing more.

Secondly, the point is put in this way that the provisions of section 151 of the Tenancy Act cover this case, because it should be held on the evidence that the defendant acquired this rent free holding for valuable consideration and that the right of resumption is now barred. Here again we may say that we should find it very difficult to read any such contention into the pleadings, as they stood either in the Trial Court or in the Court of first appeal; but in any case we are clearly of opinion that the facts before us would not warrant a finding that there had been "valuable consideration" in favour of the grantor at the time of the grant.

Passing over these points we may now come to the two main questions which have been in issue throughout. The learned District Judge has found that the land in question, although it has no doubt been in the possession of the defendant for a long time, presumably for more than fifty years, has not been held by two successors to the original grantee. The contention before us is that this is a mixed finding of fact and of law and that the conclusion of the learned District Judge is vitiated by an error of law on his part. In this connection our attention has been drawn to a reported case, to which one of us was a party, that of *Bharat Das* v. *Nandrani Kuar* (1). The judgment of

(1) 42 Ind. Cas. 813; 39 A. 689; 15 A. L. J. 763.

the lower Appellate Court certainly suggests that the learned District Judge was not aware of this ruling and we have had to consider it carefully, with reference to the findings arrived at by the Court of first appeal, and to some extent with reference also to the pleadings and to the evidence on the record. We are satisfied that the present case is clearly distinguishable on the facts from the case of *Bharat Das* v. *Nandrani Kuar* (1). In the judgment of that case particular stress is laid upon the fact that the original rent-free grant was in favour of the head or manager of a certain religious institution, although made for the benefit of a local shrine under the management of that institution. On those facts it was held that successive *mahants*, or heads of a religious institution of this sort, may fairly be held to be successors to the original grantee within the meaning of section 53 of Local Act II of 1901. The learned Judges expressed themselves with great caution and were at pains to limit the decision to the particular facts before them. We may go so far as to say that they felt that they were stretching the wording of section 158 aforesaid about so far as it could go and that they guarded themselves carefully against being supposed to lay down any principle which would stretch it too far. In the present case the finding is that the grant was in favour of the idol worshipped in a certain local shrine and this finding is borne out by the pleadings and by the evidence. We have come to this conclusion after carefully examining the record and in spite of the fact that there is some ambiguity about the form in which the plaint has been drawn up. We do not think that under the circumstances the particular priest who for the time being may be in charge as manager of the affairs of the temple in question, or of the worship of the idol as conducted therein, can be regarded as himself the grantee within the meaning of the section above referred to, or that any priest who from time to time may succeed to the office can be treated as a successor to the original grantee within the meaning of the same section. This contention, therefore, in our opinion fails.

The only remaining point is as to the rate of rent. We are satisfied that we must modify the decree of the learned Judge of this Court. It certainly looks to us as if some confusion must have crept into the record when this Court came to re-examine it after the findings on the issues remanded by it had been returned. It is quite clear to us on the evidence that the defendant is entitled to be treated as an occupancy tenant of the land and to have rent assessed on the basis of the rent paid by occupancy tenants for land of similar quality in the neighbourhood. In fact, no serious argument to the contrary has been pressed upon us on behalf of the plaintiffs-respondents. We have looked at the remand findings for ourselves and considered their bearing on the issue regarding the rate of rent. The result is that in our opinion the rent assessed on the plot of land of 1 *bigha* 5 *biswas*, which is involved in the suit to which Letters Patent Appeal No. 12 of 192 relates, should be fixed at Rs. 1 12-6 per annum, while on the plot of land of 1 *bigha* 4 *biswas* which is involved in the suit to which Letters Patent Appeal No. 13 of 1921 relates the rent should be fixed at Rs. 1-11 5 per annum. We order that the decree of this Court, and also that of the lower Appellate Court, be modified to this extent, that the rent payable by the defendant be fixed as above stated. The result is that these two appeals have succeeded to a certain limited extent. We think the justice of the case will be fairly met if the parties bear their own costs of both the hearing in this Court, and we order accordingly.

J. P. *Appeals partly allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 4 OF 1921.

March 16, 1921.

Present:—Pandit Kanhaiya Lal, J. C.

KAMPTA SINGH—DEFENDANT—APPELLANT

versus

MATA BHIKH SINGH—PLAINTIFF—RESPONDENT.

Profits, suit for—Interest, when co-sharer entitled to—Lambardar, *when liable to pay interest.*

RAMESHWAR DAS v. SRI LAL.

In a suit for profits by a co-sharer against a *lambardar* the question is one of accounts and unless the *lambardar* has deliberately or contumaciously refused to render accounts or pay what is due to the co-sharer he cannot be made liable for interest on what may be found due when the accounts are adjusted.

Udit Narayan Singh v. *Rampal Singh*, 2 Ind. Cas 920; 12 O. C. 140 and *Arjun Singh* v. *Rudra Partab Singh*, 11 Ind. Cas. 674; 14 O. C. 164, distinguished from.

Mirza Sadik Husain Khan v. *Hafiz-ul-rahman*, 6 O. C. 89, referred to.

Appeal from a decree of the District Judge, Rae Bareli, dated the 3rd January 1921, modifying that of the Assistant Collector, First Class, Partabgarh, dated the 30th August 1920.

Mr. *Ganga Dayal*, for the Appellant.

Mr. *S. P. Kain*, for the Respondent.

JUDGMENT.—The question for consideration in this case is whether the plaintiff should have been allowed interest on his share of the profits for 1324 to 1327 Fasli from the Lambardar. The lower Appellate Court has, following the decisions in *Udit Narayan Singh* v. *Rampal Singh* (1) and *Arjun Singh* v. *Rudra Partab Singh* (2) allowed interest to the plaintiff at 6 per cent. per annum but those cases are not applicable. In the former case the co-sharer had claimed arrears of rent from the *thekadar* and in the latter the Lambardar had claimed arrears of revenue due by a co sharer and interest in those cases was held to be properly recoverable. In a suit for profits by a co-sharer against a Lambardar the question is one of accounts and unless the Lambardar has deliberately or contumaciously refused to render accounts or pay what is due to the co-sharer he cannot be made liable for interest on what may eventually be found due when the accounts are adjusted. In *Mirza Sadik Husain Khan* v. *Hafiz-ul-rahman* (3), it was held in somewhat similar circumstances that no interest could be awarded and that section 73 of the Indian Contract Act (IX of 1872) was inapplicable.

The decree prepared by the Court below does not properly express the result of the appeal. The net profits of the plaintiff's share have been held to have amounted to Rs. 240-13-6. From this Rs. 13-14-1 allowed by the Court below on account of Lambardari dues and Rs. 24 on account of the costs of collection at 10 per cent. and Rs. 25 on account of the defendant's share of the value of a tree cut by the plaintiff should be deducted. The net amount due to the plaintiff is thus Rs. 177-15-7. As the defendant has already been allowed 5 per cent. on account of Lambardari dues on the Government revenue, it would manifestly be improper to allow him another 10 per cent. on the same on account of the alleged costs of collection.

The appeal is, therefore, allowed and the decree of the lower Appellate Court modified as to allow the plaintiff Rs. 177-15-5 with proportionate costs in the Court of first instance and future interest from the date of the suit till payment at 6 per cent. per annum. The rest of the claim is disallowed. The parties will bear their own costs in the lower Appellate Court and in this Court.

J. P.

Appeal allowed.

(1) 2 Ind. Cas. 920; 12 O. C. 140.
(2) 11 Ind. Cas. 674; 14 O. C. 164.
(3) 6 O. C. 89.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 195 OF 1921.

November, 10, 1921.

Present :—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

RAMESHWAR DAS—JUDGMENT DEBTOR—APPELLANT

versus

SRI LAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 145—Execution of decree—Arrest of judgment-debtor—Surety to produce judgment-debtor or to pay amount—Judgment-debtor sentenced to imprisonment—Surety aware of criminal proceedings when standing surety—Surety, liability of.

A judgment-debtor who was arrested in an execution of decree was released from custody on a surety undertaking to produce him whenever the Court required and the surety gave a surety bond to the Court binding himself, on failure to produce the judgment-debtor whenever required, to pay the amount himself. One month's time was given to the surety for the payment of the money and he was directed to produce the judgment-debtor on the expiry of the month. A criminal charge of embezzlement against the judgment-debtor was

pending at the instance of the decree-holder at the time the surety bond was given and this very surety went bail for the judgment-debtor in the Criminal Court. On the date on which the judgment-debtor was to be produced in Court he was sentenced to imprisonment and thereupon the surety applied in Court for his discharge but no order was passed. On decree-holder's application for process against the surety :

Held, that the surety was not discharged from his obligations inasmuch as it could not be said that the surety could not have contemplated the possibility, or even the probability, of the judgment-debtor being in jail within a month of his executing the surety bond when he knew that at that time criminal proceedings were going on against the judgment-debtor and that, therefore, execution could issue against the surety. [p. 375, col. 2.]

Krishanan Nayar v. *IttinanNayar*, 24 M 637, *Ashiq Ali* v. *Moti Lal*, 4 A. L. J 437; A. W. N. (1907) 20; 29 A. 466, *Nabin Chandra Hazari* v. *Mritunjoy Barick*, 19 Ind. Cas 981; 41 C. 50; 17 C. W. N. 1241, referred to.

Execution second appeal from a decree of the District Judge, Agra, dated the 13th January 1921.

Mr. *M. L. Sandal*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. One Sri Lal obtained a decree against Lakhpat Rai for some money and in execution of his decree had Lakhpat Rai arrested and brought to Court. Thereupon Rameshwar Das, the appellant, got Lakhpat Rai released from custody on his undertaking to produce him whenever the Court required, and gave a surety bond to the Court in which he bound himself that on failure to carry out his promise to produce Lakhpat Rai whenever required by the Court he would himself pay the amount decreed against Lakhpat Rai. This bond was executed on the 8th of January 1920 It may be noted here that at that time criminal proceedings were pending against Lakhpat Rai on a charge of embezzlement on the complaint of Sri Lal and in those proceedings Rameshwar Das himself went bail for Lakhpat Rai. The Court gave Rameshwar Das one month time for the payment of the money and directed him to produce Lakhpat Rai on the expiry of the month. The month expired on Sunday, the 6th of February 1920. On the 9th of February Lakhpat Rai was convicted by the Criminal Court and sentenced to undergo three months' rigorous imprisonment and to pay a fine of Rs. 1,000 or in default to suffer six months imprisonment. It was also ordered that if the fine or any portion of it were paid, that amount would be paid to Sri Lal as compensation. On the 9th of February 1920 Rameshwar Das put in an application to the Court stating that inasmuch as Lakhpat Rai had been that morning sent to jail it was impossible for him to produce him in the Civil Court and prayed that he be discharged from his bond. No order appears to have been passed on that application but subsequently when the decree holder, Sri Lal, applied for process against the surety the same objection was raised by him and accepted by the executing Court. On appeal, however, the learned District Judge has overruled the objection and directed execution to issue against the surety. Hence this appeal.

It is argued that the fact that Lakhpat Rai was in jail on the day on which the surety should have produced him was beyond the contemplation of any body when the surety bond was executed, and that circumstances over which the parties had no control prevented the surety from producing Lakhpat Rai, and reliance was placed on the cases of *Krishnan Nayar* v. *Ittinan Nayar* (1), *Ashiq Ali* v. *Moti Lal* (2) and *Nabin Chandra Hazari* v. *Mritunjoy Barick* (3). In all those cases the circumstance that prevented the surety from carrying out his promise was the death of the judgment debtor. That was not so here. It can scarcely be said that Rameshwar Das could not have contemplated the possibility, or perhaps even the probabality, of Lakhpat Rai being in jail within a month of his executing his surety bond when he knew that at that time criminal proceedings were going on against Lakhpat Rai. We, therefore, agree with the learned District Judge in holding that the rulings relied on do not cover this case.

We are informed that Lakhpat Rai has not paid up any portion of his fine and that there is no likelihood whatever of his ever doing so. Be that as it may, it seems to us that if the fine or any portion of it is realised and paid over to Sri Lal as compensation then to that extent Rameshwar Das will have a right to get a refund from the decree-holder.

(1) 24 M. 637.

(2) 4 A. L. J. 437; A. W. N. (1907) 120; 29 A. 466.

(3) 19 Ind. Cas. 981; 41 C. 50; 17 C. W. N. 1241.

The result is that the appeal fails and is dismissed with costs.

J. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 49 OF 1920.

September 9, 1920.

Present :—Mr. Daniels, A. J. C.

Nawab QAMAR JEHAN BEGAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BANSI DHAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Appeal—Remand, order of, appeal from—Findings of fact, whether can be interfered.

An appeal from an order of remand under Order XLI, rule 23, Civil Procedure Code, stands on the footing of a second civil appeal and a High Court is bound by the findings of fact of the lower Appellate Court.

Tika Ram v. *Shama Charan*, 20 A. 42; A. W. N. (1897) 195; 9 Ind. Dec. (N. S.) 387, referred to.

Appeal from a decree of the Third Additional District Judge, Lucknow, dated the 31st July 1920, reversing that of the Subordinate Judge, Lucknow, dated the 2nd March 1920.

Syed *Nabiullah*, for the Appellants.

JUDGMENT.—This is an appeal from an order of remand passed under Order XLI, rule 23. The suit was for possession of certain property alienated by a Hindu widow, *Musammat* Janki. The sole question involved is, as the learned Counsel for the appellant frankly admits, one of fact, namely, whether *Musammat* Janki was alive or dead. The learned Subordinate Judge considered that the evidence of her death was insufficient and without considering the defence evidence at all dismissed the suit. The learned District Judge in appeal found, a fact which cannot be denied, that there was evidence on the record which was admissible in support of the fact of the woman's death. The defendants had produced a woman who purported to be *Musammat* Janki herself and she was examined on commission from behind the *purda*. The District Judge pointed out that her death had been at an earlier stage admitted and that the suggestion of her being alive and resident at Fatehgarh was put in at a late stage. For various other reasons which are stated in his judgment he came to the conclusion that the woman who was examined was an impostor. He accordingly allowed the appeal and remanded the case for decision of the other issues. An appeal from an order of remand under Order XLI rule 23, stands on the footing of a Second Civil Appeal and the High Court is bound by the findings of fact of the lower Appellate Court. This is clear from the language of clause (*u*) of Order XLIII, rule 1, and has been expressly held in a number of cases of which *Tika Ram* v. *Shama Charan* (1) is an instance. This finding of fact is fatal to the appeal which I accordingly dismiss under Order XLI, rule 11.

It is obvious that the case cannot be allowed to rest here. The learned Subordinate Judge's conclusion amounts to this that there has been an attempt at personation. It is his duty to make further enquiries with a view to institution of criminal proceedings if a *prima facie* case is made out.

J. P.

Appeal dismissed.

(1) 20 A. 42; A. W. N. (1897) 195; 9 Ind. Dec (N. S.) 387.

SHEO MANGAL v. HULSA.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 641 OF 1920.

November 5, 1921.

Present:—Mr. Justice Gokul Prasad and Mr. Justice Solaiman.

SHEO MANGAL DECREE-HOLDER—APPELLANT

versus

Musammat HULSA AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Pre-emption—Suit decreed on condition of payment within certain time—Appeal—Further amount allowed not paid within time—Execution of decree by vendee for further amount—Restitution, subsequent application for--Res judicata—*Estoppel—Execution, decision in, final.*

A suit for pre-emption was decreed on condition that if the plaintiff paid a certain amount within two months he would be entitled to get possession. The money was deposited and possession obtained by the plaintiff. Meanwhile the vendee appealed and the Appellate Court allowed a further sum to the vendee and extended the time for payment. The plaintiff did not deposit the further amount within time. The vendee then applied for execution of the decree and claimed further amount allowed to him and costs and an order issuing process was made. The plaintiff appeared and deposited a part of the further amount and got an extension of time from the Court to pay the balance though he was opposed by the vendee. Before the expiry of the extended time the vendee applied for restitution of the property on the ground that the pre-emption money not having been deposited within the time allowed by the decree the suit stood dismissed. The plaintiff objected that this application was barred by the principle of *res judicata* as well as by the principle of estoppel:

Held, (1) that the rule of *res judicata* did not apply inasmuch as neither of the proceedings in execution could be said to amount to an express adjudication by the Court that the proper remedy of the vendee was to recover the further amount allowed to him by execution or that any such amount was actually due to him; [p. 379, col. 2; 380, col. 1.]

(2) that the circumstance that the vendee wanted to realise the further amount awarded to him by execution of the decree, which sum admittedly was not due to him, did not estop him from coming to Court and claiming restitution of the property; [p. 380, col. 1.]

(3) that the order of the Court giving the plaintiff further time to deposit the pre-emption money was without jurisdiction; [p. 380, col. 1.]

(4) that the fact of the default of payment made by the plaintiff was to dismiss the suit *in toto* and that his possession was wrongful and that the vendee was entitled to a full restitution. [p. 380, col. 2.]

Ram Kirpal v. *Rup Kuari*, 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718, *Lakshmanan Chetti* v *Kuttayan Chetti*, 21 M. 669, *Sheoraj Singh* v. *Kameshar Nath*, 24 A. 28'; A. W. N. (1902) 68, *Dambar Singh* v. *Munawar Ali Khan*, 30 Ind. Cas. 775; 13 A. L. J. 764; 37 A. 531, *Tameshar Prasad* v. *Thakur Prasad*, A. W. N. (1903) 93; 25 A. 143, *Lachhmi Narain* v. *Ram Chandra*, 4 A. L. J. 117; A. W. N. (1907) 64, *Kalyan Singh* v. *Jayan Prasad*, 30 Ind. Cas. 523; 37 A. 589; 13 A. L. J. 828, referred to.

If an executing Court expressly decides a point *inter partes* that decision becomes final according to the general principles of law though the question whether the law of *res judicata* applies is irrelevant as the term refers to a matter decided in another suit. [p. 379, col. 1.]

Execution second appeal from a decree of the District Judge, Allahabad, reversing that of the Judge of the Court of Small Causes, exercising the powers of the Munsif, Allahabad.

Mr. *Peary Lal Banerji*, for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT:—This appeal arises out of an execution matter. It appears that the plaintiff-appellant brought a suit for pre-emption against the defendants. That suit was decreed on the 29th of February 1916 by the Court of first instance and the decree provided that on payment of Rs. 1,200 within two months the plaintiff would be entitled to get possession of the property. The vendee appealed to the District Judge and the plaintiff-appellant filed cross-objections. The learned District Judge, on the 12th of August 1916, allowed the vendee's appeal in part and increased the amount awarded to him by a sum of Rs. 380-15-0 and directed that in case the Rs. 1,200 awarded by the First Court had not already been deposited the time for payment of whole or the balance be extended by five months from the date of his decree. There was a second appeal to this Court which was dismissed.

The plaintiff on the 29th of April 1916 deposited Rs. 1,200 in Court and on the 30th of May 1916 obtained possession of the property. He, however, did not deposit the balance of Rs. 380-15-0 within five months allowed by the Court of first appeal. On the 17th of July 1918 the vendees applied for execution of their decree for costs. This application was ultimately dismissed for default. After this on the 16th of June 1919 the vendees put in a second application for execution of the decree in their favour and claimed to recover a sum of Rs. 380-15-0 allowed by the District Judge, as well as costs to which

they were entitled, and prayed for the execution of the decree by arrest of the judgment-debtor. An order issuing process was made on that day. Before the order could be executed the judgment-debtor appeared in Court on the 13th of July 1919 and offered to pay Rs. 260 at once and prayed for two months' further time. The vendees' Pleader objected to any further extension of time but the Court thought fit to direct that the judgment-debtor should deposit Rs. 260 on that date and should be allowed two months' further time to pay the balance. Before the two months had expired and before the balance had been deposited, the vendees on the 22nd August 1919 put in an application, out of which this appeal arises, and which in effect was one for restitution of the property on the ground that the pre-emption money not having been deposited within the time allowed by the decree the suit stood dismissed. Two days before the date fixed for hearing of this application, namely, on the 18th of September 1919, the plaintiff appeared in Court and deposited the balance of the amount.

Various objections were raised by the plaintiff to the vendees' application for restitution. The Court of first instance was of opinion that this application was barred by the principle of *res judicata* as well as by the principle of estoppel, and it accordingly dismissed the application. On appeal the learned District Judge has differed from the views of the Court of first instance, and having allowed the appeal has granted the application for restitution of the property.

In the Courts below there was some dispute as to the actual interpretation of the decree passed by the learned District Judge. That decree modified the decree of the Court of first instance to this extent only that the period of payment be extended to five months and the amount of the pre-emption money be increased by Rs. 380-15-0. In other respects the decree of the Court of first instance had not been modified. It is obvious, therefore, that the clause in the First Court's decree, which said that in case of default of payment the suit should stand dismissed, held good and in our opinion there can be no doubt that on the failure of the plaintiff to deposit the full decretal amount within the time allowed by the learned District Judge his suit did stand dismissed.

On behalf of the plaintiff, however, two points have been strongly urged before us. One is that of *res judicata* and the other of estoppel. It is urged that when at the instance of the vendees the execution Court ordered process to issue and also directed that the judgment-debtor should deposit the balance of the amount within two months, it substantially decided that the decree was executable and that the vendee's remedy was to recover the pre-emption money by execution of his decree, that, therefore, this point must be taken as having been decided by a competent Court and the present application is barred by the principle of *res judicata*.

It is clear, however, that there is no express order to the effect that the decree could be executed even after the expiry of the five months. The order of the 16th of June 1919 is simply an order directing that process should issue. On that date there was the amount of costs actually due to the vendees and there can be no doubt that the execution Court had jurisdiction to execute the decree. It is true that in the application for execution a larger amount than was actually due to the vendees was put in, but this circumstance, in our opinion, cannot oust the jurisdiction of the execution Court so far as the amount actually due was concerned. It is clear, therefore, that the order of the 16th of June 1919 can in no way operate as *res judicata*. Coming to the incident of the 8th of July 1919, it will be noticed that although on that date the vendees seem to have been willing to accept the whole of the decretal amount in case it was paid to them then, they were not willing to allow any further grace to the plaintiff. The Court, however, in spite of the vendees' objection granted two months' further time for payment of the balance. This in effect was an order extending the time fixed by the decree. Section 148 of the Civil Procedure Code has no application to time fixed by a decree and it is obvious that the Court really had no jurisdiction against the will of the vendees to extend the time for payment of the pre emption money. In our opinion this order, too, cannot be said to amount to an adjudication that the decree was really executable. The fact seems to be that it did not occur to either

of the parties or to the Court that by lapse of time the suit stood dismissed. It is strongly urged by Mr. Banerji on behalf of the plaintiff that if the Court did not intend to decide that the only remedy of the vendees was to recover the amount by execution of their decree then it would not have passed this latter order. He relies on the cases of *Ram Kirpal* v *Rup Kuari* (1), *Lakshmanan Chetti* v. *Kuttayan Chetti* (2), *Sheoraj Singh* v. *Kameshar Nath* (3), *Danbar Singh* v. *Munawar Ali Khan* (4), *Tameshar Prasad* v. *Thakur Prasad* (5) and *Lachhmi Narain* v. *Ram Chandra* (6).

There can be no doubt that if an executing Court expressly decides a point *inter partes*, that decision becomes final according to the general principles of law, though the question whether the law of *res judicata* applies would be irrelevant, as the term refers to a matter decided in another suit. This is all that was held by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (1). In the case of *Lakshmanan Chetti* v. *Kuttayan Chetti* (2), there was an application for execution to which certain objections were raised and an order for the issue of warrant was issued. The application for some reason or other was struck off and, on a second application for execution having been made, a plea was raised that the previous application having been filed beyond time was not according to law. It was held that such a plea was barred by the principle of *res judicata*. That case is really distinguishable inasmuch as certain objections had actually been raised by the judgment-debtor and for some reason or other had not been pressed and process had been ordered to issue. In the case of *Sheoraj Singh* v. *Kameshar Nath* (3) also, the objections including an objection as to limitation had been raised to an application for execution but the judgment-debtor failed to appear in support of those objections, which were accordingly dismissed. On a second application for execution being made the plea of the previous application having been barred by time was disallowed on the obvious ground that the point had been expressly raised on the previous occasion and not pressed. In the case of *Danbar Singh* v. *Munawar Ali Khan* (4), it appears that in the course of the execution proceedings a compromise had been arrived at, which was made the basis of an order by the Court that the respondents were not liable for the decretal amount and that their property should be released. This order was also subsequently upheld. In spite of this, however, the decree holder's transferees put the decree in execution and re-attached the same property. Objections were filed to the effect that the respondents were not liable and that their property could not be attached, but these objections were allowed to be dismissed for default. It was then held that the latter of these two orders operated as *res judicata*. In this case it will also be noticed that objections had expressly been raised and allowed to be dismissed and the order dismissing those objections had become final. From these rulings it does not necessarily follow that the principle of implied *res judicata* would apply to execution proceedings. On the other hand it has been laid down in the case of *Kalyan Singh* v. *Jagan Prasad* (7); that if a judgment-debtor does not take any objection as to the decretal amount entered in the application for execution, that does not preclude him from raising the point at a subsequent stage.

All that happened was that on the 16th of June 1919 the vendees included an item of Rs. 380-15-0 to which they were not entitled. The judgment debtor for some reason or other did not take any objection that this amount was not payable by him. The Court also proceeded on the assumption that the amount was due and process was ordered to be issued. The judgment debtor appeared and offered to pay Rs. 2 0 and to pay the balance in two months. To this request of his the Court acceded. In our opinion neither of these proceedings can be said to amount to an express adjudication by the

(1) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. s.) 718.
(2) 24 M. 669.
(3) 24 A. 282; A. W. N. (1902) 63.
(4) 30 Ind. Cas. 775; 13 A. L. J. 764; 37 A. 581.
(5) A. W. N. (1903) 99; 25 A. 443.
(6) 4 A. L. J. 117; A. W. N. (1907) 64.
(7) 30 Ind. Cas. 523; 37 A. 589; 13 A. L. J. 823.

Court that the proper remedy of the vendees was to recover the amount of Rs. 380 15.0 by execution or that any such amount was actually due to him. The rule of *res judicata*, therefore, does not apply and the present application is not barred by such principle.

It has next been very strongly contended that the conduct of the vendees estops them from taking up a new position. It is urged that the vendees deliberately took up the position that their remedy was to recover the sum of Rs. 380-15-0 by execution of their decree and persuaded the Court to pass orders in their favour, and that they by their conduct put the judgment-debtor to a great disadvantage in compelling him to find a sum of Rs. 260 and asking for time to pay the balance in two months. This point is certainly not free from some difficulty, because the conduct of the vendees is reprehensible and it is also clear that they are now trying to shift their position and go behind the previous application. We are, however, to be satisfied whether there is any rule of law which precludes them from claiming restitution. It is obvious that after the expiry of the five months allowed by the decree the suit stood dismissed and it cannot be urged on behalf of the plaintiff that by any act of misrepresentation of the vendees the plaintiff was prevented from depositing the full amount within the time allowed by the decree. Without any fault of the vendees the plaintiff allowed the time fixed to expire and allowed the suit to stand dismissed. The subsequent conduct of the vendees cannot, in our opinion, amount to any misrepresentation on their part which has deceived the plaintiff. Their conduct did put the plaintiff to a great disadvantage for which the plaintiff may have another remedy, but, in our opinion, the circumstance that the vendees wanted to realise a sum of Rs. 380-15 0 by execution of the decree, which sum admittedly was not due to them, does not estop them from now coming to Court and saying that they were pursuing a wrong remedy and that their real remedy is to recover possession of the property which has been wrongly taken by the plaintiff. In our opinion the order of the Court giving the plaintiff two months' further time to deposit the pre emption money was without jurisdiction and it was passed against the consent of the vendees. On that day the vendees seemed prepared to waive their right to some extent and were ready to accept the amount, provided the whole amount was paid to them. This, however, was not done and we can by no stretch of language say that the vendees ever agreed to accept the whole amount within two months after the 13th of July 1919. They are, therefore, entitled to insist that inasmuch as the plaintiff did not deposit the whole amount on that day they cannot now be compelled to accept it. In our opinion the fact of the default of payment made by the plaintiff was to dismiss his suit *in toto* and he is, therefore, wrongfully in possession of the property. The vendees are entitled to a full restitution. We understand that the sum of Rs. 1,200 which had been deposited by the plaintiff and taken out by the vendees has already been re-deposited and that a further sum of Rs. 380-15-0 is still lying in Court. In these circumstances we are of opinion that the order of the learned District Judge granting the application was correct.

Having regard to the circumstances of the case and the peculiar attitude taken up by the vendees we direct that the parties should bear their own costs of the execution proceedings throughout. With this modification the appeal is dismissed.

J. P. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 18 OF 1920.

May 13, 1921.

Present :—Mr. Dalal, A. J. C. and Syed Wazir Hasan, A. J. C.

Musammat CHAURAS KUAR—PLAINTIFF—APPELLANT

versus

Musammat ABHAIRAJ KUAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Absolute estate—Gift—Coercion—Fraud—Undue influence—Knowledge of donor, effect of—Direct knowledge of one party, effect of—Parties, position of—Evidence, secondary and inferior, effect of—Court, position of—Burden of proof—Proof, nature of.

CHAURAS KUAR v. ABHAIRAJ KUMAR.

Coercion or fraud is generally a necessary substratum over which a case of undue influence rests. Therefore, in a case of undue influence allegations of fraud may simply be made with a view to emphasize it. [p. 385, col. 1.]

Sayad Muhammad v. *Fatteh Muhammad*, 22 I. A. 4; 22 C. 324; 6 Sar. P. C. J. 515; 11 Ind. Dec. (N. S.) 218 (P. C.), referred to.

Though it be found that a donor was well aware of what he did, yet if it be further found that his disposition to do it was produced by undue influence, the transaction would be set aside. [p. 386, col. 2.]

Sri Kishan Lal v. *Kashmiro*, 34 Ind. Cas. 37; 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 528; 31 M. L. J. 362; 14 A. L J. 1236 (P. C.), referred to.

Where most of the facts deposed to by the witnesses of one party are matters of which the opposite party would have in the natural course of the circumstances of any particular case direct knowledge, it is an act of impertinence on the part of the latter party to ask a Court to disbelieve the evidence led by the former party when he himself is not prepared to take the responsibility of an oath and give to the Court his own version of those facts. [p. 387, cols. 1 & 2.]

It is quite unsafe to accept the evidence more or less secondary in its character and certainly of inferior quality to the evidence which would have been produced but has been withheld. [p. 388, col. 2.]

Murugesam Pillai v. *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi*, 39 Ind. Cas. 659; 40 M. 402; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 19 Bom. L. R. 453; 25 C. L. J. 589; (1917) M. W. N. 487; 44 I. A. 98 (P. C.), referred to.

Where in a matter of a deed of gift alleged to be executed through undue influence the relation of influence has been established, and it is also made clear that the bargain is with the influencer and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. [p. 392, col. 2.]

Poosathurai v. *Kanappa Chettiar*, 55 Ind. Cas. 447; 47 I. A. 1 (P. C.); 38 M. L. J. 349; 11 L. W. 455; 18 A. L. J. 344; (1920) M. W. N. 317; 2 U. P. L. R. (P. C.) 62; 22 Bom. L. R. 535; 13 Bur. L. T. 28; 43 M. 546; 27 M. L. T. 316 and *Wajid Khan* v. *Ewaz Ali Khan*, 18 I. A. 144 (P. C.); 18 C. 515; 6 Sar. P. C. J. 42, Hafique & Jackson's P. C. No. 122; 9 Ind. Dec. (N. S.) 354, referred to.

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ and as a general rule the same questions arise. [p. 393, col. 2.]

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 27th January 1920.

Mr. *Haider Husain*, for the Appellant.

Mr. *Eisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.

WAZIR HASAN, A. J. C.—This is an appeal from the decree of the Subordinate Judge of Sultanpur, dated the 27th January 1920, by which the suit of the plaintiff, *Musammat* Chauras Kuar, was dismissed with costs. The facts of the case are as follows:—One Raghunath Singh, resident of the village Raepur, in the District of Sultanpur, owned certain shares in a number of villages and had two sons, Scambar Singh and Sheoraj Singh. Raghunath Singh died long ago. The exact period of his death is not known. His estate was inherited by his two sons, Soambar Singh, the elder of the two brothers, died about 30 years ago and it is not clear whether his brother, Sheoraj Singh, had predeceased or survived him. It is an admitted fact that Soambar Singh in virtue of a custom of the family was entitled to $1\frac{1}{2}$ shares while his younger brother, Sheoraj Singh, to one share in the estate of their father. Sheoraj Singh had no issue. He was succeeded on his death in respect of his share by his widow, *Musammat* Qadam Kuar, who died over 20 years ago. Soambar Singh had married twice. By one wife he had a daughter, *Musammat* Chauras Kuar, the plaintiff, was his other wife. From her also he had a daughter *Musammat* Munni, who died about 12 years ago. On the death of Soambar Singh, *Musammat* Chauras Kuar succeeded to her husband's estate. It is common ground between the parties that the estate, which devolved upon her on the death of her husband, was a Hindu widow's estate. With regard to the share, which was possessed by *Musammat* Qadam Kuar, it was the plaintiff's case that she entered into possession of it on the death of *Musammat* Qadam Kuar without any title and that inasmuch as a period of more than 12 years had expired since the death of *Musammat* Qadam Kuar the plaintiff had acquired title to that share also by the effect of prescription.

So far as the defendants Nos. 1 to 5 are concerned, and they are the only persons amongst the defendants, who have appeared before us at the hearing of the appeal, they in unmistakable language admitted, in fact asserted, that *Musammat* Chauras Kuar had acquired prescriptive title to Sheoraj Singh's share by entering into possession of it

after the death of *Musammat* Qudam Kuar (*Vide* the allegations in paragraph 15 of the written statement of the defendants Nos. 1, 2 and 4 and the same paragraph of the written statement of the defendant No. 3 as well as of the defendant No. 5). For the purpose of this appeal we must, therefore, accept it as an undisputed fact that *Musammat* Chauras Kuar's title with regard to Sheoraj Singh's share was that of an absolute owner. *Musammat* Chauras Kuar was thus in possession and full enjoyment of the whole property, which once belonged to Raghunath Singh, on the 23rd February 1912, which is the date of the execution of the deed of gift by her in favour of the defendant No. 1 *Musammat* Abhairaj Kuar and round which the chief controversy in the suit centres. The defendant No. 2 in the case is *Musammat* Abhairaj Kuar's husband. The defendants Nos. 3 to 5 are her sons. There are other defendants in the case, whose connection with this litigation will be mentioned hereafter.

The plaintiff is over 50 years old and seems to have managed her estate with the aid of some servants for a considerable period of time without any assistance from the step-daughter or her husband or her sons. On the 23rd February 1912 the plaintiff executed the deed of gift mentioned above in favour of *Musammat* Abhairaj Kuar. Whether this deed had the effect of stripping her of all the property that she possessed or not is a question in the case, which will be discussed at its proper place in this judgment. The deed of gift was endorsed on the stamp paper by one Deoki Lal. *Musammat* Chauras Kuar is an illiterate lady. She admittedly made her mark with her own hand on the deed and the mark was attested by one Baijnath Patwari. The execution of the document was witnessed by Chandika Dube and Mahadeo Upadhya, whose signatures the document bears as attesting witnesses. This deed of gift was presented for registration on the 15th April 1912 and was registered on the same date by Ali Ahmad, who was the Sub-Registrar of Sultanpur. In the endorsement made by the Sub-Registrar on the deed in question appears the following sentence:—"The purport of the deed was explained to the executant." On the 17th February 1916 two petitions were presented to the Revenue Authorities for mutation of names on the basis of the deed of gift in favour of *Musammat* Abhairaj Kuar, the donee. The donor, *Musammat* Chauras Kuar, was examined in the Revenue Court with respect to these petitions on the 18th February and 22nd July 1916. One of such petitions is before us and is marked Exhibit A5. The order of mutation as prayed for was passed on the 19th August 1916. (Exhibits A6 and A7). One of the orders, that is Exhibit A6, runs thus:—"On the basis of possession I order mutation in favour of Abhairaj. This order will govern case No. 659."

On the 14th April 1916 Debidin Singh, Gajadhar Singh, Baijnath Singh and Gayadin Singh, minor, instituted a suit in the Court of the Subordinate Judge of Sultanpur against *Musammat* Abhairaj Kuar, *Musammat* Chauras Kuar and Sheo Saran Singh, Ganpat Singh and Har Saran Singh, minor sons of *Musammat* Abhairaj Kuar. The relief which they prayed for in that suit was stated in the plaint (Exhibit 3) in the following terms:—"That a decree for a declaration to the effect that the deed of gift, dated the 23rd February 1912, is after the death of the defendant No. 2 (*Musammat* Chauras Kuar) invalid and inoperative as against the plaintiffs and that it is not binding on them, may be passed in favour of the plaintiffs against the defendants." That suit comprised the whole of the property, which was the subject-matter of the gift of the 23rd February 1912. The plaintiffs stated in their plaint that they were the reversioners of Soamber Singh who owned and possessed the whole of the property specified in the plaint and that on his death *Musammat* Chauras Kuar entered into possession of it as a Hindu widow without power of alienation. The cause of action was founded on the execution of the deed of gift by *Musammat* Charans Kuar in favour of *Musammat* Abhairaj Kuar on the 23rd February 1912. Debidin Singh is now dead and his two sons Indarpal Singh and Kanhaiya Bakhsh Singh along with Gajadhar Singh, Baijnath Singh and Gayadin Singh form the other set of defendants to the suit, out of which this appeal has arisen. They are numbered as defendants Nos. 6 to 10 in the plaint. *Musammat* Abhairaj Kuar and *Musammat* Chauras Kuar filed a joint

written statement to the suit of the reversioners just now mentionud on the 2nd June 1916 (Exhibit 4). In the written statement of the two ladies which bore the thumb impressions of both of them, the deed of gift of 23rd February 19 2 was affirmed and the reversioners' case that the entire property in suit belonged to Soambar Singh and that it had devolved upon *Musammat* Chauras Kuar by way of inheritance was disputed. They alleged that Soambar Singh owned and possessed $1\frac{1}{2}$ shares, that one share belonged to Sheoraj Singh, on whose death it had devolved upon *Musammat* Qadam Kuar, his widow, and that on the death of *Musammat* Qadam Kuar, *Musammat* Chauras Kuar entered into possession of it for over 12 years. This suit of the reversioners was, after some proceedings had taken place in the Court of the Subordinate Judge, Sultanpur, in which it was instituted, transferred to the Court of the Additional Subordinate Judge of Fyzabad. The suit ended in a compromise to which all the plaintiffs and the defendants were parties. The compromise bears no date but was eventually incorporated into the decree of the Court, dated the 22nd March 1917 (Exhibit 5). It is of vital importance to state the full effect of that compromise. By the first paragraph of it *Musammat* Chauras Kuar declared that she relinquished all her rights which she had as a Hindu widow in the property in suit and that her husband's reversioners had become owners of all those rights. Paragraph 2 stated that a settlement had been arrived at between the plaintiffs and the defendants Nos. 1 and 3 to 5 (*Musammat* Abhairaj Kuar and her three sons), that the former were to be declared owners of the other half and that the plaintiffs were to obtain a decree for proprietary possession of their portion while the said defendants were to be maintained in possession of the other half. By paragraph 3 the custom of the exclusion of daughters and daughters' sons in the family of the plaintiffs and that of Soambar Singh was affirmed. The above narrative is a statement of admitted facts except in so far as we have indicated to the contrary.

The present suit was instituted on the 6th March 1919. The array of the parties has been stated above. In view of the arguments addressed to us with some emphasis by the learned Advocate for the respondents, that is the donee and her husband and sons, it is necessary to reproduce the material allegations of the plaint.

"3. That the plaintiff had been in possession of the property in dispute for a long time. The defendants Nos. 2 and 3 as her general agents and *karpardazan* used to do all the work. The plaintiff being an illiterate lady of advanced years and of weak intellect all the Zemindari and the family business (*sic*) to be looked after by the *karpardazan*. The defendants Nos. 2 and 3 taking advantage of their relationship by and by took the entire management relating to the income and the expenditure into their own hands. Excepting the defendants Nos. 1 to 5 there was none within the reach of the plaintiff to give her independent advice. They had full control over the other servants of the plaintiff and their appointments and dismissals were specially in the hands of the defendants Nos. 2 and 3.

"4. That the plaintiff has recently come to know that the defendants Nos. 1 to 5 by setting up wrong facts have got a deed of gift without consideration executed in favour of the defendant No 1 on behalf of the plaintiff in respect of the entire property in dispute, the object of which as it has been known to the plaintiff is that she might not be able to derive any sort of benefit out of it. The father of the defendants Nos. 6 and 7 and the defendants Nos. 8 to 10 instituted a suit for the cancellation of the said deed of gift in the Court of the Subordinate Judge of Sultanpur. It having been transferred to the Court of the Additional Subordinate Judge, Fyzabad, was decided on 22nd March 1917 in the terms of the compromise of the same date. The plaintiff has now come to know that the effect of the compromise and the decree mentioned above is this that the father of the defendants Nos. 6 and 7 and the defendants Nos. 3 to 10 have during the lifetime of the plaintiff become the owner of half of the property in dispute while the defendant No. 1 and Nos. 3 to 5 of the other half.

"5. That the plaintiff was in every way under the influence of the defendants Nos. 1 to 5 and the defendants Nos. 2 and 3 now and then giving out that for the management of the property her thumb-impression as a proprietor was necessary,

used to get her thumb impressions on papers and the plaintiff always relying upon them used to put her signatures and as the plaintiff was under the influence of the defendants Nos. 1 to 5 in every respect, she could not reject their request contrary to their wishes.

"6. That the plaintiff did not execute any deed knowing that its legal effect would be that during her life the defendant No. 1 would become owner of her entire property in dispute nor did she execute any compromise which she knew that by virtue thereof the defendants Nos. 1 to 5, father of the defendants Nos. 6 and 7 and the defendants Nos 8 to 10 would become owners of half and half of the property in dispute respectively during the lifetime of the plaintiff. If, as a matter of fact, the thumb impressions of the plaintiff were obtained on the deed of gift and the compromise mentioned above then the defendants Nos. 2 and 3 fraudulently and having exercised influence upon the plaintiff might have got her impressions. Had the plaintiff known that the effect of the aforementioned deeds would be that she would be dispossessed from her property she would never have put her thumb-impressions thereon and verified them. The plaintiff all along knew and the defendants all along led her believe that the plaintiff was entitled to be benefited by her property in every respect.

"8. That having regard to the facts mentioned above the deed of gift dated the 23rd February 1912 and the compromise and the decree, dated the 22nd March 1912, are void on account of the defendants' fraud and undue influence and the plaintiff, as usual, is the owner of the property in dispute and she has a right that having dispossessed the defendants from unlawful possession should herself enter into possession and occupation (of the property in dispute)."

On the basis of the above allegations the plaintiff prayed that a decree for possession of the property entered in the list attached to the plaint be passed in her favour as against the defendants. In the defense lodged by the defendants, who have appeared before us, every material allegation made in the paragraphs of the plaint, which we have quoted above, was denied. The legality and the propriety of the deed of gift was asserted as well as of the compromise and the decree founded thereon. It was also alleged that "the plaintiff is a very sensible manager, clever, and an experienced woman." Objection was taken to the ambiguity of the words "undue influence" used in the plaint and the pleas of limitation, *res judicata* and estoppel were also urged. On these pleadings the learned Subordinate Judge framed the following five issues:—

1. Did the plaintiff sign the deed of gift and the *sulehnama* owing to fraud and undue influence without knowing the contents thereof as alleged?

2. Is the claim within time?

3. Is the suit barred by the principles of *res judicata* as alleged?

4. Is the plaintiff estopped from bringing the present suit?

5. Can the plaintiff sue for possession without seeking the cancellation of the deed of gift and the *sulehnama*?

He has given no finding on issues Nos. 2 to 5 and has decided issue No. 1 against the plaintiff and in consequence of that decision the suit has been dismissed.

The argument presented to us on behalf of the appellant by her learned Counsel, Mr. Haider Hasain, is a short and simple one. He has contended that notwithstanding certain allegations made in the plaint which in view of the language, in which they were couched, may be treated as indefinite, his case is that the deed of gift of the 23rd February 1912 and the compromise of the 22nd March 1917 are void on the ground of both of them being the result of undue influence brought to bear upon the plaintiff by the defendants and consequently his client is entitled to the relief prayed for in the plaint. On behalf of the respondents their learned Advocate, Babu Bisheshwar Nath, has pressed us with the argument that the case as disclosed in the plaint is one solely founded on fraud and misrepresentation and not on undue influence and inasmuch as fraud and misrepresentation have not been proved and the plaintiff's case as arising out of fraud and misrepresentation has practically been abandoned by the learned Counsel for the appellant the appeal must be dismissed.

In our judgment the contention urged on behalf of the respondents is not sound. We think that the case set up by the plaintiff-appellant in the plaint is a case of undue influence exercised on her in respect of the

execution of the deed of gift as well of the compromise. It is true that fraud is at places mentioned in the plaint as would appear by a perusal of the quotations from the plaint, which we have given above. But such an allegation of fraud does not, in our opinion affect in the least the substantial case of undue influence, upon which the entire cause of action for the suit is based. Coercion or fraud is generally a necessary substratum over which a case of undue influence rests. In delivering his judgment in the case of *Sayad Muhammad* v. *Fatteh Muhammad* (1) Lord Halsbury observed as follows:—"The question of what is undue influence is sometimes a difficult one. Lord Cranworth, when giving judgment in the House of Lords in the case of *Boyse* v. *Rosborough* (2) gives this definition. 'It is sufficient to say, that allowing a fair latitude of construction, they must arrange themselves under one or other of these heads—coercion or fraud'."

In paragraph four of the plaint, which has been quoted above *in extenso*, there is a distinct averment that the effect of the deed of gift as well as of the compromise and the decree passed thereon has been to deprive the plaintiff of all her property. This allegation is preceded by statement of circumstances, which if proved, constitute essential elements of undue influence. It is followed in paragraph 5 by distinct and definite assertion of undue influence, the further effect of which is described in a portion of paragraph 6 and the result is summed up in paragraph 8 of the plaint. We are, therefore, of opinion that the allegations of fraud were simply made with a view to emphasize the case of undue influence. In this connection we may quote with advantage the following observations of Sir W M. James, L. J. in the case of *Moxon* v. *Payne* (3):—"It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in this suit on any different ground. But the obtaining of property, or of any benefit, through the undue and conscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit. It is at most a rhetorical exaggeration, which a person who commits the frauds has no right to complain of. If a man robs his fellow-traveller, and is indicted for so doing, the allegation that he became the companion of his victim with a pre-conceived design to rob him is wholly immaterial."

The facts which constitute the plaintiff's case and which have been placed before us in the course of the arguments addressed us by Mr. Haider Husain may be categorically stated as follows:—

1. That *Musammat* Abhairaj Kuar, her husband and her sons, particularly Ganpat Singh, have been frequent visitors to her house at Raepur.

2. That Raghubir Singh defendant No. 2, the husband of *Musammat* Abhairaj Kuar, and Ganpat Singh defendant No. 3, her eldest son, came to live permanently with the plaintiff in or about the year 1910.

3 That the plaintiff is an illiterate lady of advanced years.

4. That these defendants taking advantage of their relationship took the entire management of the estate relating to the income and expenditure into their own hands.

5. That excepting the defendants Nos. 1 to 3 there was none within the reach of the plaintiff to give her independent advice.

6 That they had full control over the other servants of the plaintiff and their appointments and dismissals were specially in their hands.

7. That all the immoveable property of which the plaintiff was possessed was thrown into the gift.

8. That the proposal to make the gift emanated from these defendants, and

9. That before the mutation in favour of *Musammat* Abhairaj Kuar as well as before the compromise the defendants Nos 2 and 3, the husband and the eldest son of the defendant No. 1, respectively, took a general power of-attorney from the plaintiff in their favour on the 27th April 1914.

It is contended that the legal inferences deducible from these facts, which if proved,

(1) 22 I. A. 4; 22 C. 324. 6 Sar. P. C. J. 515; 11 Ind. Dec (N. s.) 218 (P. C.).

(2) (1857) 6 H. L. C. 2 at p. 49; 26 L. J. Ch. 253; 3 Jur. (N. s.) 373; 5 W. R. 414; 10 E. R. 1192; 108 R. R. I.

(3) (1873) 8 Ch. App. 831; 43 L. J. Ch. 240.

establish that the defendant stood in a fiduciary relation to the plaintiff and that the transaction being unconscionable the burden of proving that neither the gift nor the compromise was induced by undue influence lay upon them: in other words, the above circumstances attract the provisions of section 16 of the Indian Contract Act (IX of 1872) and entitle the plaintiff to the decree for which she has prayed.

The case so set up and argued before us was not, we are inclined to think, sufficiently appreciated by the learned Subordinate Judge. He has mainly been swayed by the facts that the plaintiff was a lady of business habits, that she more than once admitted the execution of the deed of gift and that she fully knew what she was about when she executed the deed of gift and became a party to the compromise. He opens the discussion of issue No. 1 with the following remarks:—"The plaintiff is not a *pardanashin* woman and there is no evidence on record that she is of weak intellect: on the contrary her own statement shows that she has been personally looking too much of her work in Court." He states in his judgment "The plaintiff in my opinion has failed to make out that she signed without knowing the contents of the deed of gift." He further says, after a discussion of the evidence relating to the compromise. "In my opinion the plaintiff has failed to make out undue influence or fraud and that she has also failed to make out that she signed the deed of gift and the *sulehnama* without knowing the contents thereof." "But the question is not whether the donor knew what he was doing, had done or proposed to do, but how her intention to act was produced, whether all that care and prudence was placed round her as against those who advised her, which from their situation and relation with respect to her, they were bound to exert on her behalf." said Lord Eldon in *Huguenin* v. *Baseley* (4). See also the decision of the Privy Council in *Sri Kishan Lal* v. *Kashmiro* (5). To this observation of Lord Eldon, Lord Romilly added in the case of *Hoghton* v. *Hoghton* (6) "and though the donor as well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside." [See *Allcard* v. *Skinner* (7).]

We now proceed to consider the evidence bearing upon the question of fact mentioned above The plaintiff *Musammat* Chauras Kuar entered the witness box and gave evidence in support of her case. We were much impressed with her evidence. We will here quote some portions of it. "I am 60 years old. I am illiterate. Raghubir Singh and Ganpat Singh have been living with me for the last 10 or 11 years. Raghubir Singh is husband of my step daughter, and Ganpat is his son. Sheo Saran and Har Sarar, sons of Raghubir Singh, also used to come to me. Abhairaj Kuar, my step daughter, also used to come and live with me. Raghubir Singh and Ganpat Singh are my general agents. They make collections on my behalf. They turned out Dwarka Singh, my general agent, and Chandika Singh Dube, my general agent, continued to work under the directions of Raghubir Singh and Ganpat Singh. These people looked to all my affairs. I acted according to their wishes. There was no one else with me who could give independent advice on any matter. Raghubir and Ganpat assured me that they would look to my interest." She is not quite accurate with regard to her conduct in relation to the compromise when she stated in examination-in chief that she did not verify this *sulehnama* before the presiding Judge. In cross-examination she stated:—"I was called by the Subordinate Judge in Court and I went before him. He said something but I did not speak anything.....On the day the *sulehnama* was filed I was called in Court but I was not told anything in Court. The *sulehnama* was not read over in Court. The Subordinate Judge had asked if I had executed the *sulehnama* but I gave no reply to the question." With regard to the preparation of the draft of the deed of gift she stated in cross examination:—"I went to Babu Shambhu Nath Vakil and asked him

(4) (1807) 1 Wh. & T. L. C. (7th Ed.) 247; 14 Ves. (Jun.) 273; 9 R. R. 276; 33 E. R. 546.

(5) 34 Ind. Cas. 37; 20 C. W. N. 957; (1916) 1 M. W. N. 438; 3 L. W. 528; 31 M. L. J. 362; 14 A. L. J. 286 (P. C.).

(6) (1852) 15 Beav. 278; 51 E. R. 545; 21 L. J. Ch. 482; 17 Jur. 99; 92 R. R. 421.

(7) (1887) 36 Ch. D. 145 at p. 160; 56 L. J. Ch. 1052; 57 L. T. 61; 36 W. R. 251.

to prepare a draft of gift. It was at Ganpat and Raghubir's request." Thakur (P. W. No. 3) a Zamindar stated that *Musammat* Chauras Kuar's home in Raepur is about 10 *bighas* from his village and that he often goes to her house. He further said: "I know Ganpat Singh and Raghubir Singh. They have been living with *Musammat* Chauras Kuar for the last 10 years. They have not been living with her for the last 8 or 9 months. Before 10 years Dwarka Singh and Chandika Dube used to manage *Musammat* Chauras Kuar's affairs. During the last 10 years Ganpat Singh and Raghubir Singh have been managing her affairs. They also made collections on behalf of the *Musammat*. They also employed and dismissed servants on her behalf." He also stated that *Musammat* Chauras Kuar was illiterate, a fact which is not disputed before us. Bajrang Singh (P. W. No. 50) stated as follows :—" I know *Musammat* Chauras Kuar of Raepur. I am a co-sharer in the village. I have seen Ganpat Singh and Raghubir Singh living with her for the last 10 years. Dwarka Singh and Chandika used to manage her affairs before. Dwarka has been turned out by Ganpat Singh. Chandika has not been turned out. Ganpat has been managing her affairs. No other literate man lives with *Musammat* Chauras Kuar." Ameresh Singh (P. W. No. 7) deposed "I own some Zemindari in village Raepur. *Musammat* Chauras Kuar is also a co-sharer in that village. I do not know her age. She is illiterate. I do not know who managed her Zemindari affairs 8 or 10 years ago." None of the witnesses, to whose evidence we have made references, have been disbelieved or in any manner criticised by the learned Subordinate Judge. We are, therefore, entirely free to form our opinion in regard to their veracity and we think that they have stated the true facts so far as their evidence goes. We are led to this conclusion much by the fact that except Ganpat Singh, defendant No. 3, none of the other defendants has taken courage to come into the witness-box. Most of the facts deposed to by these witnesses must be matters of which the defendants would have in the natural course of the circumstances of this case direct knowledge. We think it an act of impertinence on the part of a litigant to ask a Court to disbelieve the evidence led by his opponent when he himself is not prepared to take the responsibility of an oath and give to the Court his own version of those facts. This is a case of a nature in which it was according to our judgment the bounden duty of these defendants to come into the witness box and to have revealed the truth if it lay on their side and not on the side of the plaintiff. We have mentioned above that Ganpat Singh, defendant No. 3, has given evidence but the circumstances in which he did and the scanty character of his deposition do not in the least exonerate him from our condemnation. Ganpat Singh was required by the plaintiff to produce a document. In answer to that he entered the witness-box and stated in examination in-chief that the document had not been summoned from him and that he had not brought it. In cross examination which was on his behalf he gave certain facts relevant to the issue with which we are dealing. He admits that the lady went to Babu Shambhu Nath in his company to get the draft of the deed of gift prepared. He also admits that she applied for mutation in pursuance of the gift in his presence. He further admits that *Musammat* Chauras Kuar made a statement in the Tahsil in connection with the mutation proceedings in his presence, but the point of greater significance than these admissions is that he had no courage to deny that he and his father came to live with the lady about two years prior to the execution of the deed of gift in question, that they took over the entire management of her property, that Dwarka and Chandika, the lady's servants, continued to work under the directions of Raghubir Singh and Ganpat Singh, that she acted according to their wishes, that there was no one else with her who could give her independent advice on any matter and that they assured her that they would look to her interests—facts which were specially stated by the lady in her deposition and in the presence of Ganpat Sahai defendants' Pleader as the proceedings of the 18th September 1919, on which date the lady was examined, show. Further *Musammat* Chauras Kuar had in cross-examination distinctly stated that she had asked Babu Shambhu Nath Vakil at the request of Ganpat Singh and Raghubir Singh to prepare the draft of the deed of gift. Ganpat Singh has not contradicted

this statement of fact either and we attach very great importance to this feature of Ganpat Singh's evidence. We do not believe Ganpat Singh in much of what he has stated in support of his case. No particular reference is made to the evidence of this witness by the learned Subordinate Judge either. He has mentioned him as one amongst the several witnesses examined on behalf of the plaintiff. In our opinion Babu Shambhu Nath Vakil was a very important witness in the case. Equally was Deoki Lal, the scribe of the deed in question. The defendants should have produced them but they have not done so. We think we can safely draw from this omission of the defendants an inference adverse to their case. On this part of the case our attention was drawn to the evidence of two witnesses produced on behalf of the defendants. One of them is Chandika (D. W. No. 1). This Chandika is the old servant of the plaintiff and one of the attesting witnesses to the deed of gift. He now has come to give evidence on behalf of the defendants. But there are strong circumstances which induce us to place no reliance on his statement. He stated that the draft of the deed of gift was prepared by Babu Shambhu Nath at the request of *Musammat* Chauras Kuar. This, we think, is an attempt to supply the omission, highly glaring, in the statement of Ganpat Singh, to which we have already made reference. Besides the best evidence on the subject would have been that of Babu Shambhu Nath himself. That evidence has been withheld. Chandika is one of several persons against whom the plaintiff had instituted criminal proceedings. We do not attach much importance to that fact because those proceedings were started after the institution of the present suit, and it must have been foreseen by the lady that Chandika would be a witness in the case on the side of the defendants. He has clearly stated a lie when he said that the deed was not registered on the day it was executed as it had become late that day. He admitted that he was *Musammat* Abhairaj Kuar's agent. The other witness is Baijnath Lal (D. W. No. 6). He is the Patwari of the village He attested the lady's mark on the deed of gift. He stated the deed was explained to her by the scribe, whose name he did not recollect. Whether the deed was so explained or not is not very material in connection with the issue with which we are concerned but it is not possible for us to place any reliance on the statement of this witness when the person, who is said to have explained the deed, that is Deoki Lal, could have been produced as a witness by the defendants and was not. On almost every question of importance in this case we are asked on behalf of the defendants respondents to accept the evidence more or less secondary in its character and certainly of inferior quality to the evidence which would have been produced but has been withheld. [See the observations of Lord Shaw in his judgment in the case of *Murugesam Pillai* v. *Manickavasaka Desika Gnana Simhasi Pandara Sannidhi* (8).] Baijnath Lal admitted that at the time when the deed was executed Raghubir Singh was also there. Baijnath is also one of the persons against whom the lady has taken criminal proceedings. We have so far reviewed the whole of the oral evidence produced in the case by both sides, which has a bearing on the question, which we are considering.

We now come to mutation proceedings commenced in February 1916. This long delay is a circumstance which in our opinion throws a great deal of discredit on the truth of the defence in this case. No satisfactory explanation has been placed before us on behalf of the respondents with regard to this delay. Before, however, we deal with the effect of the mutation proceedings on the issue under consideration we desire to bring out prominently the fact that between the date of the deed of gift and the mutation proceedings Raghubir Singh, the defendant No. 2, the husband, and Ganpat Singh, defendant No. 3, the eldest son of the defendant No. 1 had acquired a closer and more direct and recognised relation with the affairs of the plaintiff and the management of her estate by obtaining a general power-of-attorney from the lady on the 27th April 1914. In her statement before the Revenue Court in the mutation

(8) 39 Ind. Cas. 659; 40 M. 402; 21 M. L. T. 288; 32 M. L. J. 389; 5 A. L. J. 28 : 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 9 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487; 44 I. A. 98 (P. C.).

proceedings *Musammat* Chauras Kuar stated as follows:—"I have gifted the property mentioned in the list attached to this report to my daughter, *Musammat* Abhairaj Kuar, wife of Thakur Raghubir Singh, ...in accordance with the last request of my deceased husband and have put her in possession thereof. Mutation of names should, therefore, be made in favour of the said Abhairaj Kuar and I have no objection therein." It is not disputed that *Musammat* Chauras Kuar made this statement. It is admitted by Ganpat Singh that the application for mutation by *Musammat* Chauras Kuar as well as her deposition just now referred to were both made in his presence. The lady has said that Ganpat Singh and Raghubir Singh were both with her when she went to Tahsil in connection with the mutation proceedings. We believe her statement because Raghubir Singh has not come into the witness box to contradict it and Ganpat Singh in his evidence does not deny the presence of his father as stated by the lady. The written statement filed on behalf of the lady on the reversioners' suit is Exhibit 4 as we have mentioned before. In that again the lady had admitted the execution of the deed of gift in favour of the defendant No. 1 as having been in accordance with the directions of her husband. This written statement was verified as it itself shows, at Raepur. It is a joint written statement on behalf of *Musammat* Abhairaj Kuar and *Musammat* Chauras Kuar as we have already noted. There is no reliable evidence on the record to bring home the contents of this document to *Musammat* Chauras Kuar. The only evidence to which our attention was invited by the learned Advocate for the respondents is that of Sripat Sahai (D. W. No. 3). He is a clerk of Babu Ganpat Sahai Pleader who was engaged on behalf of *Musammat* Chauras Kuar by Raghubir Singh, acting in the capacity of her general agent, under a *vakalatnama* dated the 8th January 1917. (Exhibit 7). Sripat Sahai stated that the written statement (Exhibit A9) filed in the reversioners' suit on behalf of *Musammat* Chauras Kuar was read over and explained by him to her. There is reliable evidence in the Court proceedings of the reversioners' case copies of which have been filed, that she came to Court in connection with the case only once and that was most probably on the 14th March 1917 when the compromise in question was verified by *Musammat* Chauras Kuar, Ganpat Singh and Raghubir Singh together, the last mentioned person having acted as the agent of the defendant No. 5 in that suit. At the request of the plaintiffs in that case the learned Additional Subordinate Judge, who was trying it, ordered a warrant of arrest to be issued against *Musammat* Chauras Kuar on the 12th January 1917 because she had failed to appear as a witness in obedience to a previous summons. Copies of the proceedings filed in this case do not show, however, that the plaintiffs took any steps towards the execution of the warrant and that *Musammat* Chauras Kuar came to Court in pursuance thereof. What we find is that on the 6th March 1917 the plaintiffs after examining a witness called Sanjhar Kuar closed their case. Chandika (D. W. No. 1) admits in his evidence that the lady came to Fyzabad only once in connection with the reversioners' suit. If the lady did not come to Court at any time before the 14th March 1917 it is difficult to perceive how the witness could have had an opportunity to read and explain the written statement to her as he says he did when he himself does not say that he went to Raepur to go through that ceremony. We have already pointed out that the written statement (Exhibit 4) purports to have been verified by *Musammat* Abhairaj Kuar and *Musammat* Chauras Kuar with the making of their thumb impressions on it at Raepur. We are led to conclude that the written statement was brought to the Court from Raepur by some person, whose identity is not disclosed, and was filed into Court by Babu Ganpat Sahai Pleader after the case had once been called on the 2nd June 1916. On that date the Court made the following note. We think it desirable to reproduce the whole of it. "2nd June 1916. Present:—plaintiffs Nos. 1 and 2, defendant absent, no written statement filed to day. Ordered that the case be taken up on the date fixed. Babu Ganpat Sahai Vakil for the defendants Nos. 1, 2 and 3 then presented himself and filed the written statement which was brought on the record. A duplicate copy

was given to Babu Ambe Sahai Pleader for the opposite party." Here again the best evidence, which could have been obtained from the mouth of Ganpat Sahai Pleader as to the circumstances in which the written statement came to him and was handed over by him to the Court has been withheld. We wholly disbelieve the witness Sripat Sahai. Assuming, however, that *Musammat* Chauras Kuar knowingly affirmed the execution of the deed of gift in the written statement (Exhibit 4) we are unable to attach much importance to that fact. It should be remembered that *Musammat* Abhairaj Kuar and her sons and *Musammat* Chauras Kuar were arrayed on the same side in the suit brought by the reversioners. They filed a joint defence and obviously they had to meet a common foe in the body of the plaintiffs' reversioners. It is but natural that *Musammat* Chauras Kuar should fall under the wings of Raghubir and Ganpat Singh for protection against such an enemy. It would have been highly in our opinion prejudicial to their defence in that suit if *Musammat* Abhairaj Kuar and *Musammat* Chauras Kuar had divided and started a controversy between themselves as regards the gift. Their common object was to defeat the plaintiffs of that suit and that could best be attained by a united front. We are, therefore, not disposed to attach much importance to the admission contained in the written statement even if we hold that it has been brought home to her. We reserve our further comments with regard to the evidence value of the admission of the deed of gift in that written statement as well as in her deposition in the mutation case (Exhibit A5) for a later stage of our judgment. Our attention was also invited to *Musammat* Chauras Kuar's petition to the Collector of Sultanpur asking for an order as to the amount of the stamp duty required for the deed of gift. We are extremely doubtful whether the petition (Exhibit A3) contains any admission of sufficient clearity as to the deed of gift on the part of *Musammat* Chauras Kuar so as to require a separate treatment at our hands. In any case it cannot stand on a footing higher than Exhibits 4 and A5.

This brings us to the consideration of the compromise (Exhibit 5). Here again we are constrained to hold that there is no satisfactory evidence to bring home the contents of this document to the plaintiff. As we have shown above the plaintiff absolutely denies the fact that it was read over to her either in Court by the Additional Subordinate Judge or by any one else outside the Court. The only evidence on that point in favour of the respondents is contained in the statement of Ganpat Singh defendant No. 3. He stated that the *sulehnama* was read over to her by the Additional Subordinate Judge of Fyzabad. Exhibit A12, which is a copy of the proceedings relating to the verification of the compromise, is as follows:—

"Filed and verified by the plaintiff No. 2 and defendants Nos. 2 and 4, Chauras Kuar and Ganpat Singh in person and Raghubir Singh, agent for defendant No. 1 and guardian for defendant No. 5, 14th March 1917". This record does not throw much light on the question under consideration and we are unable to accept *ipse dixit* of Ganpat Singh on this point whom we have shown as wholly unworthy of credit. It is clear from Exhibit 12 that Ganpat Singh could be corroborated on this part of the case by his father, Raghubir Singh, but he has very studiously avoided to face the ordeal. We think that the version of the plaintiff on this part of the case is a likely one. Her silence before the Court was taken to amount to her consent. It is not disputed that she was a consenting party to the compromise, but what is contended is that the contents of it were not brought home to her and she being admittedly an illiterate woman no presumption in favour of her knowledge of the contents can be raised.

We will assume, however, with regard to the compromise, as we have done with regard to the written statement, that the lady was aware of the contents of it but we have already expressed our opinion in commenting on some of the findings of the learned Subordinate Judge that the knowledge of the contents either of the deed of gift or of the written statement or of the compromise is not a material element in the determination of the issue of undue influence. The synopsis of the evidence and our own opinion as to its veracity

or sufficiency, which we have given above, leads us to the conclusion that every one of the heads of facts enumerated at the outset of this judgment is fully established. But before we part with this aspect of the case we desire to add a few more words with special reference to heads Nos. 7 and 8. The contention of the learned Counsel for the plaintiff-appellant that the gift had the effect of stripping the lady of all her possessions has not been accepted by the learned Advocate for the respondents. We are, however, satisfied that the appellant's contention is correct. In paragraph 4 of the plaint the plaintiff stated that the deed of gift was in respect of the entire property in dispute. This allegation was admitted in the written statement of the defendants, who have appeared before us in this appeal. It is also admitted that the property in dispute is all that was once possessed by the plaintiff's husband and his brother Sheoraj Singh. It is not shown that the lady acquired or is possessed of any other property. In fact the defendant never contended that there was any property which lay outside the scope of the gift. In this connection the learned Advocate for the respondents drew our attention to Exhibit A31 dated the 12th July 1918, which is the copy of a petition of *Musammat* Chauras Kuar filed by her in the Court of the Deputy Commissioner of Sultanpur. In that petition she states that she was the Lambardar of Mahal Tirsondi (within which the property in dispute admittedly lies) and that *Musammat* Abhairaj Kuar was a co-sharer in the said *mahal* from whom a sum of Rs. 200 was due on account of revenue for *rabi* 1325 *fasli*. She prayed that the said amount of revenue be realised from *Musammat* Abhairaj Kuar. We think that this document does not substantiate the contention urged by the learned Advocate for the respondents. In spite of the mutation in favour of *Musammat* Abhairaj Kuar previous to this petition it is likely that *Musammat* Chauras Kuar's name remained on the revenue records as the Lambardar of the *mahal* and there was no change effected in that entry till the date of this petition. *Musammat* Chauras Kuar might well have feared her liability to pay this revenue being enforced against her and took steps in anticipation of any attempts which the Revenue Authorities may make to realize this money from her. The most conclusive evidence on the subject is furnished, however, by a recital in the deed of gift itself. The document says:—"My husband had further directed me that I should at the time of the marriage of the said daughter (*Musammat* Abhairaj Kuar) make *sankalap* of the entire property to her and I have done the same accordingly." As regards head No. 8 we have already quoted *Musammat* Chauras Kuar's evidence to the effect that at the request of the defendant she had asked Babu Shambhu Nath Vakil to prepare the draft of the deed of gift. We have given our reasons for believing this statement of the lady and disbelieving a contrary statement of Ganpat Singh on the point. We are of opinion, therefore, that these two points along with the other seven points have also been established.

We now proceed to examine the terms of the deed of gift (Exhibit 1) as well as the compromise (Exhibit 5). The following facts are recited in the deed of gift and constitute the motives which prompted *Musammat* Chauras Kuar to make a present of all that she was possessed of to *Musammat* Abhairaj Kuar:—(1) "I have no other issue excepting my daughter Abhairaj Kuar. (2) The said *Musammat* is my heir according to Hindu Law (3) I am now old and unable to manage my affairs relating to Zamindari etc. (4) My husband had, further, directed me that I should at the time of the marriage of the said daughter make *sankalap* of the entire property to her and I have done the same accordingly." The first recital strictly speaking is incorrect. *Musammat* Abhairaj Kuar was not an issue of *Musammat* Chauras Kuar, but we attach no importance to this. As to the second, recognition of the right of inheritance of *Musammat* Abhairaj Kuar to her father's estate was thrown entirely overboard by the defendant's (including *Musammat* Chauras Kuar's) admission in paragraph 3 of the compromise of the custom prevalent in the family of Sambar Singh of the exclusion of daughters and their sons from inheritance. As to the third, it furnishes, in our opinion, a strong support to the arguments of the learned Counsel for the appellant that the lady had parted with the management of her property in favour of the defendants before the execution of the

deed in question. As to the fourth, there is no independent evidence in support of this recital of fact in the deed. It was repeated in the written statement filed on behalf of *Musammat* Abhairaj Kuar and *Musammat* Chauras Kuar in the reversioners' case (Exhibit 4 paragraph 12) and finds place amongst the several pleas raised in the written statement filed in the suit out of which this appeal has arisen, we have no doubt in our minds that the recital in question is a pure invention and is the product of brains far superior to *Musammat* Chauras Kuar's, the object of which was to furnish a plea of defense of any attack by the reversioners on the deed of gift. The subsequent events justified the danger which was intended to be warded off by this false recital. When Soambar Singh died both his daughters, *Musammat* Abhairaj Kuar and *Musammat* Munni, were alive. We, therefore, regard it as highly improbable that he would have given such testamentary directions as are attributable to him in this recital. Even if he had done so, it is equally improbable that the lady *Musammat* Chauras Kuar would have deprived her own daughter Munni, who was admittedly alive at the time of *Musammat* Abhairaj Kuar's marriage, of her chances of inheritance in the estate of her father. We have thus seen that some of the motives stated in this deed are either false in fact or not of such a strong character as would have induced *Musammat* Chauras Kuar in all human probability to make the gift in question.

As regards the compromise, it is sufficient to point out that it treats the whole of the property in the possession of the lady as if she had inherited it from her husband although, as we have shown at length at an earlier part of this judgment, that one part of it was acquired by her without any title in virtue of her possession after *Musammat* Qadam Kuar's death for over a period of 12 years. Such a treatment of the property in the compromise was obviously for the benefit of the reversioners. In fact there is no question of balance of advantages lying on one side or another between the parties to the compromise. *Musammat* Chauras Kuar gets nothing under it. The whole estate is divided into two equal shares between *Musammat* Abhairaj Kuar and her sons on one side and the reversioners on the other. Not only that but the latter obtain immediate proprietary possession of their share in the spoils. We are unable to regard such a disposition of property having been consented to by *Musammat* Chauras Kaur with her free and independent judgment.

It now remains for us to apply the law to the facts of this case as we have found them. The provisions of section 16 of the Indian Contract Act (IX of 1872) must be our guide in this respect. An analysis of that section has recently been made by Lord Shaw in his judgment in *Poosathurai* v. *Kannappa Chettiar* (9). His Lordship said "And where the relation of influence as above set forth has been established, and the second thing is also made clear, *viz.*, that the bargain is with the influencer and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent." If this rule of law is laid alongside of the facts of the present case, to use the language of Lord Shaw, it is abundantly clear that every element required by the rule to establish a case of undue influence is furnished by the facts which are found by us in this judgment. There can be no shadow of doubt that the defendants Nos. 2 and 3, that is, Raghubir Singh husband and Ganpat Singh the eldest son of *Musammat* Abhairaj Kuar, stood in a fiduciary relation to *Musammat* Chauras Kuar. The case before us is very similar to the case of *Wajid Khan* v. *Ewaz Ali Khan* (10). In delivering the judgment of the Privy Council in that case Lord Morris made the following observations:—"Dalmir Khan held a highly fiduciary position in regard to Rani Sadha Bibi, who was alleged to have executed it; she was a lady 65 years of age and comparatively illiterate, and she does not seem to have had any advisor or Counsel-

(9) 55 Ind Cas. 447: 47 I. A. 1: 38 M. L. J. 349; 11 L. W. 455; 18 A. L. J. 344; (1920) M. W. N. 3 7; 2 U. P. L. R. (P. C.) 62; 22 Bom. L. R. 534; 13 Bur. L. T. 28; 43 M. 546; 27 M. L. T. 3 6 P. C.).

(10) 18 I. A. 144; 18 C. 545; 6 Sar. P. C. J. 46; Rafique & Jackson's P. C. No. 128; 9 Ind. Dec. (N.S.) 364.

lor except Dalmir Khan, who appears to have had great influence over her, for one of the exhibits in the case is a Will made by her in his favour in the year 1862 only some three years before the execution of the document which is in question in this case. He certainly filled such a position towards her as to render it incumbent upon him to show that he had made a proper use of the confidence reposed in him by her, and that the execution of the document granted without any valuable consideration and from which he obtained important pecuniary benefit, was free from all attempt at undue influence." We may point out that this Dalmir Khan was Rani Sadha Bibi's confidential manager of the estate. In the case before us we have no doubt that *Musammat* Chauras Kuar reposed considerable confidence and trust in Raghubir Singh and Ganpat Singh since they came to live with her and we have equally no doubt that these two men betrayed the confidence which was thus placed in them. *Musammat* Chauras Kuar clearly stood in need of independent advice on a transaction of the nature of the deed of gift and the compromise both of which have the effect of depriving her of even the barest means of subsistence. We need hardly say that the onus which under the circumstances of the case heavily lay upon the defendants has not been discharged. In fact no attempt whatsoever seems to have been made in that direction. On the contrary these defendants have taken back the plaintiff's case at her face. The trust and confidence which these persons enjoyed has not been betrayed once or twice but on occasions more than that. The deed of gift or the draft of it was followed by a petition to the Deputy Commissioner of Sultanpur asking for determination of the proper stamp duty to be paid thereon. That petition, in our opinion, had no other object but to obtain an admission of the deed of gift from the mouth of *Musammat* Chauras Kuar. Then we come to her deposition in the mutation proceedings. Here again she has spoken under the sceptre of Ganpat Singh. After that we come to the written statement in the reversioners' suit. We find again the shadow of Raghubir Singh and Ganpat Singh hovering over it. Finally, the compromise, which marks the consummation of the attempts to obtain advantages which these persons, who stood in relation of active confidence to the lady, successfully made for a long period of time. We have also seen that prior to the compromise and also prior to the mutation proceedings the lady had executed a general power-of attorney on the 14th April 1914 in favour of these two defendants along with Chandika and Dwarka. Who can doubt in these circumstances that there was confidence reposed by one and abused by the other of these two parties for a continuous period of time? We cannot look upon these attempts on the part of the defendant detached from each other. Each transaction is, in our opinion, the product of the same undue influence which the persons acquired some time in 1910 over this old and illiterate lady. The observations of Lord Chief Justice Wilmot in the case of *Bridgman* v. *Green* (11) quoted by Lord Eldon in the leading case of *Huguenin* v. *Baseley* (4) are apposite and we need make no apology for quoting them here:—"In cases of forgery, instructions under the hand of the person whose deed or Will is supposed to be forged to the same effect as the deed or Will, are very material; but in cases of undue influence and imposition they prove nothing for the same power which produces one, produces the other: and, therefore, instead of removing such an imputation, it is rather an additional evidence of it." Lord Macnaghten in delivering the judgment of the Privy Council in the case of *Mahomed Buksh Khan* v. *Hosseini Bibi* (12) observed as follows:—"Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ, and, as a general rule the same questions arise." Then his Lordship proceeds to formulate four such questions:—(1) Was the transaction a righteous transaction, that is, was it a thing which a right-minded person might be required to do? (2) Was it an improvident act? (3) Was it a matter requiring advice? (4) Did the intention of making the gift originated with the donor? Our answers to these questions emerge from our conclusions of facts, which we have recorded above. But

(11) (1755) 2 Ves. 627; 28 E. R. 399.
(12) 15 C. 684; 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 176; 7 Ind. Dec. (N. S.) 1040 (P. C.).

we propose to answer them categorically in a few words again. As to (1) we have no doubt that the advantages gained by the defendants under the gift and the compromise were obtained by means of unconscientious use of the power which they held over the lady and which arose out of the circumstances and the conditions already adverted to by us. We cannot in any sense regard these dispositions as natural. The benefits which the defendants obtained under them are so large and one sided, to use the language of Lord Justice Lindley in the case of *Allcard* v. *Skinner* (7), "as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act." As to the second question, the answer is obvious. The effect of these dispositions was to deprive the lady of her barest means of subsistence. As to the third, we entertain no doubt that the circumstances in which dispositions were made were one of paramount influence which these defendants possessed over the lady. We here quote a passage from the judgment of Justice Kekwich in the case of *Allcard* v. *Skinner* (7) already referred to appearing on page 159:—"but where the paramount influence presumably exists it casts on the possessor of such influence the burden of proving that the gift was free, and it (law) holds an essential part of that proof to be that the donor had competent independent advice" We have already stated our opinion that this case discloses a series of circumstances which had put this lady eminently in need of such advise. "I think that where a relation of confidence is once established either some positive act or some complete case of abandonment must be shown in order to determine it," said Lord Justice Turner in the case of *Rhodes* v. *Bate* (13). No such act of abandonment has been proved by the defendants in this case. As to the fourth, we have already disclosed at length the evidence pointing to the fact that the intention as regards making of the gift originated with the defendants and there is no evidence at all that it originated with the donor.

We, therefore, reverse the finding of the learned Subordinate Judge on the first issue and hold that both the gift and the compromise were the result of undue influence which the defendants Nos. 2 and 3 exercised over the plaintiff. But this finding of ours does not dispose of the appeal. The Court below has omitted to try Issues Nos. 2 to 5 framed by it in the case without the determination of which this appeal, as we have stated above, cannot be finally disposed of. We, therefore, refer those issues for trial to that Court and direct that that Court shall proceed to try those issues and return its findings thereon to this Court within one month from the date the order of this Court reaches into the hands of the learned Subordinate Judge. No additional evidence shall be admitted. Two weeks from the date of the findings will be allowed to the parties for filing objections.

DALAL, A. J. C.—I concur.

J. P. *Appeal allowed.*

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(13) (1866) 1 Ch. App. 252 at p. 260; 35 L. J. Ch. 267; 12 Jur. (N. S.) 178; 13 L. T. 778; 14 W. R. 292.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 295 OF 1920.

December 7, 1921.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Venkatasubba Rao.

S.R.M. S.T. R.M. RAMASWAMI CHETTIAR THROUGH HIS AUTHORISED AGENT KUPPAN AYYANGAR—APPELLANT

versus

T. S. RAMASWAMI IYENGAR, OFFICIAL RECEIVER, MADURA AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 4, 5, 56 (3)—Sale by Official Receiver—Application by purchaser for removal of obstruction and delivery of possession—Jurisdiction of Insolvency Court.

A purchaser from the Official Receiver, of a property of an insolvent, can obtain under the Provincial Insolvency Act of 1920 an order from the Insolvency Court for delivery of possession of the property, where his application is resisted by a third party; and the method of executing the warrant under section 5 will be the same as that prescribed for the executing of a warrant issued by the Court in the exercise of Original Civil Jurisdiction, [p. 396, cols. 1 & 2.]

RAMASWAMI CHETTIAR v. OFFICIAL RECEIVER, MADURA.

Clause 3 of section 56 of the new Provincial Insolvency Act, V of 1920, is not limited to the case of an application by the Official Receiver, but applies equally to an application by a purchaser from the Receiver for delivery of possession. [p. 396, col. 1.]

An Insolvency Court has plenary powers under the provisions of Act V of 1920 to deal with the claims of third parties. [p. 397, col. 1.]

Guntapalli Narasimhayya v. *Malapati Veeraraghavulu*, 42 Ind. Cas. 525; 41 M. 440; 6 L. W. 694; (1917) M. W. N 857, *Official Assignee of Madras* v. *Vadavalli Ammal*, 36 Ind. Cas. 524; 4 L. W. 425; 20 M. L. T. 311; 40 M. 810, *Maddipoti Peramma* v. *Gandrapu Krishnayya*, 47 Ind Cas. 208; 8 L. W. 136; (1918) M. W. N. 479; 24 M. L. T 106 and *Kochu Mahomed Asan Tharagan* [*Official Receiver of Tinnevelly*] v. *Sankaralinga Mudaliar*, 62 Ind. Cas. 495; 44 M. 524; 40 M. L. J. 219; (1921) M. W. N. 236; 14 L. W. 505, distinguished.

Minatoonnessa Bibee v. *Khatoonnessa Bibee*, 21 C. 479; 10 Ind. Dec. (N. S.) 949, applied.

Appeal against an order of the District Court, Madura, dated the 23rd April 1920, in Miscellaneous Petition No. 178 of 1920 in Insolvency Petition No. 3 of 1917.

FACTS appear from the judgment.

Mr. *A. Krishnaswamy Aiyar*, for the Appellant.—The lower Court erred in holding that the Insolvency Court had no jurisdiction to order delivery of possession on the application of the purchaser from the Receiver. The provisions of the new Insolvency Act (IV of 1920) are wider and more elastic. The decisions negativing such power are all under the old Act. Questions arising between third parties may be decided under section 4. Section 5 should not be restricted to applications by the Receiver. When the Court can pass an order it has power to execute its order by the ordinary machinery.

Mr. *K. V. Krishnaswamy Aiyar*, for the Respondents:—The Insolvency Court has very limited jurisdiction under section 4. It can entertain applications by the Receiver and execute orders passed thereon It has no jurisdiction to deal with the rights of third parties. See *Guntapalli Narasimhayya* v. *Malapati Veeraraghavulu* (1), *Official Assignee of Madras* v. *Vadavalli Ammal* (2), *Maddipoti Peramma* v. *Gandrapu Krishnayya* (3) and *Kochu Mahomed Asan Tharagan* [*Official Receiver of Tinnevelly*] v. *Sankaralinga Mudaliar* (4).

JUDGMENT.—This appeal in effect raises the question whether a purchaser from the Official Receiver, of a property of the insolvent whom the Receiver represents, can obtain an order from the Insolvency Court for delivery of possession of the property, where his application is resisted by a third party.

This appeal has been argued before us on the footing that the rights of the parties are governed by the provisions of the Provincial Insolvency Act, Act V of 1920. It is necessary to examine equally the terms of sections 4, 5 and 56 of this Act. By section 56 (3) it is provided that "where the Court appoints a Receiver, it may remove the person, in whose possession or custody any such property as aforesaid is, from the possession or custody thereof:

"Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove"

This section clearly applies to the case of a Receiver applying for the removal of an obstructor from the possession of the property claimed to be the property of the insolvent. It is also clear that, for the purpose of determining the right of the Receiver as against the obstructor, to the possession of the property, the Court can hold an enquiry under this section.

There is no section in the old Provincial Insolvency Act, Act III of 1907, corresponding to section 4 of the present Act. There were conflicting decisions in regard to the power of the Court to deal with the claim of third parties against the insolvent and it was to set at rest the doubt that existed upon the subject that section 4 was introduced into the present Act. It will be seen that very wide powers are given to the Court under section 4: the Court may decide any question which it may deem it expedient or necessary to decide for the purpose of doing complete justice or making complete distribution of property. Sub section (2) refers, in terms, to the claims between the debtor and the debtor's estate on the one hand and all claims against him or it on the other hand. It is also to be noted that a

(1) 42 Ind. Cas. 525; 41 M. 440; 6 L. W. 694; (1917) M. W. N. 857.

(2) 36 Ind. Cas. 524; 4 L. W. 425; 20 M. L. T. 311; 40 M. 810.

(3) 47 Ind Cas. 208; 8 L. W. 136; (1918) M. W. N. 479; 24 M. L. T. 106.

(4) 62 Ind. Cas 495; 44 M. 524; 40 M. L. J. 219 (1921) M. W. N. 236; 14 L. W. 505.

discretion is given to the Court to decide the question in the insolvency proceedings and that it is not binding upon the Insolvency Court to decide under this section every claim which is brought up before it.

Passing to section 5, it makes provision *inter alia*, for effect being given to the orders and decrees passed by the Insolvency Court. Under these sections has the purchaser from the Official Receiver the right to apply to the Court for being put in possession of the property purchased by him? The District Judge disallowed the applications on the ground that Court cannot issue a delivery warrant on the application of a stranger to the proceedings. Clause (3) of section 56 is not limited to the case of an application by the Receiver and the terms of the clause are general. Why should we restrict the operation of this clause to applications by the Receiver himself? The learned Vakil for the respondent asks us, virtually, to introduce into the section the words "on the application of the Receiver." In our opinion, there is no justification for refusing to give to the words of clause (3) of section 56 their natural meaning and for restricting the scope of the clause.

It has also been contended before us for the respondent that the Insolvency Court is not vested with powers to execute its orders except to the limited extent of being enabled to execute orders in favour of the Receivers appointed under the Act. If it is conceded that there is an executing machinery that is available to the Receiver, we fail to see on what principle this machinery cannot be availed of by a purchaser from the Receiver. The execution of any order made by the Court under section 56 or section 4 will be regulated by the terms of section 5. For instance, if an order for a warrant of possession is made in favour of the Receiver or of a purchaser from him, the method of executing the warrant under section 5 will be the same as that prescribed for the executing of a warrant issued by the Court in the exercise of original civil jurisdiction. The Legislature having invested the Insolvency Courts with extensive powers under section 4, it would be, in our opinion, anomalous to hold that the Court is powerless to give effect to their judgments or orders. The terms of the sections 4, 5, and 56 do not suggest that any such limitation is intended. We are, therefore, unable to accept the contention of the learned Vakil for the respondent that the auction-purchaser cannot, under the provisions of the Insolvency Act of 1920, apply to the Insolvency Court for a warrant of possession.

Several cases were relied on by the respondent. The first case cited by him is *Guntapalli Narasimhayya* v. *Malapati Veeraraghavulu* (1). Certain property alleged to belong to an insolvent was sold by the Receiver and the purchaser while attempting to take possession was obstructed by the appellants who claimed to be in possession as owners. The District Judge purporting to act under section 47 of Act III of 1907 ordered possession to be given to the purchaser. The High Court held that the District Judge had no jurisdiction to pass such an order. Abdur Rahim. J., at page 441*, says "it would be going much too far to say that a Judge in Insolvency in the *mufassil* has powers by a summary proceeding to decide questions of title with respect to property which is claimed by third persons." The Courts have power to decide questions of title under section 4 of Act V of 1920, and the reasoning given in this judgment would not, therefore, apply to an application made under the present Act. The judgment proceeds upon the ground that section 47 of Act III of 1907 which corresponded to section 5 of the present Act did not apply because there was no decree and a sale by the Receiver was not a sale in execution of a decree. We are of the opinion that the Court has the power not only to make an order in favour of the purchaser but also to give full effect to it. We fail to see that there is anything in the terms of section 47 which fettered the power of the Court because the sale happened to be a sale made by a Receiver and not a sale made in pursuance of a decree. However, it is sufficient to say that this is a decision under the old Act and that it is distinguishable on that ground, especially in view of the enlarged powers possessed by the Court under the present Act.

We have no doubt that the Insolvency Court under Act V of 1920 has ample power to deal with questions arising between the estate of an insolvent and a third party. Section 4 is modelled on section 7 of the Presidency Towns Insolvency Act, Act III

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of 1909. Under this corresponding provision of the Presidency Towns Insolvency Act, it has been held that the Court is vested with jurisdiction to deal with questions arising between the Official Assignee and third parties. This point was expressly decided in *Official Assignee of Madras* v. *Vadavalli Ammal* (2). Bakewell, J. sitting in the Insolvency Court held that, although under the old Act, 11 & 12 Victoria Chapter 21, the Insolvency Court had a discretion to exercise jurisdiction over third parties, the Act III of 1909 effected a change in the law, and that the jurisdiction was curtailed. This view was not accepted by the appellate Court. The provisions of section 4 of the present Provincial Insolvency Act are if anything, wider than the terms of section 7 of the Presidency Towns Insolvency Act, Act III of 1909. We have, therefore, no hesitation in holding that the Insolvency Court has plenary powers to deal with the claims of third parties under the provisions of the present Provincial Insolvency Act.

The next case cited to us is *Maddipoti Peramma* v. *Gandrapu Krishnayya* (3). Bakewell, J. took the view that, under section 18 (3) of Act III of 1907, the Court had power to remove a person in possession of property of the insolvent from possession, but that the power was not intended to provide for the determination of questions of title as between the insolvent and third parties. Krishnan, J took the opposite view on this matter. But they agreed in holding that an order passed by the District Judge, on the application of a purchaser of the insolvent's property from the Official Receiver, directing the third party claiming title, to deliver possession of the property to the purchaser, was without jurisdiction. The observations we made in regard to *Guntapalli Narasimhayya* v. *Malapati Veeraraghavulu* (1) apply to this case also and we are prepared to hold that this case being a decision under the old Act, does not stand in our way of deciding in favour of the rights contended for on behalf of the purchaser from the Receiver.

We have been referred to *Kochu Mahomed Asan Tharagan* [*Official Receiver of Tinnevelly*] v. *Sankaralinga Mudaliar* (4), which is also a case decided under the old Act III of 1907. The observations of Seshagiri Ayyar, J. at page 532* that "section 4 of the present Act should not be regarded as if for the first time a new power had been conferred" are *obiter*, and it is unnecessary to discuss this point.

We may observe that in the present case an application was also made by the Official Receiver to the District Court asking for possession of the property. He applied that the auction-purchaser might be put in possession of the property on his behalf. The learned District Judge was of the opinion that, under section 13 (3) of the old Act the Official Receiver having ceased to be the owner could not apply. It is unnecessary to decide the question whether, after parting with his interest, the Official Receiver can apply, because, as stated above we are of opinion that the application on behalf of the auction-purchaser would lie to the Insolvency Court and that the District Judge was in error in refusing to entertain the application.

We would also like to refer to *Minatoonnessa Bibee* v. *Khatoonnessa Bibee* (5), where it was held by Sale, J. that "a purchaser at a Receiver's sale had a right to obtain the assistance of the Court in obtaining possession." No doubt, the Receiver referred to here was a Receiver appointed in a suit. At page 482 reference is made to an order made by the Calcutta High Court in an administration suit in which the Receiver appointed in the suit was directed to sell and upon the application of the purchaser an order was made directing possession to be given to the purchaser. In the judgment are given several instances of similar orders made by the Calcutta High Court in the exercise of its original civil jurisdiction. We think that there is no distinction in principle in this respect between a purchaser from a Receiver appointed in a suit and a purchaser from a Receiver appointed in regard to an insolvent's property.

The District Judge in the present case, on account of the view he took of his powers, refused to deal with the merits of the claim of the obstructor who is the son of the insolvent and who put forward certain contentions. We set aside the order of the District Judge and remand the application to be disposed of by him according to law in

(5) 21 C. 479; 10 Ind. Dec. (N. s.) 949.

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the light of the observations contained in this judgment.

Costs of this appeal will abide the result.

M. C. P.

J. P. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 103, 104 AND 105 OF 1921.

June 2, 1921.

Present:—Syed Wazir Hasan, A. J. C.

GHULAM SARWAR KHAN—PLAINTIFF—APPELLANT

versus

MOHAMMAD ALI KHAN—DEFENDANT—RESPONDENT.

RAHIM BAKHSH KHAN—PLAINTIFF—APPELLANT

versus

MAHMUD ALI KHAN—DEFENDANT—RESPONDENT.

Appeal, second—Evidence offered on one side or other, whether question of law—Possessory right—Trespasser—Inheritance—Khewat, *entry in—Presumption—Heirs, position of—Evidence Act (I of 1872), s. 13—Judgment not* inter partes, *whether admissible in evidence—Admission of party—Presumption.*

The question of whether any evidence has been offered on one side or the other is essentially a question of law. [p. 399, col. 1.]

Nafar Chandra Pal v. *Shukur Sheikh*, 51 Ind. Cas. 760; 45 I. A. 183; 46 C. 189; 23 C. W. N. 345; 9 L. W. 552 (P. C.), referred to.

A possessory right even that of a trespasser is heritable. [p 399, col. 2.]

Wajid Khan v. *Dargahi Khan*, 9 O. C. 167, referred to.

The entry in a *khewat* is at least *prima facie* evidence of possession and if there is nothing to show any alteration in the entry the legitimate presumption arises that the state of things indicated by the entry continued at least up to the date of the death of the person, whose name appears in the *khewat*, if not beyond it, when possession may devolve on his heirs. [p. 399, col. 2.]

The judgment passed in a previous suit, although not relating to the parties to the subsequent suit, is nevertheless admissible in evidence under section 13 of the Evidence Act to show the fact that the judgment was passed, and, therefore, it is necessarily evidence of the following facts: who the parties to the previous suit were; what the land in dispute was and who was declared entitled to retain possession For this purpose, and to this extent, it is admissible in evidence for and against every one when the fact of possession at its date has to be ascertained. [p 400, col. 2.]

Ram Ranjan Chakerbati v. *Rum Narain Singh*, 22 I. A. 60; 22 C. 533; 5 M. L. J. 6; 7 Sar. P. C. J. 630; 11 Ind. Dec. (N. S.) 355 (P. C.), *Bitto Kunwar* v. *Kesho Parsad Misr*, 24 I. A. 10; 19 A. 277 at p 289; 7 Sar. P. C. J. 131; 1 C. W. N. 265; 9 Ind. Dec (N. S.) 181, (P C) and *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani*, 29 I. A. 24; 29 C. 187; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P.C.), referred to.

What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established. [p. 400, col. 2]

Chandra Kunwar v. *Chaudhri Nurpat Singh*, 29 A. 184; 9 Bom. L. R 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102 (P. C.), referred to.

Appeal from decrees of the Subordinate Judge, Sultanpur, dated the 11th January 1921, confirming decrees of the Munsif, Musafirkhana, dated the 14th August 1920.

Mr. *Niamatullah*, for the Appellant.

Mr. *Basudeo Lal*, for the Respondent.

JUDGMENT.—These three appeals arise out of three separate suits brought in the Court of the Munsif of Musafirkhana for possession of shares in the estate of one Wazir Khan, who died in September 1908. Wazir Khan's heirs under the Hanafi Muhammadan Law were his three brothers, Jahangir Khan, Talewand Khan and Khudawand Khan and his widow, *Musammat* Raj Bibi. Rahim Bakhsh Khan plaintiff in one of the three suits is one of the sons of Talewand Khan. Ghulam Sarwar Khan, the plaintiff in the second suit, is the son of Khudawand Khan. The third suit was instituted by Rahim Bakhsh Khan and Ramzan Khan as assignees of the shares of the daughters of Khudawand Khan. The defense raised a number of pleas almost every one of which has now disappeared in view of the findings of the lower Appellate Court.

The only question, which remains to be considered in these appeals, is whether the plots of land specified at the foot of each of the plaints in the three suits were held by Wazir Khan as a mortgagee. The lower Appellate Court in agreement with the Court of first instance has answered the question in the negative. These second appeals seek to challenge that finding. The ground upon

which the lower Appellate Court has come to that conclusion may be stated in the words of the Court itself:—"In order to show that Wazir Khan held the plots Nos. 164, 167, 211, 212 and 152 as mortgagee he (the plaintiff) has relied on the entries in Exhibit 4, extract from *khewat bandobast hal*. This document shows that Wazir Khan was a mortgagee of these plots then. But there is no evidence on the record to show that when Wazir Khan died these mortgages subsisted and that these were his assets. The plaintiffs have not filed the deeds of mortgage to show that Wazir Khan possessed mortgagee rights in those plots at the time of his death".

On behalf of the respondent it was contended that the finding quoted above is a finding of fact and this Court is not competent to override it. In view of the fact, which will be stated hereafter, it is not possible to treat this finding as a pure finding of fact. Lord Buckmaster in delivering the judgment of His Majesty's Privy Council in the case of *Nafar Chandra Pal* v. *Shukur Sheikh* (1) made the following important observation on the question under consideration:—"Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and *the question of whether any evidence has been offered on one side or the other*; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact." I am of opinion that the question, which I have to decide in this case, falls within the dictum, which I have quoted above in italics.

Exhibit 4 is the *khewat* prepared at the last revision of the Settlement in the year 1893-94 of the District of Sultanpur. Except with regard to plots Nos. 113, 45 and 6/2 every one of the plots specified in these plaints as forming the estate of Wazir Khan is entered in that *khewat* as possessed by Wazir Khan in the capacity of a mortgagee. The claim of the plaintiffs also seeks to recover the possession of their shares in these plots in the character of a mortgagee and no more. Section 34 of the Land Revenue Act (III of 1901) lays down the law which necessitates entries in the revenue records as to changes in the possession by succession or transfer of any property or other right. It is a legitimate presumption to make, in the absence of any entry indicating such a change, that Wazir Khan continued in possession of the plots entered in the *khewat*. Even if we infer nothing more than mere possession on the part of Wazir Khan up to the time of his death of these plots it is well settled law that his heirs would be entitled to a share in the inheritance of his possessory title. In the case of *Wahid Khan* v. *Dargahi Khan* (2) it was held with reference to several decisions of the High Courts in India as well as to *Asher* v. *Whitlock* (3) that a possessory right even that of a trespasser is heritable. It was not disputed before me nor can it possibly be disputed that the entry in the *khewat* is at least *prima facie* evidence of possession and if there is nothing to show any alteration in the entry the legitimate presumption arises that the state of things indicated by the entry continued at least up to the date of the death of the person, whose name appears in the *khewat* if not beyond it, when possession may devolve on his heirs. This view of the evidential value of the *khewat* has clearly been ignored by the learned Subordinate Judge, who tried these appeals in the Court below.

But apart from the *khewat*, there is other evidence on the record, which was offered by the plaintiffs in support of their title to the plots in question as proving that long after the death of Wazir Khan these plots were recognised under a judicial decision to have formed the assets of Wazir Khan liable to be distributed amongst his heirs. It is strange that this evidence has been entirely overlooked by the learned Subordinate Judge.

It appears that in 1919 two suits were brought, one by the four sons of Jahangir Khan and another by another son of Talewand Khan for the recovery of their shares of inheritance in the estate of Wazir Khan from the hands of the present defendant.

(1) 51 Ind. Cas. 760; 45 I. A. 188; 46 C. 189; 23 C. W. N. 385; 9 L. W. 552 (P. C.).

(2) 9 O. C. 161.

(3) (1865) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26; 148 R. R. 598.

Amongst the properties claimed by those plaintiffs were included the plots which are the subject-matter of dispute in these suits, that is, the plots which Wazir Khan held in the character of a mortgagee. These two suits were disposed of by one judgment of the 19th December 1919 and Exhibit 2 is a certified copy of it. In the statement of pleadings in that judgment the Court observed that the defendant "admits that Wazir Khan was the owner and mortgagee of the properties in question." It is not suggested that this admission related to any other property than the one held by Wazir Khan as a mortgagee and which is in dispute in these suits as it was in the earlier two suits. In fact it is impossible to make any such suggestion in view of the fact that these plots are numerically enumerated in the decree, which followed the judgment.

As I have already observed this evidence which, to my mind, is of strongest character that could be produced in the case is not mentioned at all in the judgment of the lower Appellate Court. I am inclined to think that had this judgment been brought to the notice of the learned Subordinate Judge he would at least have discussed the question of its probative value and then either rejected it altogether or admitted it in evidence. It was, however, argued before me that inasmuch as the present plaintiffs were no party to the litigation in which the judgment (Exhibit 2) was passed that document is inadmissible in evidence in the present case.

I am of opinion that this is a far belated contention. There can be no doubt whatsoever that in spite of the fact that the present plaintiffs were no party to that litigation the judgment which ended that litigation is admissible under the provisions of section 13 of the Indian Evidence Act. There is no doubt that at a certain remote period in the past this was treated as a moot question but there have been at least three decisions of the Privy Council besides the decisions of the several High Courts in India, which place the matter beyond any doubt: see the cases of *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (4), *Bitto Kunwar* v. *Kesho Prasad Misr* (5) and *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (6). In the case of *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (4) Lord Shand observed as follows:—"Their Lordships are of opinion that although the predecessor of the Rajah was no party to that litigation it was competent to use the judgment as evidence showing the rent paid for the possession at and prior to that date, now nearly eighty years ago". In the case of *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (6) Police orders made under various sections of the Criminal Procedure Code, deciding who was in possession of the disputed land, were admitted in evidence under section 13 of the Indian Evidence Act to show the fact that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders, themselves, namely, who the parties to the dispute were, what the land in dispute was; and who was declared entitled to retain possession. For this purpose, and to this extent, such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained. Exhibit 2, therefore, is admissible in evidence in support of the title of the heirs of Wazir Khan to the mortgaged lands as well. At any rate the defendant admitted in that litigation that these plots formed part of Wazir Khan's estate. It is true that the initial onus of proving the fact that the plots subject to the mortgage formed part of the estate of Wazir Khan and were capable of being distributed amongst his heirs lay on the plaintiff, but what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted the fact admitted must be taken to be established See the observations of Lord Atkinson in the case of *Chandra Kunwar* v. *Chaudhri Narpat Singh* (7). It is not suggested that the defendant offered any evidence to rebut the presumption thus

(4) 22 I. A. 60; 22 C. 533; 5 M. L. J. 7; 6 Sar. P. C. J. 530; 11 Ind. Dec. (N. S.) 355 (P. C.).

(5) 24 I. A. 10; 19 A. 277 at p. 289; 7 Sar. P. C. J. 131; 1 C. W. N. 265; 9 Ind. Dec. (N S.) 181 (P. C.).

(6) 29 I. A. 24; 29 C. 187; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.).

(7) 29 A. 184; 9 Bom. L. R. 267; 2 M. L. T. 100; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102 (P. C.).

arisen out of his own admission. It should be remembered that this admission was made 10 years after the death of Wazir Khan, so there can be no doubt that Wazir Khan was possessed of these plots at the time of his death.

The pleadings in this case also establish that the defendant practically admitted that the plots in question along with other properties formed part of Wazir Khan's estate. The description of the properties involved in these suits was given in paragraph 2 of the plaint. That paragraph distinctly stated that the plots in question were held by Wazir Khan in the character of a mortgagee. In paragraph 2 of the written statement in reply to the allegations made in the corresponding paragraph of the plaint the defendant said :—"He does not admit that he (Wazir Khan) was also the proprietor of the land specified below the relief clause and remained in possession thereof during his lifetime." But paragraph 2 of the plaint did not allege that Wazir Khan held these plots as the proprietor of them. The answer, therefore, given in paragraph 2 of the written statement was clearly evasive. Be that as it may, there is no doubt that the plaintiffs have discharged the onus by offering evidence which must be admitted in their favour and against the defendant and to which reference has already been made.

The learned Subordinate Judge has, it would appear from the quotation already given in this judgment, made a point of the fact that the plaintiffs had not filed the deeds of mortgage. This is an extraordinary view to take of the circumstances of the case. The defendant is admittedly in possession of the whole estate of Wazir Khan. He also propounded a Will in his favour which covered all that belonged to the deceased gentleman. How could these plaintiffs, who are heirs to the inheritance, have produced these mortgage-deeds? The presumption is that these deeds must have come into the possession of the defendant along with the rest of the property of the deceased. It is admitted by the learned Pleader for the appellants that his clients in all the three suits have failed to establish their title in respect of the three plots Nos. 45, 143 and 6/3. They are, therefore, not entitled to any share in those plots.

I, therefore, allow the appeals, set aside the decrees of the lower Appellate Court to the extent to which it dismissed the plaintiff's suit and grant a decree to each of these three appellants for their shares as specified in the judgment of the Court of first instance in plots Nos. 154, 67, 211, 212 and 152 as well. The appellants will be entitled to their costs in all the three Courts.

J. P.

Appeals allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 395 OF 1920.

April 8, 1921.

Present :—Pandit Kanhaiya Lal, J. C.

NAUN DH LAL—DEFENDANT—APPELLANT

versus

MAHADEO SINGH—PLAINTIFF—RESPONDENT.

Mortgage—Further charge, deed of — Redemption of mortgage not to be made unless deed of further charge paid off, effect of—Consolidation of mortgages.

A deed of further charge expressly providing that the mortgagor would not be entitled to redeem the earlier mortgage without paying the money due on that deed and containing a covenant for the consolidation of the later deed with the earlier one, is enforceable against the mortgagor and the earlier mortgage cannot be redeemed without the payment of the money due on the later deed. [p. 402, cols. 1 & 2.]

Ram Adhin Misra v. *Sitla Bakhsh Singh*, 25 Ind. Cas. 905: 17 O. C. 803, distinguished from.

Meharban Singh v. *Raghunath Singh*, 49 Ind. Cas. 115; 5 O. L. J. 768, referred to.

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 1st September 1920, modifying a decree of the Additional Munsif, Sultanpur, dated the 6th April 1920.

Mr. *Niamatullah*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption brought by the plaintiff in respect of a mortgage effected by his father, Mahabir Singh, in favour of the defendant on the 19th May 1891. The mortgage was usufructuary and there is no

question about the money payable on account of that mortgage to the defendant.

The dispute between the parties relates to a deed of further charge set up by the defendant. That deed purports to have been executed on the 4th July 1894 for a sum of Rs. 471 re payable with interest at 6 per cent. per annum and contains a covenant that the money due on that deed shall be paid before the mortgage of the 19th May 1891 is redeemed and that in no case the mortgagor shall be entitled to redeem the mortgage without paying the money due on the deed of further charge. The deed describes itself as a *rehannama zar masid* and specifies the same plots which were mortgaged in the earlier deed.

The Court of first instance found that this deed was proved as a bond, but not as a deed of mortgage. It, however, proceeded to require the plaintiff to pay the money due on it as a condition precedent to the redemption of the earlier mortgage, on the ground that it contained a covenant which was binding on the parties. It was contended by the plaintiff that the property comprised in the deed of further charge was ancestral property and that Mahabir Singh had no right to charge it for the payment of any debt taken by him without a legal necessity binding on the family; but the finding of the Court of first instance was that the property was not ancestral property, inasmuch as it had been obtained by the mortgagor under a devise from his grand-uncle, Nidha Singh.

The lower Appellate Court, however, came to the conclusion that the deed set up by the defendant was proved as if it were a deed of mortgage, but the money due on it was not recoverable from the plaintiff because the covenant to pay that money was personal. The lower Appellate Court relied on the decision in *Ram Adhin Misra* v. *Sitla Bakhsh Singh* (1). But that decision was clearly inapplicable, because the question for consideration in that case was whether a personal undertaking not to redeem a mortgage till the money due on another deed was paid was not enforceable against a transferee for value. The deed now under consideration expressly provides that the mortgagor would not be entitled to redeem the earlier mortgage without paying the money due on that deed. It contains a covenant for the consolidation of the later deed with the earlier one, supported by a charge which is enforceable against the plaintiff, who is the heir of the mortgagor. In *Meharban Singh* v. *Raghunath Singh* (2) it was held under somewhat similar circumstances that the earlier mortgage could not be redeemed without the payment of the money due on the later deed.

It still remains to consider whether the property specified in the deed of further charge was the self-acquired property of Mahabir Singh. The lower Appellate Court was inclined to the view that the finding of the Court of first instance on that point was correct and on an examination of the evidence adduced there seems no room for doubt that that is so. The property in question belonged to Nidha Singh, from whom it passed by virtue of a devise to his grand-nephew, Mahabir Singh. It was not ancestral in the hands of Mahabir Singh, who had a right to charge it for the payment of the debt taken by him from the defendant appellant. No question of legal necessity, therefore, arises.

The appeal is allowed and the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs throughout, except in so far that in case of non-payment instead of the direction that the plaintiff shall be debarred from all right to redeem the property, a direction that the mortgaged property shall be sold will be substituted.

J. P. *Appeal allowed.*

(1) 25 Ind. Cas. 905; 17 O. C. 303.

(2) 49 Ind. Cas. 115; 5 O. L. J. 768.

PALANIAPPA CHETTY v. PALANIAPPA CHETTY.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 282 OF 1920.
(CIVIL REVISION PETITION No. 132 OF 1921.)
August 2, 1921.

Present :—Sir William Ayling, KT., Officiating Chief Justice, and Mr. Justice Kumaraswami Sastri.

R. M. P. PALANIAPPA CHETTY —PETITIONER—APPELLANT

versus

M. S. A. P. L. PALANIAPPA CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 4, O. XLIII, r. 1 (s)—Order directing Receiver to deposit money in Court, whether appealable.

An order requiring a Receiver to deposit a certain sum of money due by him into Court unaccompanied by any direction as to the attachment of his property, is not an order made under rule 4 of Order XL of the Civil Procedure Code, and consequently is not appealable under rule 1 (*s*) of Order XLIII of the Code. [p. 404, cols. 1 & 2.]

Keshobati Kumari v. *Macgregor*, 35 C. 568: 12 C. W. N. 648, *Mohini Mohan Patra* v. *Baroda Kanta Sarkar*, 12 Ind. Cas. 780; 4 C L. J. 445, *Ganesh Lal* v. *Kumar Satya Narayan Singh*, 54 Ind. Cas 207, 4 P. L. J. 636; (1920) Pat 35, *Samhuatta Singh* v. *Bhagwati Singh*, 55 Ind Cas. 15; 5 P. L. J. 97: (1920) Pat. 121, cited and followed.

Shrinivas Kuppuswami Mudaliar v. *Waz*, 59 Ind. Cas. 421; 22 Bom. L. R. 1126; 45 B. 99, distinguished.

Civil miscellaneous appeal against an order of the Additional Subordinate Judge, Ramnad, at Madura, dated the 20th September 1920, in I. A. Suits Nos. 129 and 177 of 1919, in Original Suit No. 68 of 1916.

Civil Revision Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise an order of the Additional Subordinate Judge, Ramnad, at Madura, in I. A. Suits Nos. 129 and 177 of 1919, in Original Suit No. 68 of 1916.

FACTS appear from the judgment.

Messrs. *K. S. Jayaram Aiyar* and *P. R. Narayana Aiyar*, for the Respondent, took the preliminary objection that no appeal lay under Order XLIII, rule 1 (*s*), read with Order XL, rule 4, Civil Procedure Code. Order XL, rule 4, specifically deals with attachment of property in the hands of the Receiver and for its realization. In the present case there is only a direction to the Receiver to pay money into Court. There is no order for attachment. *Keshobati Kumari* v. *Macgregor* (1), *Samhautta Singh* v. *Bhagwati Singh* (2) *Mohini Mohan Patra* v. *Baroda Kanta Sarkar* (3).

Mr. *O. S. Venkatachariar*, for the Appellant, relied on *Shriniwas Kuppuswami Mudaliar* v. *Waz* (4).

JUDGMENT.—Civil Miscellaneous Appeal No. 282 of 1920 is an appeal against the order of the Additional Subordinate Judge of Ramnad directing the 1st defendant to pay a sum of Rs. 36,100 into Court, being made up as follows:—

(1) Rs. 56,250 being the income derived by the 1st defendant as Receiver during the years 1914 to 1919;

(2) Rs. 5,850 being the difference between the market price at the time of harvest as entered in the accounts and market rate at the time the paddy was actually sold.

The 1st defendant was given credit for Rs. 21,000 on account of assessment paid by him during the said period of five years and a further sum of Rs. 5,000 on account of establishment charges. It may be mentioned that the accounts of the Receiver have not been finally passed; but so far as they have been taken, the Subordinate Judge seems to be of opinion that the 1st defendant would be liable in any event to deposit this sum of Rs. 36,100 into Court. It is against this order that this appeal has been preferred by the 1st defendant.

A preliminary objection is raised on behalf of the respondent that no appeal lies. Order XLIII, rule 1, clause (*s*) of the Code of Civil Procedure, 1908, provides for an appeal against an order under rule 1 or rule 4 of Order XL. Rule 1 of Order XL deals with the appointment of Receivers. Rule 2 deals with the remuneration to be paid for his services: rule 3 lays down the duties of a Receiver and rule 4 provides the procedure for the enforcement of the Receiver's duties. It lays down that where a Receiver fails to submit his accounts at such periods and in such form as the Court directs or fails to pay the amount due from him as the Court directs, or occasions loss to the property by his wilful default or gross negligence, the

(1) 35 C. 568; 12 C. W. N. 648.
(2) 55 Ind. Cas. 15; 5 P. L. J. 97; (1920) Pat. 121.
(3) 12 Ind. Cas. 780; 14 C. L. J. 445.
(4) 59 Ind. Cas. 421; 22 Bom. L. R. 1126; 45 B. 99.

Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance, if any, to the Receiver. The order contemplated by this rule is an order for an attachment of the Receiver's property and for realization of money by means of such attachment. The order now appealed against is obviously not an order under rule 1, nor is it an order of attachment under rule .

On a construction of rule 4 of Order XL and rule 1, clause (s) of Order XLIII it seems to us that no appeal lies against the order of the Subordinate Judge giving directions to the Receiver to pay a certain sum of money into Court. We are supported in this view not only by the plain language of the rules in question but also by authority. It was held by the Calcutta High Court under the old Code of Civil Procedure that directions given by a Court in passing the Receiver's accounts are not appealable, *vide Keshobati Kumari* v. *Macgregor* (1). See also *Mohini Mohan Patra* v. *Baroda Kanta Sarkar* (3). The case of *Ganesh Lal* v. *Kumar Satya Narayan Singh* (5) is directly in point. See also *Samhautta Singh* v. *Bhagwati Singh* (2). There the learned Judges have held that an order declaring a Receiver liable in respect of a sum of money is not appealable unless it is accompanied by an order of attachment under rule 4 of Order XL. They observe that "it is sufficient to say that under the present Code of Civil Procedure a decision of this nature would not seem to be appealable unless it is accompanied by an order under rule 4 of Order XL. that rule gives a Court power to take certain steps against the Receiver for the realization of the money and it seems that, in the present case, until the Subordinate Judge acts under this rule, there is no right of appeal by the Receiver."

The learned Vakil for the appellant relies, however, on the decision in *Shrinivas Kuppuswami Mudaliar* v. *Wat* (4). The facts in that case are distinguishable and the decision is no authority on the specific question with which we have to deal here, namely, whether a direction to the Receiver to pay a certain amount, not followed up by an order of attachment as contemplated by rule 4, is a final order under rule 4 as to give the aggrieved party a right of appeal.

We are of opinion that the decision in *Shrinivas Kuppuswami Mudaliar* v. *Wat* (4) does not support the contention of the appellant. On the other hand, the plain language of the rules shows that the Receiver's right of appeal arises only on an order of attachment being passed by the lower Court. The other decisions we referred to above also support this view. We accordingly hold that no appeal lies and dismiss this appeal with costs.

We are not prepared to interfere in revision as the lower Court has jurisdiction to entertain this matter and the appellant has his remedy by way of appeal when an order of attachment is passed. We dismiss the Civil Revision Petition No. 132 of 1921.

Appeal and Revision dismissed.

M. C. P.

W. C. A. & N. H.

(5) 54 Ind. Cas. 207; 4 P. L. J. 636; (1920) Pat. 85.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 387 OF 1920.

June 22, 1921.

Present:—Mr. Dalal, A. J. C.

SHEOAMBAR KHAN AND OTHERS—DEFENDANTS NOS. 1 TO 4—APPELLANTS

versus

RATIPAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family property—Alienation—Cause of action to challenge alienation—Members, subsequently born, position of.

Once a cause of action to bring a suit to challenge the alienation of a joint Hindu family property comes into existence no fresh cause of action accrues to members who are subsequently born in the family after the making of the alienation at such birth. [p. 405, col. 1.]

Chokhey Singh v. *Hardeo Singh*, 64 Ind. Cas. 757; 8 O. L. J. 667; 24 O. C. 330, followed.

SANTHAYI AMMAL v. MAHOMED.

Appeal from a decree of the District Judge, Rae Bareli, dated the 19th August 1920, confirming a decree of the Subordinate Judge, Partabgarh, dated the 4th June 1920.

Messrs. *Muhammad Wasim* and *Niamat-ullah*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra* and Mr. *Mohammad Sibtain*, for the Respondents.

JUDGMENT.—The issue of limitation in this case is concluded by several single Judge cases and also a Bench ruling of this Court. The Bench ruling is an unreported case in First Civil Appeal No. 10 of 1920 [*Ohokhey Singh* v. *Hardeo Singh* (1)] decided on 5th April 1921. In that case the learned Judges approved of the observation of the learned Judicial Commissioner in Second Civil Appeal No. 242 of 1920 decided on 23rd December 1920 [*Oudh Behari Singh* v. *Suraj Bali* (2)]. It was decided there that once a cause of action came in o existence, no fresh cause of action accrued to members who were subsequently born in the family after the execution of the sale-deed. Reference in that case was made to *Ujagar Singh* v. *Pitam Singh* (3), where in discussing the rights which accrued to a person who was born into a joint Hindu family it was held that birth into a Hindu family did not confer upon the person so born any right to bring a suit, the reason being that a right to bring a suit to challenge the alienation of the joint family property was in no sense a share in the ancestral estate of the father. In the case before me a suit under Article 126 clearly became time-barred at most in 1918, that is, 21 years after the sale in suit. The present suit, therefore, which was instituted in 1919, was clearly time barred.

In the result I set aside the decree of the lower Court and dismiss the plaintiffs' suit with costs of all the Courts.

Appeal allowed.

J. P.

(1) 64 Ind. Cas. 757; 8 O. L. J. 667; 24 O. C. 330.

(2) 61 Ind. Cas. 801; 8 O. L. J. 205.

(3) 4 A. 123; 8 I. A. 190; 4 Sar. P. C. J. 275; 2 Ind. Dec. (N. S.) 579.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEALS NOS. 82 AND 93 OF 1920

May 30, 1921.

Present:—Mr. S. M. Robinson, Chief Judge, and Mr. Justice Duckworth.

SANTHAYI AMMAL AND ANOTHER—APPELLANTS

versus

M. K. MAHOMED—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55 (1) (d)—Sale of immoveable property—Seller's duty to execute proper conveyance—Execution of invalid sale-deed—Agreement to execute valid one afterwards—Specific performance—Sale—Transferee in possession under invalid sale-deed—Suit for possession by seller.

In the case of a sale of immoveable property section 55 (1) (*d*) makes it a bounden duty of the seller to execute a proper conveyance of the property, and the execution of a document which for any reason does not operate to effect a legal transfer is in no way a complete performance of this bounden duty. Therefore, where a seller, being in a hurry, executes an invalid conveyance promising to follow it with a legal and binding sale-deed, the invalid conveyance is no answer to a suit for specific performance of the agreement to execute the legal and binding sale-deed. [p 407, col. 1.]

Venkatasami v. *Kristayya*, 6 M. 341; 3 M.L. J. 169; 5 Ind. Dec. (N. S.) 945, dissented from

Surendra Nath Nag Chowdhury v. *Gopal Chunder Ghosh*, 8 Ind. Cas. 794; 12 C L J. 464, *Chinna Krishna Reddi* v. *Dorasami Reddi*, 20 M. 19; 7 Ind. Dec. (N. S.) 13, *Nallappa Reddi* v. *Ramalingachi Reddi*, 20 M. 250; 7 Ind. Dec. (N. S.) 178, *Essaji Adamji* v. *Bhimji Purshotam*, 4 B. H. C. R. 125, referred to.

It is a valid defence to a suit for possession by a seller that the defendant is in possession under a contract for sale, although he may have no valid registered sale-deed. [p. 407, col. 2.]

Karamath Khan v. *Latchmi Achi*, 61 Ind. Cas. 675; 13 Bur. L. T. 119; 10 L. B. R. 241, followed.

First civil appeals against a decree passed by the District Judge, Insein.

Mr. *Higinbotham*, for the Appellants.

Mr. *Moore*, for the Respondent.

JUDGMENT.

ROBINSON, C. J.—This appeal deals with two cross suits brought by the parties under the following circumstances:—The appellant and her son, who is the second plaintiff in her suit, were going to Madras for the son's marriage. Appellant was anxious to raise Rs. 3,000 for this purpose and instructed one Pakiri Mahomed to raise the money, saying that she would give possession to the lender of 3 acres of

land, a house and ten fishing boats as security. She obtained a loan of Rs. 3,000 from the defendant and handed him possession of the properties. On her return from Madras, she tendered the money with interest and demanded the return of the properties, but defendant refused to return them, alleging that she had sold them to him. She claims possession of the immoveable property and possession of the boats or their value. Defendant alleged that these properties had been sold to him for Rs. 3,000; that the document which he produced was hurriedly executed as the plaintiffs were leaving at once for Madras, and that it was not a proper document but plaintiffs agreed to execute and register a valid document on their return. In his cross-suit he sues for specific performance of this agreement.

I will deal with the suit for specific performance first. The two suits were heard together, and the evidence in one was by consent treated as evidence in the other. The appellant gave evidence that she had instructed one Pakiri Mahomed to raise a loan of Rs. 3,000 for her on interest at 6 per cent. per annum. She says that Pakiri Mahomed and her son negotiated the loan, acting under her instructions. She deposes that after their first interview with the defendant they brought back Rs. 50, as earnest money, and that the next day the balance was given to her and she was asked to execute Exhibit A, which, her son told her, contained the agreement she had made with defendant. She says that two or three days after receiving the money she left for Madras. Respondent says she left the next day. What admittedly happened was that Pakiri Mahomed and the second plaintiff interviewed the defendant, who agreed to the bargain and gave them Rs. 50 to bind it. Next day they went to a petition-writer, who drew up a document on the instructions of the second plaintiff and the respondent. That document is a deed of outright sale. It was written on an eight anna stamp paper, although the petition-writer demurred, pointing out that for a deed of sale a stamp of Rs. 30 would be required. It was nevertheless accepted owing to the short time at their disposal and it was executed, the parties knowing that it was of no value to transfer the immoveable property. Pakiri Mahomed deposes to all these facts. He admits that the respondent and the second plaintiff gave instructions to the petition-writer, and that both their instructions were to the same effect. He was not asked about the interest arranged except by the Court at the end of his evidence. He then deposes that the second plaintiff told him that the Rs. 3,000 bore interest at 6 per cent. per annum, and that this was only after he had received this money. Had the transaction, therefore, been a loan, we have the peculiar feature of Rs. 50 being given as earnest money and the fact that the man specially deputed to negotiate the loan knew nothing about the interest, which was at an extraordinarily low rate, until after the money had been advanced. The petition-writer corroborates the facts as set out above. He deposes to informing them that the document to be of any value would require a Rs. 30 stamp, and he declares that he explained the contents of the document to the second plaintiff and the respondent, and in that he was supported by Pakiri Mahomed. The second plaintiff has not given evidence, and it is clear that, on the evidence tendered by the parties supported by their conduct, the transaction was intended to be an outright sale and not a loan. The difficulty as to the stamp on the deed of sale has been adjusted by the deficient stamp having been made good under the authority of the Collector, but it is clear that the description of the immoveable property given in the document is quite insufficient for its identification, even the district in which it lies is wrongly recorded, and that that document would never have been admitted to registration. It was impossible, therefore, for the respondent to have proceeded under the Registration Act to complete the validity of the document, and the question is whether a document of this nature having been given by the appellant, it is open to the respondent to now bring a suit for specific performance of the original agreement.

For the plaintiff the case of *Venkatasami* v. *Kristayya* (1) was relied upon. It was there held that the agreement having been carried out by the execution of an invalid document, no suit would lie to compel defendant to do that which he had already done. With that decision, with all respect, I am

(1) 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 945.

unable to agree. The document in that instance was one as to which procedure under the provisions of the Registration Act was possible. In the present instance it was not possible. But beyond that, the decision has been dissented from by the Calcutta High Court in *Surendra Nath Nag Chowdhury* v. *Gopal Chunder Ghosh* (2), where it was held that the mere execution of a lease by the defendants did not convert an executory contract into an executed contract, and that the agreement by the parties was that the defendants would execute in favour of the plaintiff a lease and register it so as to make it an instrument operative in law, and that the mere execution of the document, which was never registered by reason of the default of the defendants, was not a complete performance of the contract. It is pointed out that this Madras decision has subsequently been dissented from in *Chinna Krishna Reddi* v. *Dorasami Reddi* (3) and *Nallappa Reddi* v. *Ramalingachi Reddi* (4). In the case of a sale of immoveable property section 55 (1) (*d*) makes it a bounden duty of a seller to execute a proper conveyance of the property, and the execution of a document which for various reasons could not be operative to effect a legal transfer is in no way a complete performance of this bounden duty. On the appellant's return from Madras she was called upon to execute a proper document as she had promised, but she refused to do so and it was not, therefore, necessary for the respondent to go through the useless form of tendering a conveyance to her for execution before he brought this suit for specific performance [*Esaji Adamji* v. *Bhimji Purshotam* (5)].

The learned District Judge was not satisfied that any promise had been made to execute a proper document on her return from Madras, but I can see no reason for disbelieving the defendant's evidence on this point, having regard to the undoubted circumstances prevailing at the time of the alleged promise. At that time boats to Madras were few and sailings uncertain. A boat was leaving for Madras, and it may well be that the appellant was most anxious to catch it. She admits that she left very shortly after the money was paid. There was not sufficient time to obtain the necessary information descriptive of the land for the purposes of the sale-deed, and the document that was executed was known to the parties to be ineffective and was only taken with the idea that it would afford proof of the agreement. As to whether it would be admissible in evidence to show what the agreement actually was, I do not care to decide. There are authorities both ways. But on the evidence and the probabilities of the case I have no doubt that the agreement was one of sale and under the circumstances a promise to execute a legal and binding document may well have been given.

As regards the suit for specific performance, therefore, I am of opinion that it was rightly decreed, and the appeal should be dismissed with costs. This really disposes of the appellant's case also. But in reply to her prayer for possession it was open to the respondent to plead as a valid defence to the suit that he was in possession under a contract for sale, although he had no valid registered sale-deed [*Karamath Khan* v. *Latchmi Achi* (6)]. Her appeal is, therefore, also dismissed with costs throughout.

DUCKWORTH, J.—I have had the privilege of reading the judgment of the learned Chief Judge, and I have but few remarks to add. The appellants in these two appeals admitted the receipt of the money from the respondent, and stated that, in consideration therefor, they agreed to make a mortgage of the immoveable as well as the moveable property in question, but their contention was that, under the influence of fraud on the part of respondent, what they executed was a conveyance. They sue for restoration of the property on re-payment by them, less damages to be ascertained. The respondent, on the other hand, set up that they contracted to sell the properties. It is not part of his case that the deed executed is a valid conveyance (it has not been registered), but he pleaded that the appellants agreed to

(2) 8 Ind. Cas. 794; 12 C. L. J. 484.
(3) 20 M. 19; 7 Ind. Dec. (N. S.) 13.
(4) 20 M. 250; 7 Ind. Dec. (N. S.) 178.
(5) 4 B. H. C. R. 125.

(6) 61 Ind. Cas. 675; 13 Bur. L. T. 119; 10 L. B. R. 241.

execute a proper and binding conveyance in his favour after their return from Madras.

He is in possession, in any case, under the appellants' license, and, unless the appellants succeed in proving the fraud alleged, is not a trespasser. I have no hesitation in stating that the appellants have not succeeded in proving the fraud. It is admitted and proved that the second appellant arranged the transaction with the respondent in company with Pakiri Mahomed, and the evidence of the latter as well as that of the petition-writer shows beyond reasonable doubt that what was arranged was a sale of the property. The second appellant never appeared in the matter of these suits, and this point is most significant. It is shown that the appellants were in a hurry to get ready money and leave for India, and that neither of them knew anything about the fishing business, with which the boats and the plots of land were concerned. I agree with the learned Chief Judge that it may be taken as proved that the appellants did agree to give the respondent a conveyance on return from Madras.

Apart from this, it seems to me that the respondent can, in any case, plead that the moveable property was sold to him, even on the deed which we have before us. I have no doubt that he has proved this sale of moveables. As regards the immoveable properties, even though the deed may be inadmissible in evidence, inasmuch as the appellants failed to prove fraud on the part of the respondent, I am of the opinion that they are not entitled to oust him, since he is not a trespasser, and that he is entitled, on the other hand, to a decree for the execution of a proper and binding conveyance of the properties.

I think, therefore, that both the suits were rightly decided in the District Court, and I would dismiss the appeals with costs throughout.

N. H.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 421 OF 1915.

December 23, 1920.

Present:—Mr. Lindsay, J. C.

MAHADEO TEWARI—PLAINTIFF—APPELLANT

versus

SITLA BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgagee, usufructuary—Dispossession, effect of—Acquiescence—Interest—Further charge, deed of, providing for payment of debt at any time before redemption of original mortgage, effect of—Limitation—Limitation Act (IX of 1908), s. 20 (2)—Transfer of Property Act (IV of 1882), s. 68—First appeal, matter abandoned in—Second appeal, matter if can be taken in.

Where a usufructuary mortgagee after dispossession from a portion of the property, which constitutes the mortgage security, acquiesces in the situation and takes no action for possession or compensation for loss, he cannot put forward subsequently a claim for interest. [p. 410, col. 1.]

Partab Bahadur Singh v. *Gajadhar Bakhsh Singh*, 24 A. 521; 29 I. A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310 (P. C.), referred to.

Where a deed of further charge provides that the borrower is entitled to pay the debt at any time prior to the date on which the original mortgage is to be redeemed, the deed fixes a date for payment and the limitation for the recovery of the money due on it does not begin to run from the date of its execution [p. 410, col. 2.]

Gaya Din Singh v. *Har Karan Singh*, 22 Ind. Cas. 132; 16 O. C. 267, referred to.

The provisions of section 20 (2) of the Limitation Act do apply to cases for the recovery of the mortgage money brought under the provisions of section 68 of the Transfer of Property Act. [p. 411, col. 1.]

A matter abandoned in first appeal cannot be allowed to be re-agitated in second appeal. [p. 411, cols. 1 & 2.]

Appeal from a decree of the Additional Judge, Fyzabad, dated 23rd August 1915, modifying an order of the Subordinate Judge, Sultanpur, dated 23rd March 1915.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Ishwari Prasad*, for Respondents Nos. 1 and 2.

JUDGMENT.—This very ancient case has at last been brought on for trial. It has been pending for a very long time on account of the absence of one of the respondents on active service. The points, which are before me for decision, are comparatively few and simple.

The plaintiff is a mortgagee in whose favour a mortgage with possession was

executed on the 31st of July 1882 for a sum of Rs. 500. Under that mortgage possession over certain lands in two villages, Dhaunrahra and Chhaobha, was given to the mortgagee. Subsequently two other deeds were executed in favour of the mortgagee. One of the 14th of June 1883 was to secure a loan of Rs. 93-8-0. On this document interest was to run at 1 per cent. per mensem and the stipulation was that the borrower was to be entitled to re-pay the loan at any time before redemption of the mortgaged property. The third document, which was executed in 1886 for a sum of Rs. 200, was undoubtedly a deed of further charge and is to be read along with the first document. No interest ran upon this third deed, the arrangement between the parties being that the profits of the mortgaged property were to satisfy the interest both on the first and third loans. It is not disputed that by reason of certain partition proceedings, which took place between the mortgagor and his co-sharers in the years 1899 and 1904 respectively, the greater portion of the mortgaged property was taken out of the possession of the mortgagee.

It is admitted that at the time this suit was brought the mortgagee was in possession of only two plots situated in the village of Chhaobha. These plots are Nos. 629 and 630. In the present suit the plaintiff claimed alternative reliefs. He asked for possession of certain plots in Dhaunrahra and also for possession of an area which would bring up the area of the land in his possession to the area which had been mortgaged to him under the first mortgage. In addition to this he claimed a sum of Rs. 370 on account of mesne profits for the period during which he had been deprived of the mortgaged property. In the alternative he asked for a decree for his mortgage money. He claimed Rs. 500 under the first deed, Rs. 429-5-5 under the second deed and Rs. 200 under the third deed. He also maintained his claim for Rs. 370 in addition to these sums.

The Court of first instance held that as the suit was framed, the plaintiff was not entitled to any decree for possession. He had not specified any land which it was possible for the Court to award him and so the case was treated on the footing of a money claim. The learned Subordinate Judge, who tried the case, gave the plaintiff a decree for Rs. 700, that is to say, Rs. 500 on the first deed and Rs. 200 on the third and interest on this total at the rate of 6 per cent. per annum by way of damages. This interest was limited to the period of three years prior to the institution of the suit. The learned Subordinate Judge refused to allow any relief in respect of the document of the 14th of June 1883, being of opinion that this document did not constitute a charge upon the property.

When the case came up in appeal before the learned Additional Judge, two principal pleas were put forward on behalf of the plaintiff. He asked that he should get a decree on the deed of the 14th of June 1883 on the ground that this document created a charge upon the mortgaged property. He also claimed that instead of 3 years' interest, which had been allowed him by the Court of first instance, he was entitled to 6 years' interest.

The learned Additional Judge, while he held that the document of the 14th June 1883 constituted a charge upon the mortgaged property, refused to give the plaintiff any decree, on the ground that his remedy for the money decree under this document had been lost by limitation. The opinion of the Additional Judge was that limitation began to run from the date of the execution of the deed. Then as regards the claim for interest, he held not only that the plaintiff was not entitled to interest for 6 years but that he was not entitled to any interest at all. He founded this decision upon a judgment of their Lordships of the Privy Council which is reported as *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (1).

The plaintiff now comes here in appeal. His case is that he is entitled to both principal and interest on the deed executed on the 14th of June 1883. He says his claim in respect of this deed is not barred by limitation. His other point is that on the deeds executed respectively on the 31st of July 1882 and 3rd of February 1886 he was entitled to interest for a period of six years, that is to say, interest by way of damages.

(1) 24 A. 521; 29 I. A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310 (P. C.).

I may dispose of this latter point at once. I have heard a good deal of argument upon it, but it appears to me that the decision of the lower Appellate Court regarding this question of interest on these two deeds ought to be maintained. The principle laid down by their Lordships of the Privy Council in the case to which I have referred is that where the mortgagee after dispossession from the property, which constitutes the mortgage security, acquiesces in the situation, he cannot put forward a claim for interest. It seems to me that the mortgagee might have brought his suit at any time within six years from the date of dispossession for compensation caused to him by the loss of possession, and admittedly this suit had been brought a long time after the dates on which possession was lost to the mortgagee. I have already mentioned that one of those dates was 1899 and the other 1904; while this suit was not brought till the year 1913. I am satisfied, therefore, that the decision of the lower Appellate Court on this point is sound.

The other question is with regard to the document of the 14th of June 1883. I entertain no doubt whatever that the lower Appellate Court has correctly construed this document, and that it does constitute a charge on the property. The words which are used, as the lower Court observes, are not very well chosen, but the meaning of them appears to me to be quite clear. The person who executed this bond undoubtedly meant to hypothecate to his creditor his property, which was already held under the possessory mortgage executed in the year 1882. It remains, therefore, to be considered whether the view of the lower Appellate Court regarding the question of limitation is correct. The argument here on behalf of the appellant is that the Court below was wrong in thinking that limitation for the recovery of the money due on this document began to run from the date of the execution. According to the language of the document the borrower was to be entitled to pay the debt at any time prior to the date on which the first mortgage was to be redeemed. The learned Additional Judge observes in dealing with this question of limitation that the creditor might have brought a suit on this document to recover the money at any time after execution, but I can hardly think that this argument is correct, for it seems to me that if the borrower was to be at liberty to pay at any time before the redemption of the first mortgage, he could have defeated any claim brought by his creditor by pointing out that no cause of action had arisen. I have been in some doubt as to whether the document really does fix a date for payment, but I have come to the conclusion that I ought to hold that it does so, and I am supported in this conclusion by certain observations which were made by one of the Judges of this Court in the case decided as *Gaya Din Singh* v. *Har Karan Singh* (2). Before I dispose of this point, however, I have to notice certain points which were put forward here by way of cross-objections. Mr. Ishuri Prasad has argued not only that the claim in respect of this second deed was barred by time, but that the claims in respect of the other two deeds were also barred.

There can be no doubt that the period of limitation applicable to suits for money on the first and third deeds is a period of six years. Both the Courts below, however, held that although this period had elapsed, limitation was saved by reason of the provisions of section 20, sub-section (2) of the Limitation Act, which provides that where mortgaged land is in possession of a mortgagee, the receipt of the rent or produce of such land shall be deemed to be payment for the purpose of sub-section (1); that is to say, a payment which would extend the period of limitation for a suit for the debt which is owing. It has been found in this case that the mortgagee retained possession of two of the plots which were originally mortgaged to him and consequently the receipt of the profits of those two plots amounted to payments of interest within the meaning of section 20. Mr. Ishuri Prasad would argue that section 20 does not save limitation in this case, because the suit is not a suit for a debt but is a suit which is brought under the special provisions of section 68 of the Transfer of Property Act. It is not to be doubted that the plaintiff's right to bring a suit of this kind is founded upon the provisions of section 68. But what is the suit for? It surely is a suit for the recovery of

(2) 22 Ind. Cas. 132; 16 O. C. 267.

the mortgage money, that is to say, for the recovery of the debt. The Courts below, therefore, were quite right in holding that the money claim in respect of the first and third deeds was within time and I hold accordingly.

As regards the second deed, Mr. Ishuri Prasad, has also argued that the claim is barred. He says there was no consolidation of the mortgages, that is to say, if the second deed amounted to a mortgage, there was no consolidation of that mortgage with the first mortgage. This, however, does not seem to me to be a question which I need discuss. The point is, "when was the creditor entitled to ask for payment under this deed of the 14th of June 1883?" As I have already pointed out, the debtor had a choice of paying the debt at any time up to the date on which redemption of the first mortgage was to be made. It seems to me that acting on this principle, the claim upon this document is within time. Then it was argued again that no claim on this document could be brought in a suit which was founded on the provisions of section 68 of the Transfer of Property Act. I can see no good reason in favour of this argument, for it seems to me that the mortgagee was entitled to ask for his money under this deed, on the ground that the debt constituted a charge on the property for the reasons I have already given.

There is only one other point in connection with the cross-objections which I have to notice. A defence was put forward in the First Court that certain lands in the possession of the plaintiff mortgagee had been allotted to him on partition in lieu of the lands which had been allotted under the mortgage. The Court of first instance dismissed this defence as being partly untrue and partly irrelevant. However, I need not go into this matter, because I find from a reference to the judgment of the lower Court that all this part of the case was abandoned in the lower Appellate Court and it was for that reason that the learned Additional Judge held that it was not necessary for him to discuss the subject. He pointed out that the case had come ultimately to be treated as one in which only a money decree was being asked for and in which all claim to possession of lands had been given up. I cannot allow a matter which was abandoned in the lower Appellate Court to be re-agitated here in second appeal.

The conclusion, therefore, I have come to on the whole of this case is that the appellant is entitled to succeed with regard to his claim on the document of the 14th of June 1883. The plaintiff will be declared entitled with respect to this document to a sum of Rs. 429-5-5 (calculated up to the date of the suit) with interest at 6 per cent. per annum from the date of the suit till the date of payment. In other respects the case for the plaintiff-appellant and the cross objections fail and are dismissed. I make no order regarding costs. The decree of the lower Appellate Court will be amended accordingly.

J. P.

Appeal partly allowed.

LOWER BURMA CHIEF COURT.

FULL BENCH.

CIVIL REFERENCE No. 1 OF 1921.

February 5, 1921.

Present:—Mr. S. M. Robinson, Chief Judge,
Mr. Justice Maung Kin and
Mr. Justice Heald.

MAUNG GALE—DEFENDANT—APPELLANT

versus

MA HLA YIN—PLAINTIFF—RESPONDENT.

Burma Laws Act (XIII of 1898), s. 13 (1)—Burmese Buddhists—Breach of promise of marriage—Suit for damages—Appeal—Lower Burma Courts Act (VI of 1900), s. 30—Civil Procedure Code (Act V of 1908), s. 100.

Suits for damages for breach of promise of marriage between Burmese Buddhists are suits of the nature described in section 13 (1) of the Burma Laws Act as involving questions regarding marriage, and appeals in such suits lie under section 30 of the Lower Burma Courts Act, and not merely under section 100 of the Civil Procedure Code. [p. 415, cols. 1 & 2; p. 416, col. 1.]

Maung Hmaing v. *Ma Pwa Me*, S. J. L. B. 533, *Maung Myat Tha* v. *Ma Thon*, 2 U. B. R. (1892-96) 200, *Kan Gaung* v. *Mi Hla Chok*, 2 U. B. R. (1907-09), Contract, 5, *Mohori Bibee* v. *Dharmodas Ghose*, 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar P. C. J. 374 (P. C.), *Maung Thein* v. *Ma Thet Hnin*, 32 Ind. Cas. 507; 8 L. B. R. 347; 9 Bur. L. T. 77, *Maung Nyein* v. *Ma Myin*, 46 Ind. Cas. 421; 3 U. B. R. (1918) 75, *Maung Po Thaw* v. *Maung Tha Hlaing*, 49 Ind. Cas. 50; 3 U. B. R. (1918) 106, referred to.

MAUNG GALE v. MA HLA YIN.

Reference made by Duckworth, J., under section 11 of the Lower Burma Courts Act, 1900.

Mr. *Sin Hla Aung*, for the Appellant.

Mr. *Nyun Maung*, for the Respondent.

ORDER OF REFERENCE TO A FULL BENCH.

DUCKWORTH, J.—This was a suit for Rs. 200 by way of damages for breach of promise of marriage.

The parties are Burman Buddhists, resident in Burma.

The Township Court dismissed the suit, holding that the promise was not proved, but the District Court came to a different conclusion and decreed the claim.

Maung Gale, the defendant, now appeals to this Court, and the preliminary question arises as to whether an appeal lies under section 30, Lower Burma Courts Act, or merely under section 100, Civil Procedure Code.

It is an unclassed suit, and no second appeal will lie under section 30, Lower Burma Courts Act, unless the value of the subject-matter exceeds Rs. 500 or the suit is of a nature described in sub-section (1), section 13, Burma Laws Act, 1898.

The value is below Rs. 500.

Sub section (1), section 13, Burma Laws Act, lays down :—

"Where in any suit or other proceeding in Burma, it is necessary for the Court to decide any question *regarding* succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist Law, in cases where the parties are Buddhists .....,shall form the rule of decision ....."

The point for decision now is whether, in a suit for breach of promise of marriage, the Court has to decide any question regarding marriage, or in other words, whether a promise of marriage, and breach of such promise, are questions of marriage to be determined, in the case of Buddhists, according to Buddhist Law.

In the case of *Maung Hmaing* v. *MaPwa Me* (1) at page 534, Fulton, J. C., stated :—"It will, of course, be remembered that this (a suit for damages for breach of promise of marriage) is not a case of succession, inheritance, marriage, or religious usage, and consequently must be decided rather by the Contract Act than by Buddhist Law, but still, in assessing damages, due consideration must be given to the opinions of the people, which are doubtless in part founded on the law books to which they are accustomed to look for guidance."

This statement has apparently remained unchallenged ever since it was made in the year 1891, but there is a course of judicial decisions in Burma, which assumes that a promise of marriage and breach of such promise are questions of marriage. It is only necessary to refer to *Kan Gaung* v. *Mi Hla Ohok* (2), where on page 8, Shaw, J. C., now Sir George Shaw, clearly decided that the question was one regarding marriage.

In *Maung Nyein* v. *Ma Myin* (3) at page 76,* Heald, A. J. C., stated that the breach of a promise of marriage is a matter of marriage. He followed *Kan Gaung's case* (2).

On the other hand, Mr. Nyun Maung, though he did not refer to *Maung Hmaing's case* (1) nor quote any rulings, contends that the question is solely one of contract and implies that it could only be a question of marriage, or an incident of marriage, if marriage follows the promise.

The promise to marry is a necessary preliminary to, and incident of, marriage. Breach of such a promise would come under the same category.

The matter is important for these reasons:—It has been held in Lower and Upper Burma that parents cannot sue, or be sued, for damages for breach of promise to marry their son or daughter [*Maung Thein* v. *Ma Thet Hnin* (4) and *Maung Po Thaw* v. *Maung Tha Hlaing* (5)]. It has been held further that, if it is merely a matter of contract, a minor cannot sue for compensation for breach of promise of marriage [see *Kan Gaung's case* (2)].

Unless, therefore, it is decided that the matter is more than one of contract, suits by minors will be excluded.

(1) S. J. L. B, 533

(2) 2 U. B. R. (1907-01), Contract, 5.
(3) 46 Ind. Cas. 421; 3 U. B. R. (1918) 75.
(4) 32 Ind. Cas. 507; 8 L. B. R. 317; 9 Bur. L.T. 77.
(5) 49 Ind. Cas. 59; 3 U. B. R. (1918) 103.

*Page of 3 U. B. R. (1918)—[Ed.]

My view is that a promise to marry and breach thereof are matters of contract, but in addition, are also matters regarding marriage. In fact, I accept U May Oung's view, as expressed at page 2[illegible], Burman Buddhist Matrimonial Law, 1914.

The result is that I hold that an appeal lies under section 30, Lower Burma Courts Act, and that appellant can appeal on the facts as well as law.

However, the matter is not clear from doubt and divergent opinions have been expressed in Upper and Lower Burma.

I think, therefore, that the question should be referred to a Bench or a Full Bench, as the learned Chief Judge shall decide.

The question referred is:—In suits for compensation for breach of promise to marry, as between Burman Buddhists, residing in Burma, is the matter involved merely one of contract, or does it include any question regarding marriage? In other words, whether a promise of marriage, and breach of such promise, are questions of marriage, to be decided, in the case of Buddhists, according to Buddhist Law?

OPINION OF THE FULL BENCH.

ROBINSON, C. J.—May Hla Yin, a spinster, brought a suit, alleging that Maung Gale made her a promise of marriage and that relying on that promise she allowed him to seduce her. He refused to carry out his promise, and she sues for damages for breach of promise of marriage. The first Court dismissed the suit, holding that no promise was proved. The District Court held the promise was proved and decreed the claim. An appeal was filed to this Court and a preliminary question arose as to whether an appeal lay under section 30 of the Lower Burma Courts Act, which would permit appellant to raise questions of fact, or merely under section 100 of the Civil Procedure Code only on points of law. If the suit is one of a nature described in sub-section 1 to section 13 of the Burma Laws Act, 1898, an appeal would lie under the former provision and the question for decision, therefore, is whether this is a suit regarding marriage which is to be decided under the provisions of Burmese Buddhist Law, the parties being Burmese Buddhists, or under the ordinary law of the land as a simple matter of contract.

The decisions in Burma have not been consistent. In 1891 the Special Court in the case of *Maung Hmaing* v. *Ma Pwa Me* (1) apparently assumed that the matter was one of simple contract only. Mr. Fulton said: "It will, of course, be remembered that this is not a case of succession, inheritance, marriage, or religious usage, and consequently must be decided rather by the Contract Act than by Buddhist Law, but still, in assessing damages, due consideration must be given to the opinions of the people, which are doubtless in part founded on the law books to which they are accustomed to look for guidance." Mr. Agnew said, on the question whether between Burmans an action of breach of promise of marriage will lie, that the question should be answered in the affirmative. He said, "the action is one for damages for the breach of a contret and unless forbidden by the Burmese Law it will lie. There is nothing, so far as I am aware, in Burmese Law to prohibit such an action." In *Maung Myat Tha* v. *Ma Thon* (6), which was a suit for restitution of conjugal rights against a Buddhist girl under the age of 18, Mr. Burgess remarked, "the learned Judge treats marriage as a mere contract, but it is something more than a contract, or at any rate is subject to special conditions." In *Kan Gaung* v. *Mi Hla Chok*, (2) it was held that a female minor cannot sue for compensation under the Contract Act for a breach of promise of marriage made to her. Reliance for this proposition was based on the well-known case of *Mohori Bibee* v. *Dharmodas Ghose* (7). It was further decided that where the circumstances entitle her to compensation under the Buddhist Law, she can succeed independently of contract. Sir George Shaw stated in the course of his judgment after referring to previous cases, some of which I have noted above, "they assume what is obviously the fact that a promise of marriage and breach of such a promise are questions of marriage to be determined in the case of Buddhists

(6) 2 U. B. R. (1892-93) 200.
(7) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 874 (P. C.).

according to the Buddhist Law," and he went on to say, "I am, therefore, of opinion that where, as in the present case, the Contract Act cannot be relied upon, a suit for damages for breach of promise will still be maintainable if the Buddhist Law authorises compensation in such a case," which he held it did. In *Maung Thein* v. *Ma Thet Hnin* (4) Sir Charles Fox held that a Burmese Buddhist, whether male or female, adult or minor, cannot be legally married without his or her consent or against his or her will, and that the breach by a father of his promise to give his son in marriage and to give suitable marriage presents does not afford a cause of action. In *Maung Nyein* v. *Ma Myin* (3) my brother Heald, following *Kan Gaung's case* (2), held that a suit for damages for breach of promise of marriage will be maintainable (apart from the Law of Contract) if the Buddhist Law authorises compensation in such a case. He held that a Burmese Buddhist youth can make a valid promise of marriage, at any time after he is physically competent for marriage, and that he can be sued for damages for breach of such promise although he is under 18 years of age. And in *Maung Po Thaw* v. *Maung Tha Hlaing* (5) Mr. Saunders held that the consent of the parties is necessary to a valid marriage, and that an action for damages for breach of promise of marriage cannot be maintained against the parents of a Burmese Buddhist in respect of a promise made by such parents to give their son in marriage. In the case of *Tun Kyin* v. *Ma Mai Tin* (8) it was held that a promise of marriage made by a Burmese Buddhist male under the age of 18 years, without the consent of his parents, is ordinarily voidable. But if he has clandestine intercourse with the woman, his parents are not at liberty to withhold their consent to the marriage, and he is bound by his promise and can be sued for its breach. In the course of his judgment Ormond, J., said: "I think the validity of a contract of marriage is a question of contract, though it may involve a question regarding marriage, *e. g.*, a contract of marriage between two persons who are within the prohibited degrees of affinity; the validity of such a marriage would be determined by the personal law of the parties, and if such a marriage would be void, the contract would be void under sections 23 and 24 of the Contract Act, because the object or consideration was unlawful and immoral." And again, "a person may attain majority for some purposes, *e. g.*, of 'acting in the matter of marriage,' though not for other purposes." And later, "thus under the Contract Act the competency of a Burmese Buddhist youth under 18 years of age, to make a contract of marriage, must be determined by the Burmese Buddhist Law."

The consensus of opinion, therefore, from the decided cases is clearly in favour of the view that the question, whether a breach of promise of marriage will afford a cause of action, and the decision of other questions that may arise in such a suit as, for instance, whether the marriage is between parties within the prohibited degrees and the question of the liability of minors, is to be decided according to the principles of Burmese Buddhist Law.

Every marriage must be preceded by an offer and its acceptance. This prior agreement to marry is an integral part of every marriage. Any question, therefore, arising in connection with this promise must be held to be a question regarding marriage. Whenever a suit for breach of promise of marriage is brought the Court has to determine whether the suit will lie, that is, whether there is a cause of action, and to decide that point the Courts must look to the Burmese Buddhist Law and must decide in accordance with its rules. The authorities clearly show that a different decision would have to be arrived at in the case of minors, if the matter was to be decided according to the principles of the ordinary law of contract, to that which would prevail if the principles of Burmese Buddhist Law were applied. As to whether the promise is valid or not by reason of questions regarding the consent of the parents, the Courts would have to resort to the Burmese Buddhist Law to decide it. It is clear that Burmese Buddhist Law does contemplate compensation for seduction under a promise of marriage, and it is also clear that that law does not forbid a suit based on a promise to marry. I would

(8) 52 Ind. Cas. 653; 10 L. B. R. 28; 12 Bur. L. R. 129.

have no hesitation in holding that in suits for breach of promise of marriage between Burmese Buddhists the questions that may arise in the case are questions regarding marriage.

It has been suggested that in this case where the parties were both adults, no question whatever involving Burmese Buddhist Law arises and that, therefore, since it is not necessary for the Court to decide any question regarding marriage, section 13 of the Burma Laws Act does not apply while in the Lower Burma Courts Act suits of a nature described in section 13 (1) of the Burma Laws Act are referred to. I do not think that the matter should be decided on such narrow considerations as these. The intention of the Legislature clearly was that in respect of such personal matters as succession, inheritance, marriage or caste or religious usage, the personal law of the parties should be applied and the wording of the Courts Act was merely intended to refer to cases in which such personal questions arose. It would be wrong to give any narrow or restricted interpretation to the provisions regarding the application of the personal law.

I am of opinion, therefore, it should be held that suits for breach of promise of marriage between Burmese Buddhists are suits involving questions regarding marriage and that appeals in such suits would lie under section 30 of the Lower Burma Courts Act, and not merely under section 100 of the Civil Procedure Code.

MAUNG KIN, J.—The question is whether a suit for a breach of promise of marriage between Burmese Buddhists is a suit of a nature described in section 13 of the Burma Laws Act.

That section provides that where in a suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution—

"(*a*) the Buddhist Law, in cases where the parties are Buddhists,

* * * *

shall form the rule of decision."

The question, therefore, is whether in a suit for a breach of promise of marriage between Burmese Buddhists it is necessary for the Court to decide any question regarding marriage.

What is the meaning of the words, "when it is necessary for the Court to decide?" Do they mean and include only the issues which arise between the parties at the trial? To hold that that is so would, in my opinion, be too narrow a construction. The Court can dismiss a suit *ex parte*. One of the important matters which the Court has to pay attention to when it receives a plaint, is whether it discloses a cause of action. The plaintiff in a suit for a breach of promise of marriage has to satisfy the Court that the contract sued on is valid, otherwise the plaint will not disclose a cause of action. It will not disclose a cause of action if the parties to the contract were not competent to make a valid marriage. To decide this question the Court will have to have recourse to the personal law of the parties. The personal law of the Burmese Buddhists allows adults, otherwise competent, to marry. Other systems of law ordain to the same effect. Nevertheless, the decision of the Court as to the competency of the parties to make a valid marriage is made under the personal law of the parties concerned. It has been argued that this question was not raised by the parties and that it was, therefore, unnecessary to decide it and that the questions which the lower Courts had to decide were not questions regarding marriage at all. But as shown above, the question had to be decided by the Court before admitting the plaint.

For the above reasons I would hold that the suit is one of a nature described in section 13 of the Burma Laws Act.

HEALD, J.—The question referred for the decision of the Bench is as follows:—

"In suits for compensation for breach of promise to marry as between Burman Buddhists, residing in Burma, is the matter involved merely one of contract, or does it include any question regarding marriage?"

The Burma Laws Act says that where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding marriage, the Buddhist Law, in cases where the parties are Buddhists, shall form the rule of decision except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

VITHOBA v. BABULAL.

We have, therefore, to decide whether in a suit for damages for breach of promise of marriage it is necessary for the Court to decide any question regarding marriage.

The judgment of the learned Chief Judge shows clearly the state of the case-law on the subject and it is unnecessary for me to discuss it.

It is clear that in a suit for damages for breach of a promise of marriage one of the chief questions which the Court has to decide is whether or not there was a valid promise, since damages are not ordinarily awarded by the Courts for breach of an invalid promise. The validity of a promise of marriage can only be determined by reference to the marriage laws to which the parties are subject, and, therefore, it seems clear that in such a suit it is necessary for the Court to decide a question regarding marriage.

I would, therefore, hold that in suits for compensation for breach of a promise to marry as between Burman Buddhists residing in Burma it is necessary for the Court to decide a question regarding marriage, and that such suits are suits of the nature described in sub-section (1) of section 13 of the Burma Laws Act.

W. C. A & N. H.

Answered accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 69 OF 1920.

November 3, 1920.

Present :—Mr. Macnair, A. J. C.

VITHOBA—APPLICANT

versus

BABULAL AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 60—Sewing machine, whether tool of artisan—Exemption from attachment.

A sewing machine is a tool of an artisan within the meaning of section 60 of the Civil Procedure Code and is, as such, exempt from attachment under that section in execution of a decree.

Application for revision of a decree of the District Judge, Bhandara, dated the 23rd December 1919, in Civil Appeal No. 204 of 1919.

Mr. *D. T. Mangalmurti*, for the Applicant.

Mr. *R. B. Gadgil*, for the Non-Applicants.

ORDER.—The only question for consideration is whether a sewing machine can be regarded as a tool of an artisan. The learned District Judge has held that a sewing machine is not a tool. In Webster's Dictionary a tool is defined as "an instrument, such as a hammer, saw, plane, file and the like, used in the manual arts, to facilitate mechanical operations; any instrument used by a craftsman or labourer at his work; an implement." I can find no guidance on the point in reported rulings, but I consider that a sewing machine is a tool. It can hardly be denied that a simple machine such as a simple form of loom is a tool. I do not see how a line can be drawn shutting out a more complicated form of loom from the definition. A complicated loom or a sewing machine is certainly an instrument used by a craftsman or labourer at his work. Section 60, Civil Procedure Code, speaks of the tools of artisans and implements of husbandry of an agriculturist Implements of husbandry may be specialized and costly. I see no reason why a tool should be confined to primitive implements. I hold then that a sewing machine is a tool. I set aside the order of the learned District Judge and restore the order of the first Court. The non applicant will pay the costs of the applicant in all Courts.

G. R. D.

Petition granted.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No 3 OF 1921.

July 28, 1921.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

In the matter of Babu JNANENDRA KUMAR CHOUDHURY, PLEADER.

Legal Practitioners Act (XVIII of 1879), s. 14—Vakalatnama, acceptance of—Bona fide mistake of Pleader—Warning by Court—Subsequent proceedings for dismissal or suspension—Rules of High Court—Pleaders, duty of.

A Pleader was called upon by a Court to submit an explanation in the matter of his acceptance of a *vakalatnama*. The Pleader in his explanation submitted that he acted *bona fide* and thought that he had received the *vakalatnama* duly authorised by the executant and that he was entitled to act upon it. The Court on the 8th November 1920 accepted the explanation, excused the Pleader and warned him to be careful in future. Then on the 19th January 1921 the Court took up the matter again and drew up proceedings under section 14 of the Legal Practitioners Act for dismissal or suspension of the Pleader:

Held, that having regard to the fact that the Court had previously come to the conclusion that the Pleader had been acting *bona fide* although he had made a serious mistake there was no necessity for the Court to take up the matter again, especially after a lapse of a long time. [p. 419, col. 1.]

The rules with regard to the responsibilities of Pleaders in accepting *vakalatnamahs* should be strictly observed. [p. 419, col. 1.]

Reference under section 14 of the Legal Practitioner's Act, made by the District Judge, Midnapur.

FACTS appear from the judgment.

Babu *Manmotha Nath Mukerjee*, for the Pleader.—This is a reference under section 14 of the Legal Practitioners Act. Babu Jnanendra Kumar Chaudhury is a Pleader of Midnapore. The facts shortly are these: There was a rent-decree for Rs. 80 and the judgment debtor's holding was purchased by a stranger in the execution sale in July 1920. In August 1920 an application purporting to be filed by the judgment-debtor was made to deposit the decretal amount. The *vakalatnama* was purported to have been signed by a man named Mangobinda Maiti and was brought to the Pleader by one Rajani a friend and neighbour of the judgment debtor. Sometime after the judgment debtor and the decree-holder appeared and denied of the deposit having been made. The statement of Rajani was taken by the Munsif on 30th August 1920. Rajani bore out the facts. On 4th September 1920 the judgment-debtor was examined and cross-examined. He alleged that the deposit was probably made by a mortgagee whose interest it was to deposit. On 17th September 1920 Babu Jnanendra Kumar gave his explanation stating his ignorance of the exact terms of the High Court Circular Orders and prayed to be excused. On 18th November 1920 the Munsif accepted the explanation and dropped the proceedings with a warning to the Pleader. On 19th January 1921 the Munsif re-opened the proceedings and made a report through the District Judge to this Court. My point is that if the Munsif thought that he had no jurisdiction he ought not to have reported. Secondly, there cannot be a revival of the proceedings after two months of the dropping of the same. The Munsif thought that clemency had been exercised without jurisdiction and was misexercised. Refers to section 14 of the Legal Practitioners Act.

He should make a reference only when he finds that the charge has been established. The Pleader ought to have according to the High Court Circular Orders, obtained a letter authorising Rajani to make over the *vakalatnama*. In this case there was an authority at the back of the *vakalatnama*, executed by the executant of same in favour of Rajani. The Munsif may be right in his interpretation of the law. My submission is that you would in a matter of this kind when a sufficient warning had already been given by the Munsif, interfere and will not allow a revival of the proceedings which have been once dropped.

Babu *Ram Charan Mittra*, Senior Government Pleader, for the Government.—This Court has power also under section 15 to interfere in cases of acquittal. There is no doubt that a fraud was attempted to have been committed upon the Court. The evidence of Rajani and the judgment debtor was conflicting, a further enquiry ought to have been held to detect the perpetrators of the fraud. The Munsif's reference is in accordance with law under section 15 of the Legal Practitioners Act. The question is whether you would direct further enquiry or would uphold the order of discharge previously made, with a warning. I do not press for further enquiry as no fraud has actually been committed.

Babu *Manmothanath Mukerjee* briefly replied.

JUDGMENT.

SANDERSON, C. J.—This is a reference which was made by the learned Munsif of Danton to the High Court, and it was submitted, as is the usual practice, through the District Judge. By the reference it was submitted that the conduct of the Pleader concerned justified an order of dismissal or suspension within the meaning of the Legal Practitioners Act.

The learned Judge who forwarded the reference, for the reasons, which he stated in his letter, came to the conclusion that he was unable to support the learned Munsif's recommendation for dismissal or suspension of the Pleader in question he being of opinion that the warning given by the Munsif by his first order in final disposal of the matter was sufficient.

It appears that a rent-decree had been obtained against one Isof Khan and the holding in arrears had been sold by auction and purchased by the decree holders who were the 16 annas landlords. On the 19th of August 1920, the Pleader accepted a *vakalatnama* purporting to be executed by Isof Khan, but presented to him by one Rajani Kanta Ray who described himself as a "brother by courtesy" of the judgment-debtor: and, in pursuance of that *vakalatnama* the decretal amount together with the compensation was deposited on behalf of the judgment debtor by the Pleader on that day. On the 28th of August 1920, both the decree-holders and the judgment-debtor filed petitions to the Court alleging that the deposit was not made by the judgment-debtor: and upon enquiry, the learned Munsif came to the conclusion that in all probability the deposit had really been made on behalf of the mortgagee who was desirous of having the sale set aside; and, he held that an attempt was made to commit a flagrant abuse of the provisions of section 174 of the Bengal Tenancy Act. The Pleader was called upon by the learned Munsif to submit an explanation, and his explanation was submitted on the 17th of September. I do not intend to read the explanation. I accept the explanation which has been made by the Pleader, and assume for the purpose of my judgment that the Pleader acted *bona fide* and thought that he had received a *vakalatnama* duly authorized by the judgment-debtor and that he was entitled to act upon it. The learned Munsif considered this explanation but did not give his decision until the 8th of November 1920. This, to my mind, was an unreasonable delay I am quite aware that the vacation may have accounted for some part of the period between the 17th of September and the 18th of November, but it cannot account for more than about a month. This was a matter which was within a reasonably small compass: and, it was a matter in which the position and reputation of the Pleader were involved and which ought to have been disposed of promptly. In my judgment it was not fair to the Pleader to have the matter hanging over his head for at least two months, before the learned Munsif to deliver his judgment. However, on the 18th of November, the learned Munsif came to a conclusion and he said: "Having regard to the explanation submitted by the Pleader concerned, Babu Jnanendra Kumar Chowdhury, in which he pleads *bona fide* ignorance of the Rule on the subject of acceptance of *vakalatnama* and begs to be excused, and the circumstances of the case, the Pleader is excused but warned to be careful in future: so that any such case may not occur again." In my judgment the Pleader was entitled to assume that having regard to that judgment given by the learned Munsif the matter was at an end. But it was not at an end. It appears that on the 19th of January 1921, the learned Munsif took up the matter again after a lapse of another two months, and then he expressed his view about the responsibilities resting on the Pleader with regard to the all important subject of acceptance of *vakalatnamahs*. He pointed out that a grievous wrong was perpetuated in the name of law and through the instrumentality of the Pleader, and came to the conclusion that the clemency which he had exercised was without jurisdiction and had been misexercised. Consequently he drew up these proceedings under section 14 of the Legal Practitioners Act.

As the learned Senior Government Pleader pointed out, there is no doubt that the learned Munsif had ample jurisdiction to make the first order which he made on the 18th November 1920. He obviously came to the conclusion on that occasion that

he did not consider that the Pleader should either be suspended or dismissed and that the justice of the case would be met if a warning were administered to the learned Pleader. I do not intend to express any opinion as to whether the second order of the learned Munsif on the 19th of January 1921 was without jurisdiction or not, for the simple reason that it is not necessary for my judgment that I should do so. I can conceive cases where it would be necessary in the interests of justice for a Tribunal, however it may be composed, to withdraw the first order and make a further one. It is quite possible that further facts may come to the knowledge of the Tribunal which would justify it in investigating the matter further, but as I have said before, I do not express any opinion upon that point. It is quite sufficient to say that, in my opinion, having regard to the nature of the case, and having regard to the fact that the learned Munsif had come to the conclusion in November that the Pleader had been acting *bona fide* although he made a serious mistake; there was no necessity for the learned Munsif to take up the matter again, especially after a lapse of so long a time.

I have only one other matter to deal with before I leave this case. I endorse entirely what the learned Munsif has said with regard to the responsibilities of the learned Pleaders in accepting *vakalatnamas*. This is an instance which shows how necessary it is that the rules, which have been drawn up by the learned Judges of the High Court, should be strictly observed. Here was a case in which but for the interference of the judgment-debtor and the decree holders a very serious fraud might have been committed, not only upon the Court but by means of the Court upon private individuals. I hope that this will be an object lesson to the learned Junior Pleaders to make themselves fully acquainted with the rules of the High Court and also with the reason why those rules should be observed.

Having made these observations, I agree with the suggestion, which has been made by the learned District Judge, that this Reference ought not to be accepted.

CHOTZNER, J.—I agree.

S. M. & J. P.

Reference not accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 648 OF 1921.

December 16, 1921.

Present:—Mr. Justice Stuart.

SUKHNANDAN SINGH AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), s. 13—Public place—Private grove on occasion of fair, whether public place.

When the public have access to a place without their access being refused or interfered with, that place is a public place whether the public have a right to go there or not. [p. 419, col 2; p. 421, col. 1.]

The accused were convicted of gambling in an area occupied by a large private grove at a time when a fair was in progress there and visitors to the fair had penetrated to all parts of the grove without any interference:

Held, that the accused were gambling in a public place and were rightly convicted [p. 420, co. 1.]

Reg. v. *Wellard*, (1885) 14 Q B. D 63; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox C. C. 559; 49 J. P. and *Queen-Empress* v. *Sri Lal*, 17 A. 166; A. W. N. (1895) 42; 8 Ind. Dec. (N s.) 432, followed.

Ahmad Ali v *King-Emperor*, 1 A. L. J. 129; 1 Cr. L J. 272, distinguished.

Criminal revision from an order of the Sessions Judge, Cawnpore, dated the 21st June 1921.

Mr. *S. C. Mukerji*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The only point raised in this revision is whether the applicants were gambling in a public place. On the finding of the Magistrate who tried the case, they were found gambling in the area occupied by a large grove. At one end of the grove is the shrine of a goddess and a tank. A fair was in progress at the time that they were gambling and visitors to the fair had penetrated to all parts of the grove. The grove is private property but on the occasion of the fair the public use the grove and there is no interference with their so doing. The decision in the case of *Ahmad Ali* v. *King-Emperor* (1) is not in point, because the grove used for the purpose of gambling in that case was a private grove to which the public did not have access. The question as to whether the grove in this case was or was not a public place presents little difficulty. When the public have access to a place without their access being refused or inter-

(1) 1 A. L. J. 129; 1 Cr. L. J. 272.

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fered with, that place is a public place whether the public have a right to go there or not. Authority for this proposition will be found in *Reg.* v. *Wellard* (2). Lord Coleridge laid down there that a place was a public place if the public were in the habit of resorting to it and no one prevented them from so doing. Grove, J. laid down that a public place is one where the public go no matter whether they have a right to go or not. This view was accepted in the case of *Queen-Empress* v. *Sri Lal* (3). Edge, C. J., laid down that a public place was a place to which the public had by right or by permission or by usage or otherwise access. I, therefore, find that the applicants were gambling in a public place and they were rightly convicted. I dismiss this application.

J. P. *Application dismissed.*

(2) (1885) 14 Q. B. D. 63; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox C. C. 559; 49 J. P. 296.

(3) 17 A. 166; A. W. N. (1895) 42; 8 Ind. Dec. (N. S.) 432.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 373 OF 1921.

June 16, 1921.

Present :— Mr. Saunders, J. C.

NGA PO TIN AND ANOTHER—APPLICANTS

versus

EMPEROR— OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 169, 514—Surety bond, construction of—Surety to produce accused on particular date—Non-appearance on subsequent date—Surety, liability of.

A surety bond in criminal cases must be strictly construed and a surety cannot be required to pay the amount of his bond as the result of an opinion held by a Court as to what was in his mind when he signed it. He can be required to forfeit the amount only if the terms expressed in the bond are broken.

Where, therefore, a surety binds himself to produce an accused on a particular date and he does so his liability is discharged and he is not bound for the non-appearance of the accused on any subsequent date.

Mr. *S. Ganguli*, for the Applicant.

JUDGMENT.—Upon a trial under section 9 (*c*) of the Opium Act, the accused was released on bail in Rs. 200 with two sureties in the like amount. The accused was produced in Court on the 20th August 1920 but did not subsequently appear and the sureties have been required to forfeit a sum of Rs. 200. They claim that they are not liable under their bonds. The Sessions Judge to whom they appealed held that they were liable. They now come to this Court in revision. The terms of the bond are as follows :—

"We, the undersigned as sureties for the accused undertake that he will appear before the Magistrate on the 20th of August 1920 to answer the charge, and if he does not appear and answer the charge we will forfeit Rs. 200 to Government." The bond was in manuscript as there was no printed form apparently available. It is quite clear that this bond does not require the sureties to do anything more than produce the accused upon the date named. The Sessions Judge has held that although no mention was made of any subsequent appearance, it was evident from the wording that the surety understood and intended to bind himself to an undertaking that the accused would not consider himself discharged from attending till he had cleared himself of the charge. But the surety bond in criminal cases must be strictly construed, and a surety cannot be required to pay the amount of his bond as the result of an opinion held by the Court as to what was in his mind when he signed it. He can only be required to forfeit the amount if the terms expressed in the bond are broken. The suggestion that the bond would have been satisfied by producing the accused at 10 A. M and that there would have been no liability if the accused had departed at one minute past 10 does not appear to be correct. He was not only to appear at 10 A. M. but was to appear and answer the charge. But his appearance was to be on the date mentioned and on no other date. I think it is quite clear that the sureties did not bind themselves to produce the accused except upon the 20th of August and that having done so their liability was discharged. The order is set aside and the amount of the bail bond must be refunded to the applicant.

J. P. *Order set aside.*

PATNA HIGH COURT.
CRIMINAL MISCELLANEOUS CASE No. 33 OF 1921.
May 16, 1921.
Present:—Mr. Justice Coutts and Mr Justice Ross.
MR. H. GRANT—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 190—Cognizance of offence—Charge sheet, whether should mention what each witness is to prove.

No provision of law requires that a Magistrate before taking cognizance of an offence should know exactly what each of the witnesses named in the charge-sheet will prove. The charge-sheet alleges that a certain offence will be established by the evidence of certain witnesses and this is sufficient to enable a Magistrate to take cognizance. [p. 422, col. 2.]

Criminal ravision against an order of the District Magistrate, Bhagalpore, starting proceedings against the accused under section 150, Indian Penal Code.

Messrs *Manuk, J. N. Maitra, S. C. Roy* and *N. C. Roy*, for the Petitioner.

The Government Advocate, for the Crown.

JUDGMENT.—This an application to quash proceedings under section 150 of the Indian Penal Code, which have been instituted by the District Magistrate of Bhagalpore against Mr. Grant one of the proprietors of the Luttipore Concern. The application has been made on three grounds:—

(1) that the proceedings are not *bona fide*, (2) that on the face of the charge sheet and on admitted facts the ingredients necessary for a prosecution under section 150 of the Indian Penal Code are not present, and (3) that the charge sheet as submitted to the Magistrate is such that he could not, under the law, take cognizance.

It appears that in the Luttipore Zemindary there are a number of Diara villages which are subject to the action of the river Ganges and, it is said, that under the terms of the *kabuliyats* which are taken by the proprietors from tenants, the arrangement is that the tenants do not pay rent on diluviated lands, the rights of tenancy are extinguished and when the lands reform the proprietors have an unrestricted right of settlement. Amongst these Diara villages is one named Sonbarsa. This village diluviated many years ago to the extent of some 400 *bighas*, which in the year 1918, reformed. There were apparently many applicants for settlement and when the settlement was made, it is said that the disappointed tenants began to create disturbances. The result was that proceedings under section 107 were instituted and in the beginning of the year 1920, 19 persons were bound down to keep the peace for a year. This, however, did not settle the matter and there were in the course of the next ten or eleven months, ten criminal proceedings, which seem to have ended in convictions. The proprietors, however, were not satisfied and they made several applications to the authorities for Police aid. These were not granted. Mr. H. Grant, thinking he was aggrieved, on the 20th of January engaged 40 Gurkhas from the Depôt at Lucknow. This action, he says, was necessary for the protection of his properties, the persons of his servants and tenants and for maintaining possession. These Gurkhas came down from Lucknow and, on the morning of the 2nd February, 27 of them accompanied by tenants and Zamindary servants, crossed the river to the Diara for the purpose, it is said, of watching the crops. They were met, however, by a large body of persons, a fight ensued, twenty Gurkhas were killed and the remaining Gurkhas and the Zamindary servants fled.

Proceedings were started against both contending parties in respect of this occurrence and on the 14th February the proceedings, with which we are now concerned, was instituted by a formal first information made by the Sub-Inspector of the Thana in which the occurrence took place. This shortly is the history of the case and, in my opinion, the facts disclosed absolutely nothing which would indicate that prosecution is not perfectly *bona fide* one.

Next it has been contended by Mr. Manuk on behalf of the petitioner, that the charge sheet which was sent up after the investigation in this case, and the admitted facts do not contain the ingredients for a prosecution of Mr. H. Grant under section 150 of the Indian Penal Code. With this contention I am unable to agree. It is clearly stated in the charge sheet that

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Mr. H. Grant engaged or hired the services of 40 Gurkhas from the Lucknow Depôt, who joined or became members of an unlawful assembly which led to the commission of offences under sections 302, 148, and 379 of the Indian Penal Code, and that the charge against Mr. H. Grant under section 150 of the Indian Penal Code has been proved and satisfactorily established by the witnesses who were named by the Police. This is clearly a charge under section 150 of the Indian Penal Code. Mr. Manuk, however, contends that at the time this first information was submitted, the Magistrate had before him another charge sheet, namely, the charge sheet in a case under section 143 which had been sent up by the Police against some of the party with which it is said, the Gurkhas were at the time of occurrence on the 2nd of February. In the first information which was laid in that case the Gurkhas, who had not been killed, were named as accused, but these Gurkhas were not sent up for trial as the case against them had not been satisfactorily established and Mr. Manuk contends that this being so, there is no substance in the case against Mr. H. Grant, because unless the Gurkhas are members of the unlawful assembly, he cannot be said to have engaged or hired the services of the Gurkhas from Lucknow to join or to become members of an unlawful assembly. He, further, contends that the unlawful assembly for which hiring is done must be an unlawful assembly formed or forming and that the circumstances of this case do not comply with this view of the law.

With regard to the first of these contentions, the mere facts, that the Police did not consider that the Gurkhas could be successfully prosecuted under section 145, Indian Penal Code, by no means shows that they took no part in the occurrence. Moreover, 20 Gurkhas were killed and there is nothing to show what part they took in the occurrence. This contention, therefore, failed.

As to the second contention, its success or otherwise depends on the interpretation of section 150 of the Indian Penal Code. The interpretation of this section is not free from difficulty and without having the whole facts before us, it is impossible to say whether they will constitute an offence under this section or not.

The last contention of Mr. Manuk is that on the charge sheet as submitted the Magistrate could not, under the law, take cognizance, because it does not show exactly what each of the witnesses named in the charge sheet will prove. I can find no provision of the law which requires that the Magistrate before taking cognizance should know exactly what each of the witnesses named in the charge sheet will prove; nor can I find any authority for such a proposition. The charge sheet alleges that a certain offence will be established by the evidence of certain witnesses and, in my opinion, this is sufficient to enable the Magistrate to take cognizance.

I would accordingly dismiss the application.

Ross, J.—I agree.

J. P. *Application dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No 638 OF 1921.

December 19, 1921.

Present:—Mr. Justice Stuart.

SAGAR MAL—APPLICANT

versus

EMPEROR THROUGH BHUKAN SARAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Further inquiry—Notice to accused, necessity of.

An order for further inquiry against an accused person who has been discharged should not be passed without first serving a notice on him to show cause why the order should not be passed.

Queen-Empress v. *Ajudhia*, 20 A. 389, followed.

Criminal revision from an order of the Officiating Sessions Judge, Bareilly, dated the 15th October 1921.

Mr. *S. C. Mukerji*, for the Applicant.

Mr. *K. C. Mithal*, for the Opposite Party.

JUDGMENT.—The Officiating Sessions Judge has directed a further enquiry against Sagar Mal who was discharged by a Magistrate of the First Class without notice having

been served on Sagar Mal. An attempt was made to serve notice on Sagar Mal but the attempt was not successful, and when the matter was heard by the learned Sessions Judge, Sagar Mal was absent and unrepresented. In these circumstances the order directing further enquiry cannot stand. The principles laid down in the case of *Queen-Empress* v. *Ajudhia* (1) have invariably, as far as I am aware, been followed in this Court. I, therefore, set aside the order directing further enquiry and remit the case to the learned Sessions Judge who has succeeded the officer who passed the order, so that he may issue notice to Sagar Mal and then proceed to determine the matter.

J. P. *Order set aside.*

(1) 20 A. 339; A. W. N. (1898) 60; 9 Ind. Dec. (N. S.) 577.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 572 OF 1921.

October 28, 1921.

Present :—Mr. Justice Kumarasami Sastri.

A. B. MAHAMMAD—ACCUSED

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 423 (1) (d), 439 (4), 470, 471—Acquittal on ground of lunacy—Order for safe custody—Delivery of lunatic prisoner to parents, legality of—Omission to pass orders under s. 471—High Court, powers of, in revision.

When a Court acquits an accused under section 470, Criminal Procedure Code, on the ground of his lunacy, it should simultaneously pass orders under section 471. [p. 424, col. 1.]

Section 471, Criminal Procedure Code, should not be interpreted as compelling a Court to send the accused to a lunatic asylum. All that is necessary is to see that such safeguards are taken as would keep the accused from mischief and it is permissible to order the accused to be kept under the control and custody of his parents. [p. 424, col. 1.]

A Trial Court's omission to pass an order under section 471 will not preclude a High Court from passing such an order in revision. Such an order is in the nature of a consequential or an incidental order within the meaning of section 423 (1), Criminal Procedure Code, and does not amount to an alteration of the finding of acquittal into one of conviction. [p. 424, col. 1.]

Calendar Case No. 1 of 1921 on the file of the Court of the First Class Sub Divisional Magistrate, Mangalore, submitted in accordance with the proceedings of the High Court, dated the 16th August 1921.

FACTS appear from the judgment.

Dr. S. Swaminathan, for the Accused.—There is a finding of guilty in the judgment of the lower Court. It finds that the accused removed the coat. The acquittal on ground of insanity is quite legal.

Consequential orders under section 471, Criminal Procedure Code, however, have not been passed. That would not affect the acquittal. By virtue of its powers under section 423 the High Court can itself pass such orders as a Court of Revision. It is within its competence either to send the accused to the lunatic asylum or deliver him to his parents for safe custody on their executing bonds. The matter is within the Court's discretion and dependent on the nature of the lunacy.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.—The High Court has no power to pass order under section 471. It will be virtually converting a finding of acquittal into one of conviction. The lower Court only should do so.

ORDER.—The Sessions Judge finds that the accused took away the coat of the girl but acquits him as he was of opinion that the accused was insane when he committed the act. Reading the judgment as a whole, I think there is a specific finding that the accused committed the act complained of and the provisions of section 470, Criminal Procedure Code, have been complied with.

He was, however, wrong in not having passed orders under section 471. Mr. Adam, Public Prosecutor, contends that the High Court has no power to pass orders and that the case must go back to the lower Court. He relies on section 439, clause 4, Criminal Procedure Code, which prevents the High Court from converting a finding of acquittal into one of conviction. I do not think the passing of an order under section 471 after an acquittal has been recorded, can be said to alter a finding of acquittal into one of conviction. The acquittal is maintained, but, in view of the desirability of keeping the accused from further mischief, the Court passed orders as to his safe custody.

So far as the High Court is concerned, it has, in revision, all the powers of a Court of Appeal. Section 439, clause (1), makes this clear and confers on the High Court powers under section 423. Under clause 1 to section 423, the Appellate Court can make any consequential or incidental order as may be just and proper.

When an Appellate Court finds a man insane, it is bound to acquit him and any orders that it may pass subsequently under section 471, Criminal Procedure Code, are not part of any sentence for the offence. It is, in my opinion, an order which the Court passes as consequential on or incidental to the acquittal.

Section 471 confers the power to order the insane accused "to be kept in safe custody in such place and manner as the Magistrate or Court thinks fit." Clauses 2 and 3 have been repealed by Act IV of 1912 and the powers of the Court are wide. I see nothing in the section as it now stands compelling the Court to send the accused to a lunatic asylum. All that is necessary is to see that such safeguards are taken as would keep the accused from mischief. There are various degrees of lunacy and it would, in many cases, be quite unnecessary to take a person out of the control of his parents or relations and confine him in a lunatic asylum if he can otherwise be kept from harm. I think that, in the present case the accused can safely be kept under the custody and control of his father on the father's executing a bond for a sum of Rs. 1,000 to assure for two years undertaking to keep the accused from committing any offense. I modify the order of the lower Court accordingly.

M. C. P.

N. H. *Order modified.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 658 OF 1921.

December 22, 1921.

Present:—Mr. Justice Stuart.

AMANAT AND OTHERS—ACCUSED —APPLICANTS

versus

EMPEROR THROUGH SHAKUR —OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 297—Putting obstacle in burying dead child - Boycott—Offence—Security to keep peace.

An accused person who deliberately puts obstacles in the way of a complainant burying his dead son because he has not joined the Khilafat movement but does not use violence to him though he effectively boycotts him is not guilty of an offence under section 297, Indian Penal Code, of having offered an indignity to the corpse of the dead child and cannot also be bound over to keep the peace inasmuch as the act is an act of boycotting and not a criminal act under any law [p. 424, col 2; p. 425, col. 1.]

Criminal revision against an order of the Sessions Judge, Ghazipur, dated the 18th October 1921.

Mr. *S. C. Mukerji*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The facts are as follows:—On the 27th of July 1921 the son of Muhammad Shakur died of cholera in a village in the Ghazipur District. Muhammad Shakur told the barber to arrange for the digging of a grave. The barber came back and said that Amanat, Ghura, Jamait, Fateh Ali and another were preventing the grave being dug. Muhammad Shakur went to these persons and protested They replied that as he was not joining the Khilafat party they would not permit his son to be buried. It has been found that the above facts are correct. The four men in question deliberately put obstacles in the way of Muhammad Shakur burying his son because he had not joined the Khilafat movement. They did not use any violence to him, though they boycotted him effectively. They have been convicted under section 297, Indian Penal Code, of having offered an indignity to the corpse of the dead child. They have also been bound over to keep the peace. The matter has come before me on a reference from the Sessions Judge in respect of the order to keep the peace and in revision in respect of both orders. I do not propose

to expatiate upon the mentality of persons who, to support their views as to what they conceive desirable in politics, use their influence to prevent a man from burying his little child. But as the law stands they have not committed any criminal offence in this particular case. The act was an act of boycotting and was not a criminal act either under the Penal Code or any other law. The suggestion that by their action they offered an indignity to the child's corpse, is almost fantastic. As the appellants have not committed any criminal offense under the law, I must allow this application, set aside their convictions and sentences and direct a refund of their fines if they have been paid. The order that they should furnish security is set aside.

J. P. *Application allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 278 OF 1921.

December 23, 1921.

Present:—Mr. Hallifax, A. J. C.

DHEKLIA KUNBI—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Motor Vehicles Act (VIII of 1914), ss. 16, 18 (2)—Licensed motor driver—License not on his body—Driving, whether offence—Suspension of license, whether part of sentence—Order suspending license, whether appealable—Criminal Procedure Code (Act V of 1898), s. 565.

There is no prohibition against the driving of a motor car by a properly licensed person who has not got his license with him; it is only the non-production of the license upon demand by a Police Officer that is an offence. [p. 425, col. 2.]

The suspension of a license of a motor driver under section 18 (2) of the Motor Vehicles Act, if ordered in addition to the imposition of a fine for an offence under section 16 of the Motor Vehicles Act, is a part of the sentence, as an order under section 565 of the Criminal Procedure Code is An order of suspension under section 18 (2) as well as the order imposing fine for an offence under section 5 of the Motor Vehicles Act are both appealable under section 417 of the Criminal Procedure Code and are also subject to revision by a High Court. [p. 426, col. 1.]

Emperor v *Jhagroo*, 20 Ind. Cas. 314; 9 N. L. R. 88, 14 Cr. L. J. 299, followed.

Application for revision of an order passed by the District Magistrate, Bhandara, dated the 7th October 1921, in Criminal Appeal No. 58 of 1921.

Mr. *V. M. Jakatdar*, for the Applicant.

Mr. *G. P. Dick*, Standing Counsel, for the Crown.

JUDGMENT.—The applicant Dheklia Kunbi was convicted of an offence of not producing his driving license on demand by the Police and sentenced under section 16 of the Motor Vehicles Act (VIII of 1914) to pay a fine of twenty-five rupees. The Magistrate also passed an order under section 18 (2) of the Act that his license should be suspended for six months. The circumstances are as follows: Dheklia has held a license since 1915, and there has apparently never been a complaint of any sort against him. On the 8th of September a Sub-Inspector was stopping all motor cars that passed in front of the Police Station House for the purpose of examining the drivers' licenses: Dheklia was taking certain passengers to the Railway Station in one of his master's cars. He stopped when called upon to do so, and admitted that he had not got his license with him. The Magistrate seems to have found that he was told to go back and fetch it and that he started in the direction of his own or his master's house, but instead of going there went to the Railway Station, his original destination, by another route. He sent the license to the Kotwali in the evening.

The learned Magistrate appears to think that the offense is aggravated by the fact that after committing it Dheklia drove to the Railway Station by another route. This can, as far as I can see, only mean that he considers it proved that he drove there without having his license on his person. There is no basis whatever for such a finding, and the act is no offense. There is no prohibition against the driving of a car by a properly licensed person who has not got his license with him. What is an offence is the contravention of section 8 of the Act which lays down that "the driver of a motor vehicle shall produce his license upon demand by any Police Officer." As Dheklia must be perfectly well known to the Bhandara Police as the holder of a license the offence

is of the most trivial and technical nature possible. The sentence inflicted is a fine of a quarter of the maximum amount possible under section 16 and suspension of the license for a half of the maximum period possible under section 18 (2).

On appeal the learned District Magistrate reduced the amount of the fine to ten rupees but was of opinion that he had no authority to interfere in respect of the suspension of the license, because the order "is not actually a part of the sentence" and "no provision for an appeal against an order of suspension has been made in the Act", so that "presumably even if the conviction were upset in appeal the order of suspension would still hold good." Having himself reduced his own view of the matter to this most patent absurdity the learned District Magistrate still continued to hold it. Even so, neither of the two reasons stated gives it any support whatever. The order is just as much a part of the sentence as an order under section 565 of the Criminal Procedure Code is. I am so completely unable to imagine any reason in support of the *dictum* that such an order is not a part of the sentence, that the only reason I can give for holding the contrary view is that it seems to me fundamentally and essentially obvious. No other reason that I know of can be given for saying that the order of fine is a part of the sentence. The ruling in *Emperor* v. *Jhagroo* (1) proceeded entirely on the basic assumption that an order under section 565 of the Criminal Procedure Code was a sentence and went on to discuss whether the result of it was also a "punishment" or not. As for the other reason, if there is no provision in the Act for an appeal against an order under section 18, there is also none for an appeal against an order under section 16. Both are appealable under the provisions of the Criminal Procedure Code, in this particular case under section 407 of that Code.

In discussing the amount of the fine that would be appropriate the learned District Magistrate seems to have fallen into the same error as was made in the Court below his. That Dheklia went on to the Railway Station without having his license on his person may be relevant, though I cannot see how it is, but it is certainly no aggravation of the original offence as has already been shown. It is just possible that what both Courts regarded as an aggravation of his offence was that he was ordered to go back and bring his license to the Kotwali at once but did not do so till the evening. Of this point I need only say that there is no evidence or suggestion on the record to this effect, and the fact would not aggravate the offence if there was. A fine of a rupee or even less would have fully met the requirements of the law and of justice and expediency. The suspension of the license has been in force for three months and considerable expense has necessarily been incurred by the applicant over the appeal and this application. His actual punishment has, therefore, been almost immeasurably in excess of his deserts. The order of suspension of the license is set aside and the amount of the fine is reduced to one anna. I refrain from setting aside the fine altogether only for the purpose of leaving it on record that a technical offence has been committed. Care should be taken to see that the necessary alteration in the amount of the fine is made in the endorsement on the license prescribed by section 18 (2).

G. R. D. *Petition partly granted.*

(1) 20 Ind. Cas. 214; 9 N. L. R. 88; 14 Cr. L. J. 390.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 2 OF 1921.

May 31, 1921.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Adami.

UOHAB SANTARA—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 467, 471—Forged document, used as genuine—Proof—Handwriting, proof of—Comparison by Judge—Expert evidence, value of.

A Court is competent to use its own eyes for the purpose of deciding whether certain handwritings placed before it are similar or not and the

opinion of expert is only a piece of evidence whereas the opinion of the Judge is the decision in the case. [p. 429, col. 1.]

Barindra Kumar Ghose v. *Emperor*, 7 Ind. Cas. 359; 14 C. W. N. 1114; 37 C. 467; 11 Cr. L. J. 453, refererd to and distinguished.

It is unsafe to base the conviction of an accused entirely upon a comparison of hand writings. [p. 429, col 2]

Mohammad Kabir Uddin v. *Emperor*, 51 Ind. Cas. 774 20 Cr. L. J 534, approved.

Quære—Whether the prosecution must produce expert in handwriting when the case against the accused depends entirely upon the comparison of hand writings.

Criminal appeal against an order of the Sessions Judge, Cuttack.

Messrs. *Asghar* and *G. P. Das*, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

JWALA PRASAD, J.—The appellant has been convicted of fraudulently or dishonestly using as genuine and valuable security a forged hand-note (Exhibit 4) under section 467 read with section 471, Indian Penal Code and sentenced to five years' rigorous imprisonment and a fine of Rs. 500.

On the basis of the said hand note he instituted a suit in the Court of the Munsif of Puri against the alleged executant, Gopi Nath Haribandan (P. W. No. 5), claiming Rs 300 as due to him under the hand-note in question. The said note was filed along with the plaint. In support of his claim the appellant was examined in the Court on 26th February 1920 and he stated that the defendant Gopi Nath Haribandan (P. W. No. 5), executed the document on the 29th December 1916 on which date he took the said sum of Rs. 300. That suit of the plaintiff was dismissed by the Munsif after a special oath having been taken by the defendant, Gopi Nath Haribandan, denying the execution of the hand-note and the taking of the loan. The appellant was directed by the Munsif to be prosecuted for using the document said to have been forged. After the necessary preliminary enquiry, the prisoner was committed to the Court of Sessions and was tried with the aid of two assessors, with the result, as stated above at the very outset of this judgment, that he was convicted and sentenced to five years' rigorous imprisonment. The assessors returned an unanimous verdict of guilty. The learned Sessions Judge has held that the appellant did use the document in question in support of his claim in the Civil Court. This finding is based upon the good evidence on the record and has not been challenged in this Court. The only question, therefore, for consideration before us is whether the document in question is a forged document.

The hand-note bears the date "29th December 1916," Babu Pulin Behari Banerjee, Stationary Store Keeper, in the office of the Controller of Stationary, Calcutta proved that the Cartridge Paper on which the hand-note is written was not only not in existence in December 1916 but that it had not been ordered by the Controller's Office from the manufacturers until after the month of June 1917. Therefore the hand note in question could not have been executed on the 29th of December 1916. In the interest of the public, the documents and the distinctive marks that they bear are kept confidential and are not disclosed. The witness Pulin Behari Banerjee accordingly refused in the cross-examination to disclose the confidential and secret matters. The learned Counsel on behalf of the appellant argues that the learned Sessions Judge ought to have compelled the witness to disclose those confidential matters and that the refusal of the witness has affected his evidence to such a degree that it renders it inadmissible. Reliance has been placed upon section 162 of the Evidence Act. The first paragraph of that section no doubt requires a witness summoned to produce a document to bring it into Court. The second paragraph of that section gives the discretion to the Court to inspect the document "unless it refers to matters of State." The document said to be produced on behalf of the appellant to my mind refers to State matters and consequently the Court could not compel the witness to produce the same in Court for the inspection of the appellant or the public. I accordingly overrule this contention. But in view of the defence taken by the appellant in the Court below and also vehemently urged in this Court, the evidence of the Store Keeper becomes wholly irrelevant. The accused's case now is that the writing upon the document in question was not written on the 29th of December 1916 as it purports to have been on the face of it. That date depotes the date of execution

of a hand note which was subsequently substituted by the document in question and the original date of execution "29th December 1916" was retained in the substituted document which has been produced in Court. In other words it is now said that the document in question came into existence subsequent to June 1917 after it was manufactured according to the evidence of the Store Keeper. This was not the case of the prisoner in the Civil Court. There the prisoner case was based on the hand-note stating that it was executed on the 29th December 1916, the date on which the money was advanced. The present case of the prisoner is that money was advanced on the 29th of December 1916, but the original document is no longer in existence and on the date when the present document was written no money was paid to Gopinath Harichandan, the debtor. This is obvious from the statement on oath of the appellant in Exhibit 5 when he gave evidence in support of his claim in civil suit. "I see the hand note Exhibit. 1" said the appellant in the civil suit. "It is dated 29th December 1916 on that very day the defendant executed this hand-note to me." The defence witness No. 1 Banamali Mahanty contradicts the case of the appellant by stating that on the date when the document in question was substituted for the old damaged document, the appellant paid the consideration money to Gopinath, the debtor. He says that the money was paid to Gopinath on the same day that Gopinath wrote the paper. Thus apart from the evidence of Pulin Behari Banerjee, Store-Keeper the document in question upon the evidence on the record does not seem to be a genuine one.

The question then is whether the prosecution has been able to prove affirmatively that the document is a forged one, the onus of proof being upon the prosecution. Exhibit B, a blank stamp paper with endorsement on the back of it in the handwriting of Gopinath Harichandan the debtor, was produced on behalf of the accused in the Sessions Court with a prayer to send it to Government expert in handwriting for comparison of handwriting on the two documents. The trial before the learned Sessions Judge commenced on the 6th October 1920 and after the case having been opened by the Public Prosecutor and the examination of some of the prosecution witnesses the case had to be adjourned to the 15th of January 1921 to enforce the attendance of Babu Pulin Behari Banerjee. The assessors were then discharged and a *de novo* trial was directed. No application for the comparison of the handwriting was made at the commencement of the trial on the 6th of December, nor was any application made previously in the commitment Court. The application made on the 5th of January 1921 was, therefore, rejected by the Court below as being too late. I do not think that the Judge was wrong in refusing the application in the circumstances of this case. The accused is required to give the list of witnesses in the commitment Court if the order for commitment is made. No doubt, in certain special circumstances the Sessions Judge may allow fresh evidence to be given on behalf of the defence, but the accused failed to make out a sufficient case before the Sessions Judge for sending the document in question to the handwriting expert. That would have delayed the disposal of the case and certainly the Court could not have allowed the document to be taken away in the midst of the trial. The Court, however, compared the writing on the document in question with the admitted handwriting of Gopinath on Exhibit B, and came to the conclusion that although there is similarity between the two handwritings yet they are not of the same person. Indeed, as the learned Judge says, the similarity between the two writings is no greater than can fairly be expected from a competent forger. We have ourselves also compared the writings, and we are not satisfied that they are of the same person. Mr. Asghar has then referred us to the case of *Barindra Kumar Ghose* v. *Emperor* (1) where Sir Lawrence Jenkins, C. J., on the authority of the distinguished Judge (Blackburn) held that the prosecution must produce an expert in the handwriting when the case against the accused depends entirely upon the comparison of the handwritings. The learned Chief Justice further observed that the Court should not take upon itself the responsibility of judging of the handwriting by

(1) 7 Ind. Cas. 359; 14 C. W. N. 1114; 37 C. 467; 11 Cr. L. J. 453.

making comparison itself unaided by the opinion of an expert. This is no doubt, a very valuable opinion and a very wholesome guide in judging handwritings. To my mind however this does not at all suggest that the Court is incompetent to use its own eyes for the purpose of deciding whether certain handwritings placed before it are similar or not. To do this would be to deprive the Court of the function for which it exists of deciding disputed facts placed before it. The opinion of experts is only a piece of evidence. The opinion of the Judge is the decision in the case. A Judge has to be satisfied and he is entitled to take such assistance upon evidence as is available in the circumstances of each case. No doubt where the conviction of the accused rests entirely upon a comparison of handwritings, it has been held in a number of cases that such a conviction is not very safe. I had the opportunity of discussing the point in the case of *Mohammad Kabiruddin* v. *Emperor* (2). The opinion then expressed by me was based upon a consideration of the authorities on the subject. I still adhere to that opinion. But the present case does not depend solely upon the comparison of handwritings. Here we have got the direct evidence of Gopinath Harichandan who is said to have written the document in question that the document was never executed by him and he did not take the loan of Rs. 300 mentioned therein. The accused, on the other hand, asserts that this was the document executed by Gopinath Harichandan. So in this case we have got direct evidence on both sides. The question before the Court is which evidence is acceptable. Gopinath Harichandan's case is that of denial. He could not be expected to corroborate his case by direct evidence. The case of the accused is in the nature of affirmative statement, but the evidence offered on his behalf is so contradictory and inconsistent and improbable that it is impossible to act upon it. I do not think that Mr. Asghar has himself laid any stress upon that evidence. The evidence given by the defence witnesses are palpably false. They have purported to prove that the document in question was substituted for an old and damaged hand-note. I cannot for a moment believe that an old damaged hand-note will be substituted by another one, keeping the old date on the new one, if the question of the hand-note and a renewal as may be expected is a true case. Defence witness No. 1, as observed already, contradicted the case of the accused by stating that the money was paid at the time when the substituted hand-note was executed. The defence case and the evidence in support of it must, therefore, be eliminated from this record as being rank perjury.

Let us now see whether the prosecution evidence of Gopinath survives to the extent of carrying conviction in our minds so as to accept it as having been conclusively proved that the hand-note in question was a forged one. I say so with purpose, for nothing short of a firm convictions in our mind will entitle us to punish the prisoner—a conviction that the hand-note in question is a forged document to the knowledge and belief of the accused and that he used it with such knowledge and with the intention of committing fraud or dishonesty. The learned Counsel on behalf of the prisoner has not shown to us inherent improbability in the case of Gopinath Harichandan. The evidence, as we read it, appears to us to be straightforward. It is corroborated by the circumstances of the case and as such it is more acceptable than the evidence sought to be corroborated by the direct testimony of the witnesses. The circumstances of this case in favour of the prosecution are such as are incapable of being fabricated. The Court below has accepted the evidence. I therefore, have no hesitation in accepting the evidence of the prosecution and in holding that the case against the accused has been fully and firmly proved. It was a daring act on his part to concoct the hand-note of a large sum of Rs. 300 which he deliberately used in the Civil Court to support a wholly false claim against the defendant, Gopinath Harichandan. These are the circumstances which the Court below took into consideration in awarding somewhat heavier sentence against the accused. I agree with the Court below that the accused deserves a deterrent sentence. We, however, think that the fine of Rs. 500 imposed upon the petitioner be remitted, inasmuch as the sentence of rigorous imprison-

(2) 51 Ind. Cas. 774; 20 Cr. L. J. 534.

ment for five years is sufficient to meet the ends of justice.

The conviction and sentence of imprisonment are upheld and the sentence of fine is remitted.

ADAMI, J.—I agree.

M. L. *Sentence reduced.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 779 OF 1921.

November 15, 1921.

Present:—Mr. Justice LeRossignol.

BACHITTAR SINGH—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), s. 19—*Punjab Government Notification of 11th May* 1917—Kirpan, *what is*—*Burden of proof.*

Every sword is not a *kirpan*. A person who claims that a particular kind of sword is a *kirpan* and that he is entitled to carry it with impunity under the Punjab Government Notification of 11th May 1917, must prove that the weapon in question is a *kirpan*.

In this case it was held that a sword 31 inches long with a blade length of 22 inches had not been proved to be a *kirpan*.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Amritsar, dated the 14th May 1921, varying that of the Additional District Magistrate, Amritsar, dated the 30th March 1921.

Sardar *Mehtab Singh*, S. B., for the Petitioner.

The Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The petitioner in this case was convicted under the Arms Act of going armed with a sword. The Local Government has remitted the unexpired portion of the sentence but this petition is pressed by reason of the principle involved in the case.

In the Courts below the argument employed by the defence was that the implement or weapon found in petitioner's possession was a *kirpan* and not a sword; in this Court it is admitted that the weapon is a sword, and I am asked to find that '*kirpan*' is merely a Punjabi equivalent for 'sword' when a Sikh wears it.

The Government Advocate appears for the case for the Crown but holds only a watching brief and does not oppose the petition. The petitioner is a Sikh and bases his claim to exemption from prosecution on the Notification of 11th May 1917 which permits Sikhs to carry a *kirpan* with impunity. That Notification unfortunately gives no definition of a *kirpan* and the argument now employed is that any sword of any shape or dimensions is a *kirpan*.

The weapon recovered from petitioner is described as a short sword, 31 inches long with a blade length of 22 inches, in a simple scabbard and the finding is that the petitioner has not proved that it is a *kirpan* which the learned Sessions Judge states is a smaller implement. He does not, however, furnish any clear criterion for the determination of the question whether any given article is a *kirpan* or something prohibited by the Arms Act. He appears to think that a *kirpan* should not be a lethal weapon, but this view is hardly consistent with its special exemption under the Arms Act.

Nor am I impressed with the argument that it could never have been the intention of Government to prohibit one class from carrying a lethal weapon and to allow that privilege to another for it clearly was the intention of Government to confer on the Sikhs an immunity which was refused to other communities.

If Government was in possession of the fact that a *kirpan* is a sword, it could have fixed the extreme dimensions of the *kirpan* for which immunity was granted: if it did not, and a *kirpan* is nothing but a sword, then Sikhs wearing *kirpans* of any size are rendered immune by the Notification.

From the prosecution side, no light on the meaning of *kirpan* is given to this Court. For the petitioner, I am referred to Macauliff's "The Sikh Religion" Volume V, page 95, where the five "*kakas*" are described, one of which is "*kirpan, a sword.*"

In the St. Petersburgh Sanskrit Dictionary the meaning of '*kirpan*' is given as 'sword;'

in Monier William's 'sword' and 'sacrificial knife' are the equivalents.

Now if any sword is a *kirpan*, it is remarkable that Government in its Notification did not use the word 'sword' but deliberately used the word *kirpan*.

From this I gather that it was intended to exempt Sikhs wearing that peculiar kind of 'sword' called a *kirpan*. The petitioner claims the benefit of an exception to the broad rule of law and he must establish that he comes within that exception.

I have seen a facsimile of the *kirpan* of the Tenth Guru, which does not resemble the weapon in respect of which the petitioner was charged. The weapon in this case is considerably longer and is of a different shape. It is certainly a sword and is not proved to be a *kirpan*.

Not being satisfied that the sword in this case is a '*kirpan*' I refuse to interfere with the conviction and dismiss the petition.

Z. K.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 10 OF 1921.

February 28, 1921.

Present :—Pandit Kanhaiya Lal, J. C.

MAHABIR *alias* HIRA—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 438, 439—Commitment, quashing of—Law, question of—Evidence on record, sufficiency of, to establish charge.

A commitment can only be quashed on a question of law. The question whether the evidence already on the record is sufficient to establish the charge is not such a question It is a question connected more with the propriety of a conviction rather than with the propriety of a commitment.

Case reported by the Additional Sessions Judge, Bahraich, dated the 14th February 1921, from an order of the Magistrate, First Class, Bahraich, dated the 29th December 1920.

The Government Pleader, for the Crown.

JUDGMENT.—This is a reference by the Additional Sessions Judge of Bahraich for the quashing of a commitment made by a Magistrate of the First Class of Bahraich. The accused is charged with an offence under section 412 of the Indian Penal Code. The learned Additional Sessions Judge states that the evidence sent up does not go far enough to establish the offence charged inasmuch as there is nothing to show that the wristlets produced at the identification proceeding were actually those found on the person of the accused and made over to the Magistrate conducting the identification proceeding.

After the case was committed the Magistrate called for fresh evidence and submitted the evidence of the additional witnesses' examination under section 219 of the Code of Criminal Procedure. These witnesses had been examined by the Committing Magistrate in the presence of the accused and it was open to the latter to take copies of their evidence, free of cost, and to call any additional evidence himself to meet it, if he thought necessary. It is open to the Magistrate to send up a supplementary list of persons subsequently examined by him under section 219 of the Code and it is equally within the competence of the accused to file a supplementary list under section 211, clause (2), of the Code.

A commitment can only be quashed on a question of law. The question of law which the learned Additional Sessions Judge asks this Court to consider is whether the evidence already on the record is sufficient to establish the charge but that is a question connected more with the propriety of a conviction rather than with the propriety of a commitment. If there is an accidental gap in the evidence, the law permits the Trial Judge, if he thinks proper, to call additional evidence under section 540 of the Code unless the Committing Magistrate himself takes steps before the trial under section 219 to supplement it. The Committing Magistrate would have undoubtedly done better had he completed his enquiry before committing the case to the Sessions, but the omission to record such formal evidence is not such as cannot be legally rectified. There is no reason, therefore, for quashing the commitment and the accused must be duly tried. The record will be returned.

J. P.

Record returned.

AUDHI RAI *v.* EMPEROR.

PATNA HIGH COURT.
CRIMINAL REVISION No. 162 OF 1921.
May 9, 1921.
Present:—Justice Sir John Bucknill, KT.
AUDHI RAI AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 345 (5), (1), (d), 439—Composition of offence, whether can be allowed in revision.

A Court exercising revisional jurisdiction has no power to sanction the composition of an offence when entered into after the conviction of the accused.

Akshoy Singh v. *Rameswar Bagdi*, 35 Ind. Cas. 515; 43 C. 1143; 20 C. W. N. 1071; 17 Cr. L. J. 339, followed.

Adhar Chandra Dey v. *Subodh Chandra Ghosh*, 26 Ind. Cas. 176; 18 C. W. N. 1212; 15 Cr. L. J 728, *Sankar Rangayya* v. *Sankar Ramayya*, 31 Ind. Cas. 350; 16 Cr. L. J. 750; 29 M. L. J. 621; 18 M. L. T. 381; *Ram Chandra* v. *Emperor*, 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L. J. 247, referred to.

Criminal revision against the order of the Sessions Judge, Monghyr.

Messrs *C. C. Das* and *S. S. Bose*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in Criminal Revisional Jurisdiction and arises out of the conviction of certain persons who are the petitioners here and who were convicted of certain offences against the provisions of sections 504 and 341 of the Indian Penal Code. Apparently the first petitioner was sentenced to six weeks' rigorous imprisonment, the second and third to one month's rigorous imprisonment and the fourth and the fifth accused to a fine of Rs. 40 each (or in default to one month's rigorous imprisonment) under section 504; although they were found guilty also under section 341, no separate sentences were passed in respect of the offence committed against the provisions of that section. Certain circumstances in this case to which I will refer presently, were somewhat curious, but the legal points which have been placed before me and upon which I have been asked to interfere are really but two in number. The first point is certainly an interesting one. It is said that there was a possibility of a compromise and that in fact there had been a compromise. When the case had been tried (the Sub-Divisional Officer thought there was no effective composition) it went up on revision to the Sessions Judge of Monghyr, and it was then suggested that even then it was open to him to allow the conviction to be set aside on a composition on agreement being accomplished. He held, however, that on the authority of certain cases, he could not accept or give effect to any such alleged compromise. The question is now, however, brought before me and it is suggested that under sections 345 423, (1) (*d*) and 439 of the Criminal Procedure Code it is possible for the matter to be dealt with in that manner. It is said that under the provisions of that section it may be open for a Court exercising revisional jurisdiction to give effect to a compromise. The point has been very well put before me by the learned Counsel for the petitioners and a good deal of authority has been quoted to me much of which was in favour of the contention, whilst much on the other hand was against it, but I think that the latest case of *Akshoy Singh* v. *Rameswar Bagdi* (1) places the matter, so far as I am concerned substantially out of further serious consideration. In that case which was heard before Mr. Justice Mookerjee and Mr. Justice Sheepshanks, it was held that the High Court has no power as a Court of Revision under section 439 read with section 423 (1) (*d*), to sanction the composition of an offence when entered into after the conviction of the accused. The learned Judges there quoted every case which has been quoted before me and whilst dissenting from some followed a line of decision of which the following are the most important, *Adhar Chandra Dey* v. *Subodh Chandra Ghosh* (2), *Sankar Rangayya* v. *Sankar Ramayya* (3) and *Ram Chandra* v. *Emperor* (4). I think in view of these that it is unnecessary for me really to review this matter further.

[*Note.*—The rest of the judgment is not material for the purpose of this Report.—*Ed.*]

M. L. & J. P. *Order accordingly.*

(1) 35 Ind. Cas. 515; 43 C 1148; 20 C. W. N. 1071; 17 Cr. L. J. 39.
(2) 26 Ind. Cas. 176; 18 C. W. N. 1212; 15 Cr. L. J. 728.
(3) 31 Ind. Cas. 350; 16 Cr. L. J. 750; 29 M. L. J. 621; 18 M. L. T. 381.
(4) 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L. J. 247.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 464 OF 1921.

August 13, 1921.

Present:—Mr. Justice Lindsay.

SHANKAR LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Excise Act (IV of 1910), ss. 60, 64—Selling liquor after hours—Police Officer, when can arrest—Illegal arrest, prosecution for, sustainability of—Police Act (V of 1861), s. 42, applicability of.

Unless a report concerning the commission of an offence of selling liquor after prescribed hours is made, a Police Officer has not power to arrest. [p. 433, col. 2.]

Section 42 of the Police Act is no bar to a trial of a Sub-Inspector for illegal arrest where the complaint is made against him within the period of limitation perscribed by that section. [p 433, col. 2.]

Criminal revision from an order of the Sessions Judge, Farrukhabad, dated the 7th July 1921.

Mr. *S. C. Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application for revision on behalf of Shankar Lal, a Sub-Inspector of Police, who has been convicted on a charge of wrongful confinement and sentenced to pay a fine of Rs. 300. Both the Courts below have found the charge proved. The facts may be briefly stated as follows:—The applicant was the Sub-Inspector of Police at Kamalganj in the Farrukhabad District. It is said that on the 25th of October 1920 he wrongfully arrested and kept in confinement one Ram Ghulam, who is a liquor seller in the Kamalganj Bazar. The story which was put forward by the complainant was that on the evening of the 24th of October the Sub Inspector sent four constables to his liquor shop and demanded two bottles of liquor on credit. Ram Ghulam refused to supply the liquor because the Sub-Inspector owed him the price of ten or twelve bottles previously supplied. Ram Ghulam said that on his refusal the constables used some threats to him and said that they would see him. The next morning Ram Ghulam was arrested and kept in wrongful confinement till the afternoon, when he produced some sureties and was released.

The counter-story put forward on behalf of the accused was that very late on the night of the 24th of October a report was made at the Police Station that Ram Ghulam was selling liquor at his shop after hours. The Sub Inspector took no action that night but took action the next morning and being of opinion that the report disclosed an offence under section 60 of the United Provinces Excise Act (IV of 1910), he arrested Ram Ghulam in the exercise of the powers conferred upon Police Officers under section 50 of that Act.

The case was tried at considerable length by the District Magistrate, who came to the conclusion that the story told by the complainant Ram Ghulam was in substance the truth. He has rejected the defence put forward by the Sub-Inspector and has held that there was no reliable evidence before him to show that any report was made at the Police Station on the night of the 24th of October alleging that Ram Ghulam was keeping his shop open after hours for the sale of liquor. In appeal the learned Judge has agreed with the findings of the District Magistrate. Several grounds are set out here in the petition of revision. I have to notice first the point which is raised in the second paragraph in the petition of revision. It is pleaded that section 42 of the Police Act was a bar to the trial of this case. That argument cannot be sustained. The complaint which was made against the Sub-Inspector was made against him four or five days after the alleged offence was committed. Then it is said that the Sub-Inspector at least had a right to arrest the accused for an offence under section 60 of the Excise Act (Local Act No. IV of 1910). This argument can only be put forward if it is assumed that any report concerning the commission of such an offence was brought to the notice of the Sub-Inspector. It may be a question whether the offence of selling liquor after hours is an offence under section 60 or only under section 64 of the Excise Act. For an offence under the latter section the Police have no authority to arrest without warrant. However, I am satisfied that this point does not really arise, because unless it is established that a report concerning the commission of such an offence was made no question regarding the Police Officer's power to arrest could possibly arise. The same remark applies to the plea based

upon section 79 of the Indian Penal Code. Section 79 contains one of the general exceptions set out in the Code and provides that 'nothing is an offense which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law in doing it.' No plea of good faith can be advanced in view of the findings come to by both the Courts below, namely, that no report was made at the Police Station on the night of the 24th October. On this point both the Courts below are in agreement and hold that the making of such a report was not established. In these circumstances I see no reason to interfere with the order of the learned Sessions Judge and I dismiss this application.

J. P. & N. H.

Application dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 998 OF 1921.

December 16, 1921.

Present :—Mr. Justice Campbell.

MUHAMMAD HAYAT—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 191, 193, 194, 211—Criminal Procedure Code (Act V of 1898), ss. 174, 175—Death under suspicious circumstances—Inquest—False charge—False evidence—"Institution" of proceedings, meaning of.

The offence of a person accusing another falsely of murder to a Police Officer in an enquiry under section 174 of the Criminal Procedure Code would not fall under section 194 of the Penal Code, the reason being that it is difficult to affirm the existence of an intention to cause, or of knowledge that the false evidence is likely to cause, a person to be convicted of a capital offence, when the proceeding in which the evidence is given is one in which such a conviction is not legally possible. [p. 435, col. 1.]

Empress v. *Muhammad*, 32 P. R. 1886 Cr., relied on.

Queen v. *Nim Chand Mookerjee*, 20 W. R. 41, referred to.

A person who comes forward without being summoned and volunteers information at an enquiry under section 174 of the Criminal Procedure Code, is not bound to answer truly questions put to him under section 175 of the Code, and not being so bound, his answers, if false, cannot form the basis of a charge of perjury, having regard to the definition of that offence in section 191 of the Penal Code. [p. 435, cols. 1 & 2.]

The term "institution" in section 211, Indian Penal Code, means the institution either by the accused himself, or by the Police or others in consequence of the accused's action, in some Criminal Court. [p. 436, col 1.]

Sultan v. *Empress*, 3 P. R. 1888 Cr., followed.

Sulla v. *Empress*, 17 P. R. 1884 Cr., referred to.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Jhelum, dated the 6th July 1921, affirming that of a Magistrate, First Class, Gujrat, dated the 30th May 1921.

Mr. *Zafrulla Khan*, for the Petitioner.

JUDGMENT.—On 8th January 1921 an enquiry into the death of a cooly working on a building under construction by Mohamed Din of Pindi Baha ud-Din was held under section 174, Criminal Procedure Code, by Mangal Sen, Head Constable.

During the proceedings a written statement written by Mohamed Hayat and signed by Mirza was presented by these two persons and by Karm Dad, Bahlu, Haku and Sardara. This stated that the cooly had really been killed in their presence by Mohamed Din who had thrown a brick at the man in the course of a dispute about the man's wages, that a second brick had been thrown by one Ghulam Mohamed and that both, assisted by other labourers, had heaped bricks over the body to make it appear that death had been the result of an accident. Mohamed Hayat, Mirza, Karm Dad, Bahlu and Haku made statements, which were recorded by the Head Constable, repeating this story. Sardara refused to make any statement.

It was found after enquiry that death had been caused accidentally by the collapse of a wall and as a result all of these persons, except Haku who is said to be absconding, were tried on charges under sections 193 and 211, Indian Penal Code, by a Magistrate exercising enhanced powers under section 30, Criminal Procedure Code. Sardara was acquitted. Mohamed Hayat, Mirza, Karm Dad and Bahlu were convicted, and each was sentenced to a year's rigorous imprisonment and Rs. 50 fine. They appealed unsuccessfully to the Sessions Judge, and Mohamed Hayat, Mirza and Karm Dad have come to this Court on revision. The Sessions Judge

has reported all four cases under section 438, Criminal Procedure Code, with the recommendation that the convictions be altered to convictions under section 194, Indian Penal Code, and the sentences enhanced to the maximum periods of imprisonment which the Magistrate could have inflicted. There are thus seven proceedings before me and they will all be disposed of in this judgment.

The first question is whether section 194, Indian Penal Code, applies to the facts found and I am bound to hold that it does not, for two reasons. In the first place, a very positive opinion was expressed in *Empress* v. *Muhammad* (1) that a witness who gives false evidence in the committing proceedings against an accused person subsequently committed to the Sessions on a charge of murder would not be guilty of an offence under section 194, Indian Penal Code, the reason being that it is difficult to affirm the existence of an intention to cause, or of knowledge that the false evidence is likely to cause, a person to be convicted of a capital offence, when the proceeding in which the evidence is given is one in which such a conviction is not legally possible. It would follow from this *a fortiori* that the offence of a person accusing another falsely of murder to a Head Constable in an enquiry under section 174, Criminal Procedure Code, would not fall under section 194, Indian Penal Code. It is true that this opinion was to some extent *obiter* and is also to some extent (for the facts of that particular case have to be borne in mind) in conflict with a Calcutta case of 1873 reported as *Queen* v. *Nim Chand Mookerjee* (2), but it undoubtedly is entitled to respect. Secondly under section 191, Indian Penal Code, false evidence to be punishable must have been given in a proceeding in which the defendant was bound by law to speak the truth. Section 161 (2), Criminal Procedure Code, does not bind a person to tell the truth when questioned by a Police Officer. If the proceeding is under section 174, Criminal Procedure Code, as in the present instance, he is only bound to answer questions truly if he has been summoned in writing to attend before the Police Officer. It may seem anamolous that a man who comes forward without being summoned and volunteers information at a Police enquiry under section 174, should not be bound to give true answers to questions, but such are the plain words of section 175 read with section 161. I agree with the learned Sessions Judge that the present petitioners must have been *questioned* by the Head Constable and I consider that the record of their statements contains internal evidence that they were, but technically what they said, although intentionally false (a fact proved and also admitted by their Counsel in this Court), does not come within the definition of section 191, Indian Penal Code.

This fact disposes of the question whether section 194 should be applied or could be applied without another trial and the argument of Counsel appearing on behalf of the complainant that the sentences should be enhanced under section 193, Indian Penal Code, and settles in favour of the petitioners their contention that they have been convicted wrongly under section 193. It remains to decide whether the conviction under section 211 should be maintained and whether the sentences should be enhanced with reference to that section.

The further argument of Counsel for the petitioners that they did not falsely charge Mohamed Din with causing the death under investigation or that they did not all do so, has no force. They are proved to have presented themselves in a body with a document stating to that effect, which was written by one of their number and signed by others. All made statements that the contents of the document were true and used words which showed that they knew the contents. They alleged the commission of an offence cognizable by the Police, and it is impossible to believe that they had any other intention than to set the Criminal Law in motion against Mohamed Din. That they had no just or lawful ground for doing so is proved. It is urged by Counsel for the complainant that the written report and statements to the Police Officer amounted to the institution of a criminal proceeding and that their offence is punishable with seven years' imprisonment under the second part of section 211, Indian Penal Code. There is some conflict of authority on the point, but so far as I am aware, this Court has

(1) 32 P. R. 1886 Cr.
(2) 20 W. R. 41.

always followed *Sultan* v. *Empress* (3), which laid down that the term institution in section 211, Indian Penal Code, means the institution either by the accused himself, or by the Police or others in consequence of the accused's action, in some Criminal Court A previous ruling to the contrary, *Sulla* v. *Empress* (4), was not noticed in *Sultan* v. *Empress* (3), but its facts do not fit the present case exactly and I prefer to be guided by the latter decision.

The maximum sentence of imprisonment which can be awarded under the first part of section 211, Indian Penal Code, is a period of two years and I agree with the opinion of the learned Sessions Judge that the sentences imposed by the Magistrate are inadequate. A grave charge was made deliberately, by persons who said that they were eye witnesses, of what they knew perfectly well that they had not seen.

Accordingly I reject the revision petition for acquittal and in each case I alter the conviction to one under section 211, Indian Penal Code, and enhance the sentences of imprisonment to one of two years' rigorous imprisonment, including two months' solitary confinement, maintaining in each the additional sentence of Rs. 50 fine, with six months' rigorous imprisonment in addition in default of payment.

Z. K. *Petition rejected;*
Conviction altered.

(3) 3 P. R. 1888 Cr.
(4) 17 P. R. 1884 Cr.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 615 OF 1921.

December 21, 1921.

Present:—Sir Grimwood Mears, KT., Chief Justice.

ANRUDH KUMAR AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476, prosecution under, stay of, pending civil appeal—Finding of Criminal Court—Effect on civil appeal

Where a Subordinate Judge, District Judge or Sessions Judge of experience makes an order that a party or witness in a civil case shall stand his trial under section 476, Criminal Procedure Code, the prosecution should not be stayed because of an appeal pending against the civil case, if the appeal is not likely to be decided soon. At the same time the decision arrived at by the Magistrate should not have any effect upon the Court which may hear the civil appeal, rather the decision of the Magistrate in that matter is not relevant evidence to produce and bring before the Appellate Court.

Criminal revision from an order of the Magistrate, First Class, Dehra Dun, dated the 13th October 1921.

Messrs. *S. C. Mukerji* and *L. M. Roy*, for the Applicants.

The Government Advocate, for the Crown.

JUDGMENT.—This is an application on the part of Anrudh Kumar and Mahtab Singh that criminal proceedings which were ordered to be instituted by the Subordinate Judge of Dehra Dun may be stayed until the decision in this Court of a first appeal. I think myself that it is of importance that the Criminal Law should proceed with due expedition. I should, however, have been prepared to make the order if this first appeal could have been brought on in two to three months. It cannot, however, be so accelerated. It is agreed that it could not be brought on before at least six months, which may very well mean that it would not come into the list until October or November of next year. In these cases where a Subordinate Judge, District Judge or Sessions Judge of experience makes an order that a party or witness shall stand his trial under section 476 of the Indian Penal Code, it is of importance that the case should be dealt with promptly. There is no reason why the decision arrived at by the Magistrate who will ultimately try this case should have any effect upon the Bench who will hear the first appeal, and indeed I go further and say that the decision of the Magistrate in that matter is not relevant evidence to produce and bring before the Bench. The civil appeal should and must be decided simply on the record as it comes up before the Bench from the lower Court, giving due weight,

of course, to whatever observations the learned Judge in the Court below may have made as regards the evidence. But the fact that in a criminal proceeding Anrudh Kumar was said to be innocent or said to be guilty of the charge of putting forward a forged Will, is not a matter which in this Court ought to be urged in argument or given weight to by Judges. I am, therefore, unable to accede to this application. Therefore, the stay order granted by Mr. Justice Lindsay on the 24th of October 1921 must be discharged and the case will proceed.

J. P. & N. H.

Stay order discharged.

LAHORE HIGH COURT.
CRIMINAL REVISION PETITION No. 666 OF 1921.
December 2, 1921.
Present:—Mr. Justice Harrison.
SEWA SINGH SON OF MAHNA SINGH—CONVICT—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 345—Compromise by leave of Court—Duty of Magistrate—Revision.

It is the duty of a Magistrate, in each case which is compoundable with his leave, to decide whether he will or will not allow a compromise and the responsibility rests entirely with him.

Where the offence is not of a serious nature and a compromise is arrived at at a very early stage, the Magistrate ought to allow the compromise.

In this case, a compromise that had been disallowed by the trying Court was allowed by the High Court in revision.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sub-Divisional Magistrate, Kasur, District Lahore, dated the 20th April 1921, affirming that of a Magistrate, Second Class, Kasur, dated the 16th April 1921.

Mr. *D. N. Mehra*, for the Petitioner.

JUDGMENT.—Sewa Singh has been convicted under section 325, Indian Penal Code, for breaking the arm of one Jallu by striking him with a *lathi*. The cause of the fight is said to have been that Jallu and another man were catching quail in the field of the accused, who resented their conduct, quarrelled with Jallu and struck him with a *lathi*. The Sub-Divisional Magistrate, Kasur, has dismissed the appeal and the only question on revision is whether the parties should have been allowed to compromise as they wished to do. Every case of this sort must be decided on its own merits. Here it appears that at a very early stage and before the prosecution evidence was recorded, the parties came to terms and filed an application for permission to compromise. This being so, I do not think it was necessary in the interests of justice to proceed with the case, and more especially as the bad blood between the parties must be perpetuated thereby. Nor do I think that the offence is so serious that punishment is absolutely necessary. The Honorary Magistrate who tried the case did not allow the compromise because the offence was committed in the *Manjha* where such offences are rife. Even so it is the duty of the Magistrate to decide in each case whether he will or will not allow a compromise and the responsibility rests entirely with him. This appears to me to be a case in which the compromise should have been allowed, more especially as it was made at a very early stage in the case, and if the Magistrate liked to attach any condition as to the payment of a reasonable sum of money to the injured man as compensation before he permitted the compromise to take effect, he would have been fully justified in doing so. Counsel tells me that his client has paid Rs. 50. I consider this sufficient and, therefore, am all the more ready to accept the revision, and allowing the compromise, to set aside the conviction, and this I do.

Z. K.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 696 OF 1921.

December 2, 1921.

Present :—Mr. Justice Stuart.

BHOLA—APPLIC NT

versus

EMPEROR—OPPOS.TE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Jurisdiction—Accused triable where carrying on career of crime—Revision—Findings of fact—High Court, power of.

In giving jurisdiction to a Magistrate to try an accused under section 110 of the Criminal Procedure Code, the question is not of permanent residence of the accused, but of where he practises his career as a thief or a house-breaker or whatever it may be. [p. 438, col. 2.]

If a resident of *A.* goes to *B.* and there carries on a career of crime for several months, the *B.* Magistrate has the power to take action against him under section 110, Criminal Procedure Code. If, on the other hand, a resident of *A.* carries on a career of crime in *A.* and then goes temporarily to *B.* for a few months, the *A.* Magistrate has a right to proceed against him. [p 438, col. 2.]

A Court of Revision should not usually go behind the facts as found by the Trial Court and the Court of Appeal. Unless on the face of it the decisions are perverse, it is most inadvisable to go behind their findings. [p. 438, col. 2.]

Criminal reference made by the Sessions Judge, Agra, dated the 16th November 1921.

Mr. *Iqbal Ahmad*, for the Applicant.

JUDGMENT.—The Sessions Judge of Agra has referred to this Court the case of a certain Bhola sweeper, who has been bound over by the Cantonment Magistrate of Agra under section 110, Criminal Procedure Code. He has been asked to furnish two sureties of Rs. 100 each and to execute a bond himself for Rs. 200 to be of good behaviour for one year. The proceedings were perfectly regular. An appeal was filed to the District Magistrate, who dismissed it by a considered order. The Judge suggests that the proceedings were without jurisdiction and that the evidence did not justify the passing of the order. Bhola has been represented in this Court by competent Counsel who has argued on the merits. I take first the question of jurisdiction. It is proved that Bhola is a resident of Boileauganj, which is in the Agra Cantonments. The Cantonment Magistrate had clearly jurisdiction under section 110, Criminal Procedure Code, if Bhola was a person within the local limits of his jurisdiction. The section has left the matter of permanent residence open. It is not a question of permanent residence, but of where the man practises his career as a thief or a house-breaker or whatever it may be. If a resident of Allahabad went to Benares and there carried on a career of crime for several months, the Benares Magistrate would have the power to take action against him under section 110, Criminal Procedure Code If, on the other hand, a resident of Allahabad was carrying on a career of crime in Allahabad and then went temporarily to Benares for a few months, the Allahabad Magistrate would have a right to proceed against him. The case here is that the man is usually a resident of Boileauganj. The evidence shows that he was by habit a thief in Boileauganj. Some months before the proceedings commenced, he worked as a Chaukidar of a Munsif a short distance away in civil lines. He is no longer Chaukidar to that Munsif. His service with him was not uninterrupted. He continued to return to Boileauganj and the evidence shows that he is carrying on a career of crime in Boileauganj. The Cantonment Magistrate certainly had jurisdiction. With regard to the merits, a Court of Revision should not usually go behind the facts as found by the Trial Court and the Court of Appeal. Unless on the face of it the decisions are perverse, it is most inadvisable to go behind their findings. The Cantonment Magistrate tried the case very carefully. He has written a reasoned and well thought out judgment. He had before him a mass of evidence on behalf of the prosecution, which showed that in Boileauganj there is a gang of thieves the members of which are sweepers; that Bhola is closely connected with certain men who have already been convicted, and that he s a member of the gang. The evidence of repute is very strong. Against this was the evidence of perfectly respectable witnesses who state that they know nothing against him, but these witnesses were not in a position to know very much about the matter one way or another. Instances could be multiplied in which men working as domestic servants for respectable gentlemen who have no reason to suspect them in any way,

GOBIND RAM *v.* EMPEROR.

have carried on, unknown to their employers, a career of crime. That is a phenomenon common to all countries. The learned Sessions Judge appears to think that if a man works as a Chaukidar, it would be impossible for him to get away at night to commit crime without the knowledge of his master. So far from being impossible, in most cases it is comparatively easy for him to do so. Apart from any other method of escaping observation, it is very simple, if a man be a criminal, for him to provide a substitute for the hours when he is otherwise engaged. That there was a mass of evidence which proved that Bhola was a habitual thief. That evidence was believed by the Cantonment Magistrate and by the District Magistrate who heard the appeal. There is no reason for me to disbelieve it. On the face of it it reads true. The evidence for the defence was of no value. The learned Sessions Judge notes that it appears that the Cantonment Magistrate rejected the security tendered by Bhola without taking any evidence. I have been unable to discover anything on the record to show that the Cantonment Magistrate rejected any security without making proper enquiries. I refuse to interfere and direct that the record be returned.

J. P.

Reference not accepted.

SENEHI SINGH, *In the matter of.*

Case reported by the Sessions Judge Karnal, with his No. 817 of 13th May 1921.

FACTS.—Gobind Ram and Shamsher, petitioners, were tried and convicted by a Magistrate of the Second Class under section 7 of the Stage Carriages Act, XVI of 1861, and sentenced to pay fines.

GROUNDS.—*Empress* v. *Moti Ram* (1) is authority that a Magistrate of the Second Class has not jurisdiction to try an offence under section 89 of the said Act. The reasoning would also cover section 7.

I, therefore, recommend that the conviction be set aside and the fines, if paid, be refunded.

Mr. *J. M. Mackay*, for the Respondent.

ORDER.—I see no sufficient cause to differ from the ruling cited, *Empress* v. *Moti Ram* (1), which lays down that a Second Class Magistrate has no jurisdiction in such cases.

I, therefore, quash the convictions and direct that the fines, if paid, be refunded.

Z. K.

Conviction quashed.

(1) 7 P. R. 1879 Cr.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 803 OF 1921.

October 28, 1921.

Present:—Mr. Justice Chevis.

GOBIND RAM AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Stage Carriages Act (XVI of 1861), s. 7, offence under—Jurisdiction of Second Class Magistrate.

A Second Class Magistrate has no jurisdiction to try an offence under section 7 of the Stage Carriages Act.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 1 OF 1921.

January 31, 1921.

Present:—Mr. Justice Jwala Prasad.

In the matter of SENEHI SINGH AND OTHERS—CONVICTS.

Prevention of Cruelty to Animals Act (XI of 1890), applicability of, to Saran District.

Prevention of Cruelty to Animals Act, XI of 1890, has no application to the local area of Saran in the Province of Bihar and Orissa and, therefore, an accused committing an offence under that Act within that area is not punishable.

Criminal reference by the Sessions Judge, Saran, dated 8th January 1921.

FACTS of the case are as follows:—Senehi Singh, Tarachand Singh and Ram Sajiwan Singh were charged in a petition of com-

plaint with having maimed the complainant's buffalo by wounding it with a spear and striking it with *lathis*. The Magistrate found the accused guilty under section 3 (*c*) of the Cruelty to Animals Act (XI of 1890) and sentenced them to pay a fine of Rs. 15 or in default to undergo rigorous imprisonment for two weeks.

The Sessions Judge of Saran recommended to the High Court under section 438, Criminal Procedure Code, that this order of conviction should be set aside on the ground that Act XI of 1890 had no application to Saran.

ORDER.—The reference is accepted and, as recommended by the learned Sessions Judge, the conviction and sentences passed on the accused are set aside inasmuch as Act XI of 1890, under which the accused have been convicted, does not apply to the Local Area where the offence is said to have been committed.

J. P.

Reference accepted.

CALCUTTA HIGH COURT.

CRIMINAL MISCELLANEOUS NOS. 83 AND 84 OF 1921.

August 11, 1921.

Present :—Mr. Justice Teunon and Mr. Justice Suhrawardy.

IN No. 83

NOGENDRA CHANDRA DAS AND OTHERS —ACCUSED—PETITIONERS

versus

REHAN ALI SERANG—COMPLAINANT—OPPOSITE PARTY.

IN No. 84

ANANTA KUMAR KAR—ACCUSED—PETITIONER

versus

SUDHANYA CH. DE—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of criminal case—Unreasonable ground.

Where certain strikers against a Navigation Company are placed on their trial under sections 506 and 143, Penal Code, before the District Magistrate, it is no ground for the transfer of the case that the District Magistrate has been taking precautions against the intimidation and illegal picketing indulged in by the strikers likely to result in a breach of the peace. [p. 441, col. 2.]

Rules.

FACTS appear from the judgment.

Mr. *N. C. Sen* (with him *M. A. K. Fuzlul Huq* and Babu *Probodh Chandra Kar*), for the Petitioners.—This Rule was issued in connection with a petition for transfer of the petitioners' cases from the District of Bakarganj. The petitioners have a reasonable apprehension that they will not get justice if their cases are tried by the Sadar Sub-Divisional Magistrate or by any Judicial Officer, for that matter, of that District. In these cases the complainant has obviously been put up by the River Steam Navigation Company, and the Local Officers of the District have practically identified themselves with the interests of the Steamer Company at Barisal. The District Magistrate deputed a number of his officers, high and low, to see that the non-co-operation movement did not interfere with the normal work of the Steamer Company. Under the circumstances it is quite apparent that the petitioners are reasonably apprehensive that they will not have justice at Barisal. The learned Magistrate says he had merely taken measures to prevent breaches of the peace and disorder and also illegal picketing. Of course some of the volunteers of the non-co operation movement were persuading people not to board the steamers and help the Steamer Company. Your Lordships might transfer the case to a near station as Khulna or Dacca to remove fear from the minds of your Lordships' petitioners.

Mr. *Orr*, for the Crown.—The learned Magistrate's explanation is quite clear and disposes of the objections raised by my learned friend. The District Magistrate as the head of the executive of the district has got to see, under all circumstances, that peace and order are maintained. He had nothing absolutely to do with the Steamer Company. He was within his rights to do what he did, and it is a sheer travesty of language to say that he identified himself with the interests of the Steamer Company.

Babu *Amulya Charan Sen*, for the Opposite Party, supported Mr. Orr.

Mr. *N. C. Sen* briefly replied.

JUDGMENT.

No. 83.

From the petition on which the present Rule was issued it appears that in the first week of last June there began a strike among the employees of the River Steam Navigation Company, at Barisal. In this strike, which it is understood still continues, the three petitioners joined.

On the complaint of, or on information received from, one Rehan Ali whose services as a Serang had been secured by the Company, proceedings have now been taken against the petitioners and others on charges under sections 506 and 143 of the Indian Penal Code. The case against them is pending in the Court of the Sadar Sub-Divisional Magistrate at Barisal: and the prayer of the petitioners is that their trial should take place in some district other than Bakarganj. They allege in substance that the District Magistrate and the Local Officers generally have identified themselves with the interests of the Steamer Company and are doing their best "to harass the strikers in any and every way." They, therefore, apprehend that they will not obtain a fair trial before any Local Magistrate.

The District Magistrate has submitted an explanation in which he deals *seriatim* with the allegations of the petitioners. He states that he has found it necessary to take precautions against the intimidation and illegal picketing indulged in by persons known as "non-co-operators" and against the disorder and breaches of the peace likely to result from these practices. Of these precautionary measures he has placed some of the Local Deputy Magistrates in charge. The further allegations made against himself and the Local Officers are unfounded.

We accept the District Magistrate's explanation without reserve, and we need only say further that the performance by him and by the Local Officers under his instructions of their public duties affords no ground for any apprehension on the part of the petitioners that, whether before the Magistrate in whose Court the case against them now is or before any other Magistrate in the District, they will not obtain an impartial trial. We do not believe that they in fact entertain any such apprehension, and if they do, such apprehension is unfounded and unreasonable. We, therefore, discharge this Rule.

No. 84.

The judgment just delivered in Case No. 83 governs also this Rule, which is also discharged.

N. H.

Rules discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 586 OF 1921.

November 5, 1921.

Present:—Mr. Justice Stuart.

GANGA SAHAI—APPLICANT

versus

JASWANT AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898) . 192 —Transfer of case—Magistrate, power of, to re-transfer.

Where a Magistrate transfers a case for trial under the provisions of section 192, Criminal Procedure Code, he has no power to transfer it again.

Criminal reference made by the District Magistrate, Etawah, dated the 23rd August 1921.

Mr. *S. N. Mukerji*, for the Applicant.

Mr. *S. C. Mukerji*, for the Opposite Parties.

FACTS appear from the following Referring Order of the District Magistrate:—

"In this case the complainant came to the Court with the allegation that the accused had broken a hole in

the wall of his master's house and had taken away from it some property belonging to him, and further that when he remonstrated with the accused, they rushed into the house and offered to beat him. The complaint was stated to be under sections 455, 379 and 352 of the Indian Penal Code. The complainant was examined on oath and stated all this. The learned Magistrate who had the case before him recorded the following order:— "From the complainant's statement it is clear that there was no lurking house trespass but an open house trespass to commit an assault. The offence, if any, was under sections 380 and 452 of the Indian Penal Code, which is triable by a Second Class Magistrate. I, therefore, transfer the case to the Honorary Magistrate for trial and disposal." The Honorary Magistrate referred to was the Raja of Partapnagar, M. L. C., a Magistrate of the Second Class. As the Raja was away at Lucknow attending the Legislative Council's sittings, the file came back before the Sub-Divisional Magistrate, who then transferred it to Babu Balkrishna Dass, a Third Class Magistrate. This Magistrate tried and acquitted the accused.

The complainant has now come to me under section 435 of the Code of Criminal Procedure and points out that the trial of an offence either under section 455 as alleged by him in the complaint, or even under section 452 as held by the Sub-Divisional Magistrate, is one which can only have been held by a Second Class or higher Magistrate. He, therefore, says that the proceedings of the Third Class Magistrate are entirely null and void under section 430 (p) of the Code of Criminal Procedure. For the accused it is stated that the trial as held did not disclose an offence under either of these sections. But this argument is of no avail. In order to determine whether a Magistrate has jurisdiction to try a certain case or not, we have only to see whether the facts, as revealed on the examination of the complainant, constitute an offence within his jurisdiction or not. Were it to be held that the jurisdiction of the Magistrate would be determined after going through the whole trial and seeing what offence was constituted, there would be no bar to a Third Class Magistrate even trying a murder case, so long as after the trial he held that the offence did not amount to murder but to, say, simple assault. This is the *reductio ad absurdum* of the argument of the accused. In the present case both the facts as given in the complaint and the preliminary order of the Sub Divisional Magistrate make it clear that the offence to be tried was at least one under section 452 of the Indian Penal Code, and was, therefore, beyond the jurisdiction of the Third Class Magistrate It is inexplicable how the Sub-Divisional Magistrate sent it to him and how he persisted with the trial in spite of the facts having been brought to his notice. The whole of the trial is under section 430 (p) null and void. I, therefore, order that the records be submitted with this report to the Hon'ble High Court with the recommendation that re-trial may be ordered, if the Hon'ble High Court so wishes. I may add, however, that on the merits of the case the decision seems to be a correct one.

JUDGMENT.—The view taken by the District Magistrate must prevail. When the case came on before Mr. Zamiruddin, he transferred it for trial under the provisions of section 192 of the Code of Criminal Procedure. Having done that, he had no power to transfer it again and in no circumstances are the proceedings before the Third Class Magistrate effective. It was legally transferred to the Raja of Partapnagar, Magistrate of the Second Class. All subsequent proceedings are null and void. The case must go back to the Raja of Partapnagar for trial. I order accordingly.

J. P. & M. H.

Order accodringly.

PATNA HIGH COURT.
CRIMINAL APPEAL No. 123 OF 1921.
November 7, 1921
Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.
SUMESHWAR JHA AND OTHERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 297—Jury trial—Verdict—Misdirection—Inadmissible evidence, omission to refer to, effect of.

The verdict of a Jury cannot be set aside unless there is a clear misdirection in the charge by the Judge to the Jury. [p 443, col 1.]

Where a statement inadmissible in evidence is brought to the notice of a Jury, an omission by the Judge to refer to it in the charge to a Jury is a misdirection in law and vitiates the trial. [p. 444, col. 1.]

Criminal appeal against an order of the Sessions Judge, Muzafferpore.

Messrs. *S. P. Verma* and *H. P. Sinha*, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The appellants were committed to the Court of Sessions on charges under sections 147, 148 and 379, Indian Penal Code. The accused No. 1, Sumeshwar Jha, was further charged under section 304 and the remaining accused were charged under section 304 read with section 149, Indian Penal Code.

As to the charge under section 379, the accused have been convicted by the learned Sessions Judge on acceptance of the unanimous verdict of the Jury. The verdict of the Jury cannot be set aside unless there is a clear misdirection in the charge by the Judge to the Jury. It is pointed out by the learned Counsel on behalf of the accused that the verdict of the Jury is vitiated on account of the statement of the accused, which was in the nature of an admission of his having removed potatoes from the field in question, having been brought on the record. During the examination of the Sub-Inspector P. W. No. 10, upon questions put to him by the Public Prosecutor he stated that Sumeshwar Jha had stated to him that "he had gone there (the field)' for sharing *alua* which was given by one Hiraman Dusadh of village Sultanpore on behalf of complainant, he having only *batai* interest in it; only 6 *passeries* of *alua* were dug by Hiraman, of which he took three *passeries* as his own share leaving the other half with Hiraman Dusadh for sharing with him, and they had exchange of blows in which Ramrush sustained injuries." The Sub-Inspector then stated that "it further appeared from him (Sumeshwar Jha) that he was alone and that he took away 3 *passeries* of *alua* on his own head." The learned Sessions Judge held that the latter portion of the statement, where Sumeshwar told the Sub-Inspector that he had taken 3 *passeries* of *alua* on his own head, was inadmissible in evidence, as it may in certain circumstances amount to a confession. He remarked in the margin of the evidence of the Sub-Inspector that this portion will not be placed before the Jury in summing up. In the charge to the Jury there is no reference made to this statement. If the evidence in the shape of the statement of the accused referred to above was inadmissible, in view of its having been brought to light in the presence of the Jury and formally recorded as part of the evidence, it cannot with any confidence be said that the Jury were not at all influenced by the statement. It is immaterial that the Judge did not refer to it in his charge to the Jury and it does not at all affect the question. The Jury had heard the statement and they knew that the accused Sumeshwar had admitted before the Police the fact of his having removed the three *passeries* of *alua*. It is possible, therefore, that their judgment in the case was affected by the statement in question. The removal of the *alua* is, we think, the most important ingredient in the charge of theft which the Jury was trying at the moment; and the statement of the accused Sumeshwar Jha before the Police tending to show that he had admitted the removal of *alua*, must have weighed with the Jury to a great extent in arriving at the conclusion as to whether the accused had or had not committed the offence in question. The mischief had been already done in bringing the statement to the notice of the Jury

and, therefore, it could not be undone by the omission by the Judge to refer to it in the actual charge to the Jury.

It will also be observed that the charge to the Jury does not clearly bring out the delay that took place in the lodging of the first information, but it only asked the question as to whether the delay would go against the prosecution case.

If the statement referred to above was inadmissible as held by the learned Judge, then his omission to refer to it in the charge was a misdirection in law and vitiated the trial and the accused, therefore, must be re-tried. If, on the other hand, the statement in question was admissible as is contended for by the learned Assistant Governmet Advocate, then the trial is not vitiated. But this statement must have been prominently brought out by the learned Judge in his charge to the Jury. Therefore whether the statement is admissible or not, the result is the same and the verdict of the Jury is vitiated. The question then is whether the accused should be put upon their trial again on the charge under section 379.

In view of the findings we have arrived at on the general circumstances of the present case and in view of the circumstances of the case and also in view of the fact that Sumeshwar has already been punished under section 325, we do not think that a re-trial at this stage is at all desirable in the interests of justice.

The result is that we set aside the convictions and sentences of all the accused under all the sections except that of Sumeshwar Jha under section 325, Indian Penal Code. The sentence passed upon him under that section has been already reduced to a period of three years' rigorous imprisonment.

ADAMI, J.—I agree.

J. P. & N. H. *Convictions set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 362 OF 1921.
(CRIMINAL REVISION PETITION No. 287 OF 1921.)

October 27, 1921.

Present:—Mr. Justice Kumaraswami Sastri.

MAHOMED HUSSAIN SAHIB AND OTHERS—PETITIONERS

versus

PACHAYAPPA CHETTY—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Possession, few days before preliminary order—Order silent as to possession at date of preliminary order—Revision.

Where, a preliminary order under section 145, Criminal Procedure Code, contains a finding that a party was in possession a few days before the date of the order, but contains no finding as to who was in possession on the actual date of the order, the order is illegal, but if there is nothing on the record to suggest that there was any change of possession in the interval, a High Court is not bound, in revision, to vacate the order. [p. 445, col. 1.]

Thumbalabed Hampanna v. *Parisi Gangamma*, 27 Ind. Cas. 911; 16 Cr. L. J. 239 and *Mundlamuny Ellamandu* v. *Gadipudi Chinnah Venkiah*, 2 Ind. Cas. 159; 9 Cr. L. J. 505, distinguished.

Gordon Sims v. *Johurry Lal*, 5 C. W. N. 563 and *Madholal Bithul Gayawal* v. *Jug Lal Singh*, 6 C. W. N. 841, followed.

Petition, under section 107 of the Government of India Act, 1915, praying the High Court to revise the order, dated 18th May 1921, of the Court of the Sub-Divisional Magistrate, Dharmapuri, in Miscellaneous Case No. 6 of 1921.

Mr. *P. K. Ohari*, for the Petitioners.—The lower Court's order is illegal, as there is no finding as to which party was in possession at the date of the preliminary order. The finding that the counter-petitioner was in possession five days previously does not comply with section 145 (4), Criminal Procedure Code. *Thumbalabed Hampanna* v. *Parisi Gangamma* (1), *Mundlamuny Ellamandu* v. *Gadipudi Chinnah Venkiah* (2).

Mr. *S. Srinivasa Iyer*, for the Respondent.—In the cases relied on by petitioners' Counsel, there was a long interval of time between the date when the party was found to be in possession and the date of the preliminary order.

(1) 27 Ind. Cas. 911; 16 Cr. L. J. 239.
(2) 2 Ind. Cas. 159; 9 Cr. L. J. 505.

Here there was also a decree of the Civil Court in my client's favour, *Gordon Sims* v. *Johurry Lal* (3), *Madholal Bithul Goywal* v. *Jug Lal Singh* (4).

The Public Prosecutor, for the Crown.

ORDER.—The preliminary order was passed on the 21st March 1921. The Magistrate finds that the counter-petitioner was in possession on the 15th March 1921, but there is no finding as to who was in possession on the 21st March. It is argued that the order passed is illegal owing to there being no finding as to who was in possession on the 21st March 1921, as required by section 145, clause (4) of the Code of Criminal Procedure. *Thumbalabed Hampanna* v. *Parisi Gangamma* (1) and *Mundlamuny Ellamandu* v. *Gadipudi Chinnah Venkiah* (2) support the contention. There is no doubt that the order is irregular, as it does not find that the counter petitioner was in possession on the 21st March.

The question remaining is whether, on the facts of the present case, I should set aside the order. The interval between the date when the Magistrate finds counter-petitioner to be in possession and the date of the preliminary order is only five days, and there is nothing in the record to show that there is any likelihood of possession having changed in the interval. In the case in *Mundlamuny Ellamandu* v. *Gadipudi Chinnah Venkiah* (2) the interval was more than a year and in the case reported as *Thumbalabed Hampanna* v. *Parisi Gangamma* (1) it was nearly a month. It also appears that the counter petitioner has a decree of Court in his favour and having regard to the rulings in *Gordon Sims* v. *Johurry Lal* (3) and *Madholal Bithal Goyawal* v. *Jug Lal Singh* (4), it would be the duty of the Magistrate to maintain the possession of the party who has a decree of a competent Court and who was put in possession in execution.

When a party is found to be in possession a few days before the preliminary order and when there is nothing on the record to suggest that there was any change of possession, I do not think the Court is bound in revision to vacate the order.

I dismiss the petition.

M. C. P.

N. H. *Petition dismissed.*

(3) 5 C. W. N. 563.
(4) 6 C. W. N. 841.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 473 OF 1921.

September 12, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

ABDUL RAHMAN ISMAIL—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Juvenile offender—Sentence.

In inflicting a sentence a Magistrate must consider in the first instance the offence committed. A Magistrate is not entitled to sentence a juvenile offender to a longer term of imprisonment than he would be otherwise entitled to merely because it would be to his benefit to be detained in a Juvenile Prison.

Appeal from conviction and sentence passed by the Fourth Presidency Magistrate, Bombay.

JUDGMENT.

MACLEOD C. J.—If the second accused is sentenced to be detained under rigorous imprisonment in the Juvenile Prison at Dharwar for two years, as he is a lad of sixteen, and the first accused, who is an adult, although he admittedly has three previous convictions, is sentenced to one year's rigorous imprisonment, it follows that the Magistrate gave the second accused a longer sentence because he considered that it would be for his benefit to remain within the walls of the Dharwar Institution for two years. It is nowhere laid down that a Magistrate has such powers to increase the sentence of imprisonment on this ground. However desirable it might be for the Magistrates to have such powers, the sentence is one under the Indian Penal Code, but as the rules with regard to the detention of a juvenile in the Dharwar Jail provide that no one should be admitted into the jail unless he has been sentenced to a period of one year or upwards, the result is, that in the case of juveniles Magistrates increase the sentences in many cases up to one year so as to enable them to be sent to the Dharwar Jail instead of to the ordinary jail, and to that extent we might overlook the fact that they increase the sentences on juveniles beyond what the sentences would amount to in the case of adults, in order that juveniles should get the advantage of being detained in the Juvenile Prison. We doubt very much whether they are entitled to go beyond

that and to sentence a juvenile to a period, as in this case, of two years, merely because they think that such detention would be to the benefit of the accused. We have to consider in the first instance the offence committed. Clearly, since the first accused, who was not only an adult but also had been previously convicted, only got one year's rigorous imprisonment, the second accused would, in the ordinary course, have been sentenced to less than one year. For these reasons we think the sentence must be reduced to one year.

SHAH, J.—I agree.

Z. K.

Sentence reduced.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 40 OF 1920.

May 14, 1920.

Present:—Mr. Justice Sultan Ahmad.

DAMODAR DAS—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 263—Convictions, reason for, necessity of—Revision—Penal Code (Act XLV of 1860), s. 447—Trespass—Offence, ingredient of—Intention.

Under section 263 a Magistrate must give the reasons, though briefly, for justifying the conviction. Convictions are revisable by the Superior Court, and the Superior Court will always insist on having materials before it so that it may be in a position to say whether the conviction is proper or not.

The main ingredient of an offence under section 447, Indian Penal Code, is that the trespass must be with the intention of annoying or insulting some one or must be with the intention of committing an offence and where there is nothing in the order of a Magistrate convicting an accused for criminal trespass which would show the intention of the accused, the conviction cannot be sustained.

Criminal reference by the Sessions Judge, Cuttack.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a reference by the Sessions Judge of Cuttack, recommending that the conviction of the accused under section 448 of the Indian Penal Code by the Deputy Magistrate be quashed. The trial was summary, but it appears to me that the order of the Deputy Magistrate does not comply with the provisions of section 263 of the Code of Criminal Procedure. It must be remembered that the summary procedure provided for in Chapter XXII of the Code of Criminal Procedure is not to become too summary. Under section 263 the Magistrate must give the reasons, though briefly, for justifying the conviction. The only reason that I find in the order that he has passed is that the accused is guilty under section 447. If that were sufficient, then no other reasons justifying the conviction could possibly be given. Convictions are revisable by a Superior Court, and the Superior Court will always insist on having materials before it so that it may be in a position to say whether the conviction is proper or not. The main ingredient of section 447 is that the trespass must be with the intention of annoying or insulting some one, or must be with the intention of committing an offence. There is nothing in the order of the Magistrate which would show the intention of the accused. That not having been found, the conviction for criminal trespass is an impossibility. At the highest it can be said that the accused trespassed into the room of the Sub-Inspector, but that would be criminal trespass if the criminal intention of the accused is clearly found. Therefore, I agree with the learned Sessions Judge that the conviction of the accused is not maintainable and, therefore, direct that the fine, if paid by himself, must be refunded, the conviction being quashed.

J. P. & M. L.

Conviction quashed.

LAHORE HIGH COURT.
CRIMINAL REVISION PETITION No. 738 OF 1921.
November 4, 1921.
Present:—Mr. Justice Harrison.
NARINJAN SINGH AND ANOTHER—CONVICTS—PETITIONERS
versus
EMPEROR—RESPONDENT.

Arms Act (IX of 1878), s. 19 (f)—Arms—Possession—Chhavi found in bed of two persons in third person's house.

Two persons were lying on a bed in the house of a third person and a *chhavi* was found in the bedding wrapped in a piece of cloth:

Held, that even if it were assumed that the *chhavi* did not belong to the owner of the house, these two persons could not be convicted of an offence under section 19 of the Arms Act, inasmuch as it could not be said which of them was actually in possession of the *chhavi*.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Amritsar, dated the 29th March 1921, affirming that of a Magistrate, First Class, Amritsar, dated the 28th February 1921.

Lala *Gopal Chand*, for the Petitioners.

JUDGMENT.—The facts are that the two accused were found lying on a bed in the house of one Channan Singh and in the bedding a *chhavi* was found wrapped in a cloth. Both have been convicted of being in possession of the *chhavi*. The conviction cannot stand, as it is impossible to say which of the two was actually in possession, even if it be held to be proved that Channan Singh was not the owner.

I accept the application and acquit both accused.

Z K.

Application accepted.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No 472 OF 1921.
August 13, 1921.
Present:—Mr. Justice Sulaiman.
JUGGAN—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), ss. 314, 333—Tahsildar sanctioning prosecution—Conviction, legality of—Irregularity in sanction, whether cured—Criminal Procedure Code (Act V of 1898), s. 537.

A Tahsildar acting as officer in charge, Municipal work, under section 333 of the U. P. Municipalities Act cannot sanction a prosecution under section 185 of the U. P. Municipalities Act and a conviction based on such a sanction is illegal. [p. 448, col. 1.]

An irregularity in a sanction, as required by section 314 of the U. P. Municipalities Act, cannot be cured by the provisions of section 537 of the Criminal Procedure Code, which are not applicable to the sanction under section 314 of the U. P. Municipalities Act. [p. 448, col. 2.]

Criminal reference made by the District Magistrate, Meerut, dated the 2nd July 1921.

JUDGMENT.—This is a reference under section 438 of the Criminal Procedure Code by the District Magistrate of Meerut. It appears that while Barant was a notified area, Juggan accused applied to the Notified Area Committee for permission to build a wall On the 9th of January 1921 the Committee by a resolution ordered that a space of $9\frac{1}{2}$ feet should be left between the wall and an adjoining drain. On objections having been raised by the accused and a report having been called for, the Committee by a second resolution, dated the 16th February 1921, modified its previous order and reduced the width of the open space from $9\frac{1}{2}$ feet to 5 feet. The accused, however, built the wall without leaving the required space of 5 feet. The Notified Area Committee accordingly on the 26th of March 1921 issued a notice to him to remove the wall within fifteen days. After this, the notified area was converted into a Municipality with effect from the 1st of April 1921. The accused replied to the notice, saying that the land was his own and intimated that he would institute a suit in a Civil Court. On the 15th of April 1921 the Tahsildar, purporting to act under section 333 of the

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Municipalities Act, II of 1916, as the officer in charge, Municipal work, sanctioned prosecution under section 185 of the Municipalities Act.

The learned Magistrate did not accept the Committee's case that a public right of way existed over the land which was to be left open; on the other hand, he found that the land did not belong to the Committee at all, but was the private property of the accused and, in fact, considered that the order of the Committee was not justifiable. He, however, convicted the accused as, in his opinion, he had contravened the order of the Committee, and sentenced him to pay a fine of Rs. 20.

On the 15th of April 1921 the Notified Area Committee had ceased to exist and the Municipality had come into existence, but there is nothing on the record to show that this was so.

In my opinion this reference must be accepted and the conviction set aside. There is, in fact, no evidence to show that the Tahsildar had been empowered under section 333 of Act II of 1916 to exercise the powers of the Board. But assuming that he had such powers, in my opinion, he would have no authority under section 333 of Act II of 1916 to sanction a prosecution. Under that section his powers are limited and he can exercise them only (1) for the purpose of making preliminary arrangements for the holding of first elections or otherwise, and (2) generally of expediting the assumption by the Board of its duties when established. It is quite clear that sanctioning a prosecution is neither for the purpose of making preliminary arrangements for the holding of first elections, nor is it any step towards expediting the assumption by the Board of its duties when established. Section 333 of the Municipalities Act, II of 1916, therefore, gave him no such power. Under section 314 of that Act it is provided that "no Court shall take cognizance of any of the offences punishable under this Act or under any rule or bye-law, except on the complaint of, or upon information received from, the Board or some person authorized by the Board by general or special order in this behalf." It, therefore, follows that without a proper sanction the conviction was illegal. The irregularity in the sanction, as required by section 314 of the Act, cannot be cured by the provisions of section 537 of the Code of Criminal Procedure, which are not applicable to the sanction under this section.

There are other legal objections also, for instance, (1) that the order of the Committee requiring the appellant to leave a space of 5 feet was in itself illegal, inasmuch as the previous resolution had been passed within six months of it and the Committee could not modify its own resolution within that period, and (2) that there is nothing on the record to show that there are any regulations under which the Board is empowered to prohibit the erection of a wall on private land and not abutting on a public street. In the view which I have taken as to the want of a proper sanction it is unnecessary for me to go into these other questions.

I accordingly accept this reference, set aside the conviction and sentence and direct that the fine, if paid, be refunded.

J. P. & N. H.

Conviction set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 226 OF 1920.

February 9, 1921.

Present:—Pandit Kanhaiya Lal, J. C.

DAL CHAND—DEFENDANT—APPELLANT

versus

SITA RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage, simple—Mortgage to be converted into usufructuary—Possession not delivered—Simple mortgage, whether can be enforced—Interest not to cease from date mortgagee to obtain possession—Mortgagee, position of.

If a mortgage is originally a simple mortgage, liable to be converted into a usufructuary mortgage after the expiry of a certain period, the mortgagee can fall back on the simple mortgage and enforce it in case the mortgagor does not fulfil the obligation as to delivery of possession. [p. 450, col. 1.]

Lingam Krishna Bhupati Deva v. *Maharaja Manya Sultan Bahadur of Vizianagram*, 10 Ind. Cas. 272; 8 A. L. J. 594; 15 C. W. N. 441; 9 M. L. T. 445; 12 C. L. J. 584; 13 Bom. L. R. 447; (1911) 1 M. W. N. 429; 21 M. L. J. 1147 (P. C.) and *Lalta Prasad* v. *Hori Lal*, 19 Ind Cas. 748; 16 O. C. 90, referred to.

A mortgage provided that the mortgagor shall re-pay the mortgage money at a certain rate of interest within three years, that the interest shall be payable yearly, and that if for two consecutive years the interest due remained unpaid, the mortgagee would be entitled to obtain possession of the mortgaged property in lieu of the principal sum secured by the mortgage subject to the condition that in the event of his getting possession of the mortgaged property the liability of the mortgagor for interest on the principal money shall cease and the profits of the mortgaged property shall go to the mortgagee. The interest for two consecutive years was not paid to the mortgagee and the mortgagor did not deliver possession over the mortgaged property:

Held, that the mortgagee could not be disallowed interest from the date when he became entitled to claim possession. [p. 449, col. 2.]

Sundar Dei v. *Baldeo Bakhsh Singh*, 28 Ind Cas. 161; 18 O. C. 10; 2 O. L. J. 165 and *Mata Din* v. *Sheikh Ahmad Ali*, 24 Ind. Cas. 874; 1 O. L. J. 263, distinguished from.

Appeal from a decree of the Additional Subordinate Judge, Hardoi, dated 23rd April 1920, confirming that of the Munsif, Hardoi, dated 28th July 1920.

Mr. *Ishri Prasad*, for the Appellant.

Mr. *H. K. Ghosh*, for Respondents Nos. 1 to 3.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for the redemption of a mortgage effected by Pragdat in favour of the defendant-appellant on the 15th February 1910. Pragdat died, leaving a widow, *Musammat* Piari, who subsequently mortgaged the property with the plaintiffs on the 22nd July 1918.

The mortgage, which is the subject of redemption, provided that the mortgagor shall re-pay the mortgage money with interest at Rs. 1-4-0 per cent. per mensem within three years, that the interest aforesaid shall be payable yearly, and that if for two consecutive years the interest due remained unpaid, the mortgagee would be entitled to obtain possession of the mortgaged property in lieu of the principal sum secured by the mortgage subject to the condition that in the event of his getting possession of the mortgaged property the liability of the mortgagor for interest on the principal money shall cease and the profits of the mortgaged property shall go to the mortgagee. There was a further condition that whatever interest might remain due till such delivery of possession shall carry compound interest at the same rate till the redemption of the mortgage.

The mortgagor did not deliver possession over the mortgaged property. The mortgagees consequently claim interest on the entire principal money from the date of the mortgage. The Courts below have disallowed interest on the principal money from the date when the mortgagees became entitled to claim possession. They have relied in support of their decision on *Sundar Dei* v. *Baldeo Bakhsh Singh* (1). That was a case in which the mortgagor had agreed to pay the mortgage money within three years with interest at 2 per cent. per mensem payable half yearly and in case of default of payment of the said money within that period to put the mortgagee in possession of the mortgaged property for four years, and had further agreed that if he failed to pay the mortgage money within the extended period the mortgagee shall be entitled to claim foreclosure. The mortgagor, however, did not deliver possession and was, therefore, held liable for interest for seven years but for no

(1) 28 Ind. Cas. 161; 18 O. C. 10; 2 O. L. J. 165.

interest thereafter because the remedy provided by the deed of mortgage after the expiry of seven years was that the mortgagee should obtain foreclosure. For the period during which the mortgagor had agreed to give possession but had not done so the mortgagee was allowed full interest. That decision does not, therefore, help the plaintiffs. On the other hand, as pointed out by their Lordships of the Privy Council in *Lingam Krishna Bhupati Deva* v. *Maharaja Manya Sultan Bahadur of Vizianagram* (2) where the mortgagor undertakes to deliver possession after a certain period but does not do so, the mortgagee is entitled to enforce the initial terms of his mortgage independently of the position which would have been created had such possession been delivered. If the mortgage was originally a simple mortgage, liable to be converted into a usufructuary mortgage at the expiry of a certain period, the mortgagee can fall back on the simple mortgage and enforce it in case the mortgagor does not fulfil the obligation, he had undertaken. In *Lalta Prasad* v. *Hori Lal* (3) it was held in somewhat similar circumstances that if the mortgagor failed to deliver possession the mortgage would continue to retain its character of a simple mortgage and a decree for sale would, therefore, be permissible.

The learned Counsel for the plaintiffs-respondents has also referred to the decision in *Mata Din* v. *Sheikh Ahmad Ali* (4) but in that case the mortgage was from its very inception a usufructuary mortgage.

The appeal is, therefore, allowed and the defendant-appellant will be awarded Rs. 1,324-1-6 on account of interest from the 15th February 1912 up to the date of the institution of the appeal in this Court with further interest thereon at the stipulated rate from the date of the appeal till six months from this date. In case of non-payment of the amount awarded by the Courts below and of the further amount awarded by this Court the mortgagee shall be entitled to a decree for sale for the entire money due on the said mortgage on the date above mentioned with future interest thereon at 6 per cent. per annum from the said date till payment. The decree shall be framed in terms of Order XXXIV, rule 7 of the Code of Civil Procedure. The defendant-appellant shall get his costs here and hitherto from the plaintiffs respondents.

J. P.

Appeal allowed.

(2) 10 Ind. Cas. 272; 8 A. L. J. 594; 15 C. W. N. 441; 9 M. L. T. 445; 13 C. L. J. 584; 13 Bom. L. R. 447; (1911) 1 M. W. N. 429; 21 M. L. J. 1147 (P. C.).

(3) 19 Ind. Cas. 748; 16 O. C. 90.

(4) 24 Ind. Cas. 874; 1 O. L. J. 263.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION
No. 25 OF 1920.
May 16, 1921.

Present:—Mr. Justice Maung Kin and Mr. Justice Duckworth.

PONNAMMAL—APPELLANT
versus
THE BANK OF RANGOON AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XLV, r. 7—Appeal to Privy Council—Security, extension of time for depositing—Cogent reason.

Where a party who has obtained leave to appeal to His Majesty in Council applies for an extension of the prescribed period of six weeks for furnishing the requisite security and depositing costs, he is bound to show that during that period he exercised due diligence in endeavouring to obtain the necessary money: the mere statement that he has been trying to raise a loan and has failed will not be considered a "cogent" reason for granting an extension within the meaning of the Privy Council ruling in *Barjore* v. *Bhagana* (1). [p. 452, col. 1.]

Burjore v. *Bhagana*, 10 C. 557; 11 I. A. 7; 8 Ind. Jur 216; 4 Sar. P. C. J. 498; Rafique and Jackson's P. C. No. 76; 5 Ind. Dec. (N. s.) 373, *Rangasayi* v. *Mahalakshmamma*, 14 M. 391; 5 Ind. Dec. (N. s.) 274; *Bagga* v. *Salihon*, 6 Ind. Cas 723; 44 P. R. 1910; 70 P. W. R. (1910); 118 P. L. R. 1910 and *Roy Jotindra Nath Chowdhury* v. *Rai Prasanna Kumar Banerjee Bahadur*, 11 C. W. N. 1104, referred to.

Mr. *Naidu*, for the Appellant.

Mr. *Lentaigne*, (*Jr.*), for Respondent No. 1.

JUDGMENT.—The applicant was granted leave to appeal to His Majesty in Council on the 21st March 1921.

On the 2nd May 1921 she filed an application, supported by an affidavit, praying that

(1) 10 C. 557; 11 I. A. 7; 8 Ind. Jur. 216; 4 Sar. P. C. J. 498; Rafique & Jackson's P. C. No. 76; 5 Ind. Dec. (N. s.) 373.

the time for furnishing security and depositing costs may be extended for a further period of one month. Six weeks allowed by Order XLV, rule 7, of the Code of Civil Procedure expired on the 3rd May 1921. The application was heard on the 9th following. In her affidavit sworn on the 2nd May 1921 the applicant says that she owns a piece of land measuring about 64 acres and worth over Rs. 30,000, and that she has been trying to raise a loan on the security of this land to enable her to make the necessary deposit in this case, but that she has not so far succeeded. She further says that owing to old age and illness she has not been able to go about and raise a loan for the past three weeks. The applicant was present when the application was heard, and although she was said to be 64 years of age, she appeared to be very well preserved, and we came to the conclusion that, in spite of her old age, she was strong enough to go about. As to her alleged illness there is only her affidavit and nothing else to support her. The statement that she has been trying to raise a loan on the security of the land is also uncorroborated, and she does not show in her affidavit what steps she had taken to raise the necessary money, so that the Court may be in a position to determine whether she has been diligent in due time to be prepared to lodge the deposit within the limited period. So that there is only her bare word that she has been trying to raise a loan. One would have thought that it would be easy to raise Rs. 5,000 on the security of a piece of land worth Rs. 30,000 and that if by any chance any difficulty arose, the applicant ought to have explained the nature of that difficulty to the Court. The applicant does not refer to any arrangement she had made within the prescribed period for obtaining a loan which fell through from some cause for which she was not to blame.

In *Burjore* v. *Bhagana* (1) their Lordships of the Privy Council laid down that the Court has the power to extend the time, but that it ought not to do so without some cogent reason.

In *Venkatachalam* v. *Mahalakshmamma* (2) reported at the foot of the report of the case of *Rangasayi* v. *Mahalakshmamma* (3), it was held that the "cogent reasons referred by the Privy Council [in *Burjore's case* (1)] must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period; and that he was prevented from making his deposit, not owing to absence or dffiealty of getting funds but owing to some circumstance accidental or otherwise over which he had no control, or owing to mistake which the Court would consider not unreasonable or caused by negligence." In *Rangasayi's case* (3) Muttusami Ayyar, J., held that it is necessary for the petitioner to show that he was diligent in due time to be prepared to lodge the deposit within the limited period. The facts alleged were that the petitioner had letters in his possession from certain persons who promised to lend, if he waited till the jaggery season in the local market, but there was nothing to show that he had applied to them for loans in sufficient time before the expiration of the prescribed period. The learned Judge held that a mere promise by the petitioner's friends to lend on the arrival of a particular season is not a sufficient cause for extending the prescribed time. Best, J., observed that on the facts he would have held that sufficiently cogent reasons had been shown for the extension of time, but felt bound by the ruling in *Venkatachalam's case* (2). He further said: "It seems to me that absence of funds or difficulty in raising the same, if true, is a very cogent reason for granting an application such as the present one for extending the time and accepting the money now brought into Court."

In *Bagga* v. *Salihon* (4) Johnstone and Chevis, JJ., held that the interpretation of the Privy Council case by the Madras High Court in *Venkatachalam's case* (2) is a mere gloss upon the ruling of the Privy Council, and that it is not a necessary consequence of that ruling, and they declined to accept it. The facts of the Punjab case are that three days before the date on which the prescribed time expired an application was made for an

(1) 10 C. 557; 11 I. A. 7; 8 Ind. Jur. 216; 4 Sar. P. C. J. 498; Rafique and Jackson's P. C. No. 76; 5 Ind. Dec. (N. S.) 373.

(2) 4 M. 391*n*; 5 Ind. Dec. (N. S.) 274.
(3) 14 M. 391; 5 Ind. Dec. (N. S.) 274.
(4) 6 Ind. Cas. 723; 44 P. R. 1910; 70 P. W. R. 1910; 118 P. L. R. 1910.

extension on the ground of poverty. At the expiration of the period more than three fourths of the amount had been deposited in Court. The learned Judges held that the applicant had shown due diligence by having paid in three-fourth of the mony required, and they held that sufficient reasons had been shown for extending the prescribed period.

In *Roy Jotindra Nath Chowdhury* v. *Rai Prasanna Kumar Banerjee Bahadur* (5) the ground for the extension the petitioner asked was contained in the following paragraph of the petition:—"That your petitioners expected that the said amount of Rs. 2,460 would come to them from their Zamindari, but instead of that amount the sum of Rs. 2,000 reached them during the Christmas vacation." Maclean, C J, who delivered the judgment of the Court said: "There is no plea of poverty. The applicants knew on the 12th November that they must find the money within six weeks: there is no case of mistake or surprise: and the paragraph I have cited is very vague as to dates. The petitioners are Zamindars, and there is nothing to indicate that if they had given proper directions, they could not have obtained the whole amount from the Zamindari. In these circumstances can we say that any cogent reason has been shown? I think not."

In the present case the applicant has not, as we said before, given any facts from which we may draw the inference that she had been diligently endeavouring to get the necessary amount by raising a loan on the security of her land. She has not spoken as to any arrangement, which she had made, falling through for some reason for which she was not to blame. The prescribed period of six weeks is ordinarily sufficient for raising funds on credit. Therefore, an applicant who asks for an extension of the time is bound to show that during that period he exercised due diligence in endeavouring to obtain the necessary money. The mere statement that she has been trying to raise a loan and has failed, as the applicant in the present case has said, will not be considered to be a sufficient or, to use the word used by the Privy Council, "cogent" reason.

We will, therefore, reject the application with costs, Advocate's fee two gold *mohurs*.

W. C. A. *Application rejected.*

(5) 11 C. W. N. 1104.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 22 OF 1920.

June 21, 1921.

Present:—Mr. Wazir Hasan, A. J. C.

MUHAMMAD HAMIDULLAH KHAN—DEFENDANT—APPELLANT

versus

Musammat FAKHRJAHAN BEGAM—PLAINTIFF—RESPONDENT.

Cause of action, definition of—Marriage, dissolution of, suit for—Divorce, declaration of, suit for—Conjugal rights, restitution of suit for—Limitation Act (IX of 1908), s. 23, Sch. I, Art. 120.

A cause of action includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action. [p. 454, col. 1.]

In 1912 defendant, husband, filed a suit against plaintiff, his wife, for restitution of conjugal rights. The plaintiff pleaded divorce and cruelty The suit was dismissed on the ground of cruelty but no specific finding was given on the question of divorce. The plaintiff thereafter sued for a declaration that the relationship of wife and husband between the parties ceased to exist in consequence of a divorce effected by the defendant and in the alternative for a decree for dissolution of the marriage and the cause of action was stated to have arisen on the date on which the Appellate Court delivered its judgment in the previous suit. The defendant denied the alleged divorce and cruelty and pleaded limitation:

Held, that the opinions expressed in the judgments of the previous litigation as to the affirmation of cruelty and the negation of divorce could not form a cause of action for the present suit of the plaintiff and that any admission of evidence of acts of cruelty and of divorce other than the acts and the divorce mentioned in the plaint would amount to a departure from the cause of action on which the suit was brought and that the plaintiff could not prove them. [p. 454, cols. 1 & 2.]

As a suit for dissolution of marriage or for a declaration as to an accomplished divorce is essentially different in cause of action from a suit for restitution of conjugal rights, the former suit does not fall within the purview of section 23 but is governed solely by Article 120, Schedule I, of the Limitation Act. [p. 454, col. 2.]

Binda v. *Kaunsilia*, 13 A. 126; A. W. N. (1891) 18; 7 Ind. Dec. (N. s.) 79, distinguished.

Appeal from a decree of the Officiating Subordinate Judge, Sitapur, dated 12th January 1920.

Messrs. *A. P. Sen* and *Muhammad Wasim*, for the Appellant.

Messrs. *Shahenshah Husain Rizwi* and *Wasi Hasan*, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Sitapur dated the 12th January 1920. The suit,

out of which this appeal arises, was brought by the plaintiff-respondent, *Musammat* Fakhrjahan Begam, against the defendant appellant, Muhammad Hamidullah Khan, for a declaration that the relationship of wife and husband between the parties ceased to exist in consequence of a divorce effected by the defendant and in the alternative for a decree for dissolution of the marriage. The lower Court rejected the declaratory relief asked for but has granted a decree for dissolution of marriage. The appeal questions the validity of such a decree.

The plaintiff's case is that she was married to the defendant in November 1914 at Akbarpur, in the District of Sitapur, that subsequent to the marriage differences arose between the parties, that eventually the behaviour of the defendant towards the plaintiff was of positively cruel character and that the defendant divorced the plaintiff on account of her refusal to go back to his house. The acts of the defendant, which amounted to cruelty, and the alleged divorce, all happened admittedly prior to December 1912.

It appears that on the 19th December 1912 the defendant filed a suit against the plaintiff for restitution of conjugal rights. The lady in her defence to the suit set up the plea of divorce and the cruel treatment to which she had been subjected by the defendant as grounds which would justify the Court in refusing the relief of the restitution of conjugal rights, which the husband had asked for in that suit. That suit was dismissed by the Subordinate Judge of Sitapur on the 10th March 1914 and his judgment was upheld by the District Judge of the same place on the 19th November 1914. The findings of the Court of first instance were that the alleged divorce was not proved and that the cruelty was proved. The Court of Appeal did not give any specific finding on the question of divorce but agreed with the Court of first instance on the question of cruelty. The cause of action for the present suit is stated in the plaint to have arisen on the 19th November 1914, the date on which the Court of Appeal in the previous suit delivered its judgment. The defendant in his defence to the present suit denied the alleged divorce. He also denied cruelty and pleaded that the suit so far as it sought the dissolution of marriage on the ground of cruelty was not maintainable and that both the reliefs of the declaration as regards the divorce and the dissolution of marriage on the basis of cruelty were barred by limitation.

The lower Court has held that the plaintiff is estopped from re-opening the issue of divorce by reason of the judgment in the previous litigation and that the defendant is also estopped by the same judgment from re-opening the question of the factum of cruelty. It has rejected the plea of limitation and granted a decree for dissolution of marriage on the ground of cruelty as already indicated. The appeal raises two substantial questions of law:—(1) The whole suit is barred by limitation and (2) the suit for dissolution of marriage on the ground of cruelty is not maintainable. The respondent has challenged the validity of the finding of *res judicata* on the question of divorce under the provisions of Order XXI, rule 33, of the Code of Civil Procedure. I propose to dispose of the appeal as well as the objections on the simple ground of limitation.

The Indian Limitation Act (IX of 1908) does not exempt suits for dissolution of marriage brought by persons, who are not governed by the Indian Divorce Act, section 29, sub-section (2), of which says that "nothing in this Act shall apply to suits under the Indian Divorce Act." It is agreed that the present suit does not fall within the purview of the Indian Divorce Act. It follows, therefore, that section 3 of the Indian Limitation Act applies to it. The lower Court is of opinion that the suit is governed by Article 120 of the First Schedule of the Indian Limitation Act. This finding has been accepted by both the parties before me and in my judgment it is correct. As regards the point of time from which the period of limitation began to run the lower Court observes as follows:—"Following these authorities I think the decision of the First Court and the Appellate Court in the last litigation gives rise to a fresh cause of action. The suit is, therefore, within limitation." I am unable to agree with this opinion of the learned Subordinate Judge. The cases quoted by him in support of his view have no bearing whatsoever on the question under consideration. It is true that so long as the right to the subject-matter of a suit for a declaration subsists every invasion of that

right gives rise to a fresh cause of action. In the present case the grounds for the relief of dissolution of marriage as well as the grounds for the declaration as to the divorce admittedly came into existence prior to the institution of the suit of 1912. It is not alleged in the plaint or anywhere else in the proceedings that since the date of the institution of that suit, that is to say, 19th December 1912, the defendant was guilty of any fresh act of cruelty or that there has been a fresh pronouncement of divorce. In paragraph 12 of the plaint it is distinctly alleged that since the divorce there existed no connection whatsoever between the parties. It is also clear from a perusal of the plaint that every act of cruelty attributed by the plaintiff to the defendant was committed before the institution of that suit. This view of the pleadings was accepted by the learned Pleader for the respondent. As nothing happened after the institution of the suit of 1912 it follows that the plaintiff's right to sue for the reliefs she has prayed to be granted to her in this suit arose on the cause of action furnished by the events which happened prior to the institution of the previous suit. Article 120 of the First Schedule of the Indian Limitation Act (IX of 1908) provides a period of six years for a suit for which no period of limitation is provided elsewhere in that Schedule and according to column 3 of that Article time begins to run "when the right to sue accrues." Generally speaking "the right to sue accrues" when the cause of action arises. The precise definition of cause of action was laid down by the Court of Appeal in England in the case of *Read* v. *Brown* (1). Lord Esher, M. R., said:—"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court," is the plaintiff's cause of action. Fry, L. J., in the same case, said:—"Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action," and Lopes, L. J., added, "I agree with the definition given by the Master of the Rolls of a cause of action, and that it includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action." It is perfectly clear to my mind that the plaintiff in this case in order to support her right to the judgment of the Court must establish the specific acts of cruelty and the specific divorce, which she alleged in her plaint of the present suit. Any admission of evidence of acts of cruelty and of divorce other than the acts and the divorce mentioned in the plaint will amount to a clear departure from the cause of action on which is brought the present suit. Nor as a matter of fact has any act other than the acts prior to the litigation of 1912 or any divorce alleged to have happened prior to that litigation been pleaded in this case. The opinions expressed in the judgments of the previous litigation as to the affirmation of cruelty and the negation of divorce cannot, in my opinion, form a cause of action for the present suit of the plaintiff.

As a last resort it was argued by the learned Pleader for the plaintiff-respondent that his client's case was governed by section 23 of the Indian Limitation Act. He relied on the decision of the Allahabad High Court in the case of *Binda* v. *Kaunsilia* (2). But that case does not, in my opinion, furnish any analogy, which may be taken as a guide for the decision of the question with which I am concerned in this appeal. The case before the Allahabad High Court was one of restitution of conjugal rights by the husband against his wife. The learned Judges in that case held that Articles 34 and 35 of the Second Schedule of the Limitation Act, 1877, did not apply to a suit brought by a Hindu or Muhammadan husband for the recovery of wife and restitution of conjugal rights but that Article 120 applied subject to the provisions of section 23 of the Act. But a suit for dissolution of marriage or for a declaration as to an accomplished divorce is essentially different in cause of action from a suit for restitution of conjugal rights. The cause of action for a suit for restitution of conjugal rights is founded on a breach of the contract of marriage and as observed in the Allahabad case the breach continues so long as the person of the wife is withheld from the husband and he is denied the undoubted legal right of her conjugal society.

(1) (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 260; 37 W. R. 131.

(2) 13 A. 126; A. W. N. (1891) 18; 7 Ind. Dec. (N. s.) 78.

This view of the cause of action in a suit for restitution of conjugal rights places it within the purview of section 23 of the Limitation Act. The same cannot be predicated of a cause of action for a suit for dissolution of marriage or for a declaration that a divorce had taken place between the parties. It may be observed that Articles 34 and 35 of the old Limitation Act have disappeared from the new Act (IX of 1908). The present suit both in respect of the relief of declaration as to the divorce and in that of dissolution of marriage is clearly barred by Article 120 of the First Schedule of the Indian Limitation Act (IX of 1908).

The appeal is, therefore, allowed and the plaintiff-respondent's suit dismissed with costs in both Courts.

J. P. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2067 OF 1919.

July 12, 1920.

Present:—Mr. Justice Wilberforce.

DHANPAT RAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BADRI DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—Bequest in favour of female.

A bequest in favour of a Hindu female must be construed in the same way as any other disposition of property. [p. 456, col. 2.]

A Hindu testator after reciting in his Will that he was the *malik* of his property made the following bequest:—"After my death *Musammat* Khushali will be the *malik* of the property and after her death *Musammat* Parwati will be the *malik* of the property:

Held, that the testator intended to give an absolute estate to *Musammat* Khushali and *Musammat* Parwati. [p. 457, col. 1.]

Gurmukh Singh v. *Makhan Singh*, 11 Ind. Cas. 846; 61 P. R. 1911; 147 P. W. R. 1911, *Surajmani* v. *Rabi Nath Ojha*, 33 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.), *Fateh Chand* v. *Rup Chand*, 37 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (916) 2 M. W. N. 567; 26 C. L. J. 182; 43 I. A. 183 (P. C.), *Naulakhi Kunwar* v. *Jai Kishen Singh*, 48 Ind. Cas 905; 40 A. 575; 16 A. L. J. 561, *Sulochana Debi* v. *Jagattarini Debi*, 53 Ind. Cas. 602; 30 C. L. J. 51, *Chidambaranatha Goundan* v. *Sellappa Reddi*, 54 Ind. Cas. 524; 10 L. W. 620; 27 M. L. T. 87, followed.

Ralia Ram v. *Musammat Ved Kaur*, 27 P. R. 1893, dissented from.

Ram Chand v. *Dewan Chand*, 13 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W. R. 1912; *Moulvie Mohamed Shamsool Hooda* v. *Shewukram*, 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409; 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 43 (P. C.), referred to.

Radha Prasad Mullick v. *Rani Manee Dassee*, 35 C. 896; 12 C. W. N. 729; 35 I. A. 118; 4 M. L. T. 23; 18 M. L. J. 297; 5 A. L. J. 460; 10 Bom. L. R. 604; 8 C. L. J. 48 (P. C.) and *Sasiman* v. *Sibnarain*, 39 Ind. Cas. 755; 1 P. L. W. 375, distinguished.

Obiter.—If the ideas of a Hindu are naturally repugnant to giving an absolute title to females, there is nothing easier for him than to limit the title of a female donee.

Second appeal from a decree of the District Judge, Jullundur, dated the 15th July 1919, reversing that of the Munsif, First Class, Jullundur, dated the 7th of November 1918.

Lala *Fakir Chand*, for the Appellants.

Lala *Jagan Nath* for Mr. *Badri Das*, for the Respondent.

JUDGMENT.—In this case the reversioners of the husband of *Musammat* Khushali respondent sue for a declaration that a mortgage effected by her shall not affect their reversionary rights. *Musammat* Khushali's husband, Ralla Ram, made a Will leaving his property to his widow and after her death to one *Musammat* Parwati a relation, whom he had brought up. *Musammat* Parwati is not his daughter as stated by the District Judge but his brother's granddaughter. She is dead and the property is with *Musammat* Khushali, and the only question for decision was whether under the Will *Musammat* Khushali had inherited an absolute right in the property. The lower Appellate Court relying on *Ram Chand* v. *Dewan Chand* (1) and *Surajmani* v. *Rabi Nath Ojha* (2) has considered that the Will conferred an absolute title and has dismissed the suit. Against this decision a second appeal has been preferred.

In the Will it is stated that "after my death *Musammat* Khushali will be the owner (*malik*) of the property and after her death *Musammat* Parwati will be the owner (*malik*) of the property." Counsel for the appellants urges that in interpreting a Will of this kind the ordinary notions and wishes of Hindus with respect to the devolution of

(1) 13 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W. R. 1912.

(2) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.),

property must be taken into consideration. "Ordinarily their ideas are repugnant to giving a female power of alienation over immoveable propety, especially if it is ancestral nor is it a necessary result from the use of the term *malik* in respect of a Hindu female to whom a bequest is made that she should be considered the absolute owner of the property so bequeathed to her" *Rallia Ram* v. *Musammat Ved Kaur* (3). This decision was considered obsolete in *Gurmukh Singh* v. *Makhan Singh* (4), but Counsel for the appellants urges that the learned Judges in that case did not take into consideration another Privy Council ruling which had then been published, *viz.*, *Radha Prasad Mullick* v. *Ranee Mani Dassee* (5). He urges that in this judgment their Lordships of the Privy Council had modified their views expressed in *Surajmani* v. *Rabi Nath Ojha* (2). He also relies upon a recent judgment of the Patna High Court *Sasiman* v. *Sibnarain* (6). I am unable to agree with Counsel's contentions. I do not consider that *Radha Prasad Mullick* v. *Ranee Mani Dassee* (5) in any way modified the views expressed in *Surajmani* v. *Rabi Nath Ojha* (2). It merely proceeded on its own facts and held that a testator bequeathing his property to daughters and daughters' sons did not contemplate thereby the inheritance of his daughters' daughters. In this judgment it is true there is a reference to *Moulvie Mohamed Shamsool Hooda* v. *Shewukram* (7) which was followed in *Rallia Ram* v. *Musammat Ved Kaur* (3), but these remarks had really little reference to the matter in dispute and their Lordships in no way showed that they differed from the decision printed in *Surajmani* v. *Rabi Nath Ojha* (2). The other judgment relied upon by Counsel, *viz.*, *Sasiman* v. *Sibnarain* (6), proceeds on its own particular facts and is of little assistance to the appellants in this case.

On the other hand, *Gurmukh Singh* v. *Makhan Singh* (4) following a Privy Council ruling is a clear authority that a deed in favour of a Hindu female has to be interpreted in the same way as any other deed. This judgment obviously represents good law and is in accordance with common sense, for if the ideas of a Hindu are naturally repugnant to giving an absolute title to females, there is nothing easier for him than to limit the title of the female. Moreover, *Surajmani* v. *Rabi Nath Ojha* (2) followed in that case has been affirmed in a later Privy Council judgment *Katch Chand* v. *Rup Chand* (8). There are many other judgments following the same view; see for instance *Sulochana Debi* v. *Jagattarini Debi* (9), *Chidambaranatha Goundan* v. *Sellappa Reddi* (10) and *Naulakhi Kunwar* v. *Jai Kishen Singh* (11). There is, therefore, no ground whatever for dissenting from the exposition of the law given in *Gurmukh Singh* v. *Makhan Singh* (4).

Counsel for the appellants also argued that the law laid down in *Gurmukh Singh* v. *Makhan Singh* (4) did not apply to this case as *Musammat* Khushali herself did not consider that she had an absolute title to the property. In 1915 she issued a notice to her reversioners saying that she wanted Rs. 600 and asked them to advance this money on the security of her property. They, however, refused. This offer to the reversioners who will naturally inherit the property unless *Musammat* Khushali alienates by sale, Will or otherwise was eminently a proper one and in no way proves any admission on her part that she had a limited title.

Finally I may state that without the assistance of previous authorities the only possible interpretation of the Will would be that the testator intended to give an absolute estate to his widow and to *Musammat* Parwati. The word *malik* is used three times in the

(3) 27 P. R. 1895.
(4) 11 Ind. Cas. 846; 61 P. R. 1911; 147 P. W. R. 1911.
(5) 35 C. 896; 12 C. W. N. 729; 35 I. A. 118; 4 M. L. T. 28; 18 M. L. J. 287; 5 A. L. J. 460; 10 Bom. L. R. 644; 8 C. L. J. 48 (P. C.).
(6) 89 Ind. Cas. 755; 1 P. L. W. 375.
(7) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 407; 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 48 (P. C.).
(8) 37 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 182; 43 I. A. 183 (P. C.).
(9) 53 Ind. Cas. 602; 30 C. L. J. 51.
(10) 54 Ind. Cas. 524; 10 L. W. 620; 27 M. L. T. 37.
(11) 46 Ind. Cas. 905; 40 A. 575; 16 A. L. J. 564.

Will and the testator begins by saying: "I am now the *malik*" and proceeds to bequeath the property to *Musammat* Khushali as *malik* and to *Musammat* Parvati as a *malik*. There could be no justification whatever for interpreting one word *malik* in different ways.

For the foregoing reasons I agree with the decision of the lower Appellate Court and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 150 OF 1920.

February 10, 1921.

Present:—Mr. Lyle, A. J. C.

Musammat MAKHANA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BINDESHRI PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Will, construction of—Widows, property bequeathed to—Transfer, absolute power of, given subject to certain conditions—Conditions, whether enforceable.

The material portions of a Will were as follows:—"After me, the executant, no other person except the widows are heirs to the above mentioned share. Therefore, in accord with the opinion of each of the three widows, I do hereby bequeath my eight-anna share together with all the rights, recorded as well as unrecorded, without exemption of any thing or right, with power of alienation of every sort, to the above named ladies, in equal shares, and declare that after my death those ladies will remain in use and occupation of the said share like myself. In the event of the death of any of the three widows her share will devolve on the two surviving widows in equal shares, or if only one of them survives she will be in full possession and enjoyment of the entire property. But, the condition is that if any of these widows misbehaves herself, thereby bringing disgrace on the family, she will forfeit her share, which will go to the remaining widow or widows; and that if any of these widows intends to transfer the property she can do it only with the consent and approval of all or the remaining widows. Thus, whatever rights I possess will be exercised after my death by the widows subject to the conditions imposed as above."

Held, that under the terms of the above Will none of the ladies was entitled to transfer her share or any portion of it without obtaining the consent of her co-widows. p. 459, col. 1.]

Appeal from a decree of the District Judge, Rae Bareli, dated 12th March 1920, confirming that of the Subordinate Judge, Partabgarh, dated 17th December 1919.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Ishwari Prasad*, for the Appellants.

Mr. *S. N. Roy*, for the Respondents.

JUDGMENT.—This was a suit for possession of a 2 annas 8 pies share in village Malhwa Milkia. An 8 annas share in this village was owned by one Har Sahai Ram who by a Will executed in 1894 left the property to the three widows of his son Payag Dat. One of the widows, *Musammat* Sukhrani, by a deed of gift dated the 28th of May 1912 transferred her 2-annas 8 pies share in the property to her daughter's sons. The plaintiffs, *Musammat* Makhana and Bhagwani, are the other widows of Payag Dat. Their claim was that in accordance with the terms of the Will *Musammat* Sukhrani could not transfer any portion of the property without their consents that as their consent had not been obtained the deed of gift was invalid and on the death of *Musammat* Sukhrani in accordance with the terms of the Will they (the plaintiffs) were entitled to possession of *Musammat* Sukhrani's share.

The Court of first instance held that the Will conferrred an absolute estate on each of the widows to the extent of 2 annas 8 pies share, that any conditions in the Will restricting the right of alienation were void under sections 10 and 11 of the Transfer of Property Act and that *Musammat* Sukhrani was competent under the Will to transfer her share without the consent of her co-widows. On these findings the plaintiffs' suit was dismissed. The lower Appellate Court has concurred in these findings and the plaintiffs have come to this Court in second appeal.

It is quite clear from the definition of the phrase "transfer of property" in section 5 of the Transfer of Property Act that sections 10 and 11 of that Act have no application and that they apply only to transfers *inter vivos*. The sole question

before us is what is the correct interpretation of the Will left by Har Sahai Ram. The material portions of the Will are as follows:—

"*bad man mukir siwai bewagan ke waris hissa mazkur-us sadar ke koi nahin hai, is liye.....apne hissa ath anna mai tamami hukuk dakhili wa khariji bila istasnai kisi shai wa haq ke ba ikhtiyar intikal har kism, ba ittifaq rai her seh bewagan, musammatan mazkurain ko ba hissa masawi wasiyat karta hun wa likhs deta hun ki bad wafat man mukir musammatan Sukhrani, wa Makhani, wa Bhagmani uper ath anna hissa wasiyat karda ke misl mere kabiz wa mutsarrif rahain - Agar minjumla har seh bewagan ke koi bewa faut ho jawe to hissa uska do bewagan minjumla ba hissa masawi lewain ya agar ek bhi zinda rahe to wohi malik wa kabiz hissa ki hogi magar shart yeh hai ki minjumlai bewagan mazkur us sadar ke koi bewa aisa fail kare ki jis se nang wo nek khandan ke ho to woh apne hissa se mahrum ho jawegi, jo bewa ya bewagan maujud rahegi usko ikhtiyar hoga ki usko hissa se mahrum kardewen — our agar kisi kism se intikal hissa ka karna manzur ho to ba ittifaq rai har seh bewagan ya jo us waqt maujud hon karen—bahar hal jo jo ikhtiyarat mujh ko hasil hain wohi ikhtiyar bad man mukir bewagan ko hasb sharayat mazkure bala hasil rahenge.*"

It is true that the testator declares that the three ladies shall have the same powers as he himself possesses over the property, but he adds the words "*hasb sharayat mazkure bala,*" and the document must be read as a whole. The "conditions mentioned above" are that if any one of the widows wishes to transfer any portion of the property she shall do so only with the consent of the other widows, that on the death of any one of the widows her share will go to the surviving ladies and that if any of the ladies does any act which would bring disgrace on the family the others shall be entitled to deprive her of her share. There is nothing whatever illegal in any of these conditions and they are conditions limiting the absolute right of the ladies to make a disposition of the property. The Will in effect gives the ladies a limited estate which on the death of two of the widows will ripen into an absolute estate for the last surviving widow. It is urged that the condition requiring the consent of all the widows to any transfer applies only in case it is proposed to transfer the whole 8-annas share and not to a proposed transfer by any one of the widows of her 2-annas 8 pies share. I cannot read this meaning into the terms of the Will. In the first instance such a condition would be altogether superfluous as none of the widows could in any case transfer more than her own share of the property; and the testator clearly provides that each of the widows shall be entitled to a one-third share with power of transfer subject to the consent of her co-widows, "*ba ikhtiyar intikal har kism ba ittifaq rai har seh bewagan musammatan mazkurain ko ba hissa masawi wasiyat karta hun*"

Furthermore, immediately before the phrase "*agar kisi kism se intikal hissa ka karna manzur ho*" we have the provision that if any of the widows does anything which would bring disgrace on the family the other widows will have the right to deprive her of her share (*unko ikhtiyar hoga ki us ko hissa se mahrum kar dewain*). It seems, therefore beyond question that in the phrase "*agar kisi kism se intikal hissa ka karna manzur ho*" the word "*hissa*" refers not to the whole 8 annas share left by the testator but to the share left to each of the widows I am clearly of opinion that under the terms of the Will none of the ladies was entitled to transfer her share or any portion of it without obtaining the consent of her co widows. It is further urged that each of the widows has in fact been making transfers without obtaining such consent, and it is urged that the plaintiffs are, therefore, estopped from questioning the right of *Musammat* Sukhrani to execute the deed of gift without their consent. I may note that this point was not taken in either of the lower Courts and in any case it is altogether without force. The mere fact that the plaintiffs have mortgaged portions of their shares without obtaining the express consent of *Musammat* Sukhrani cannot act as an estoppel against them from questioning the right of *Musammat* Sukhrani to execute a deed of gift in respect of her share without their consent.

As it is admitted that the consent of the appellants to the execution of the deed of gift by *Musammat* Sukhrani was not obtained and as I have held that *Musammat*

Sukhrani under the terms of the Will had no power to execute the deed of gift without the consent of the appellants it follows that the gift is invalid and that the plaintiffs-appellants are entitled to succeed.

The appeal is, therefore, allowed, the decree of the lower Appellate Court is set aside and the plaintiffs-appellants' suit is decreed with costs in all Courts.

J. P. *Appeal allowed.*

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 84 OF 1919.

February 22, 1921.

Present :—Mr. S. M. Robinson, Chief Judge, and Mr. Justice Heald.

MAUNG TIN—APPELLANT

versus

MA MAI MYINT—RESPONDENT.

Fraud—Party when may plead his own fraud—Fraud effectuated—Rule to be followed—Minor, whether can take advantage of guardian's fraud.

Where a fraud has been effectuated, the sound rule is to leave the parties exactly as they are, that is to say, to leave the property in the possession of whichever of the two parties it happens to rest with. [p. 462, col. 1.]

The Courts will not assist a party to a fraud to obtain possession of the subject of the fraud. Therefore, although a plaintiff will not be allowed to plead his fraud in order to obtain possession of the subject of the fraud, a defendant, who in spite of the fraud having been effectuated is still in possession, will be allowed to defend his possession by pleading the true nature of the transaction. [p. 461, col. 2.]

Babaji v. *Krishna*, 18 B. 372; 9 Ind. Dec. (N. S.) 756, *Mandaya* v. *Ma E*, 17 Ind. Cas. 918; 5 Bur. L. T. 166, *Petherpermal Chetty* v. *Muniandy Servai*, 25 C. 551; 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 240; 4 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98 (P. C.), *Preo Nath Koer* v. *Kazi Mahomed Shazid*, 8 C. W. N. 620, *Sidlingappa* v. *Birasa*, 31 B. 405; 9 Bom. L. R. 542, *Maniram* v. *Ganesh*, 4 Ind. Cas. 233; 5 N. L. R. 146 and *Girdharilal* v. *Manikamma*, 21 Ind. Cas. 50; 37 B. 10; 15 Bom. L. R. 805, referred to.

Although a minor may not be answerable for the fraud of his guardian, he cannot take advantage of it. [p. 462, col 1.]

Eugane Pogose v. *Delhi & London Banking Co. Lt.*, 10 C. 951; 5 Ind. Dec. (N. S.) 635, referred to.

First civil appeal against a decree passed by the Additional District Judge, Henzada.

Mr. *May Oung*, for the Appellant.

Mr. *Sin Hla Aung*, for the Respondent.

JUDGMENT.

ROBINSON, C. J.—These are appeals in two suits which were tried together and may be disposed of by one judgment. Maung Po Saw was married first to Ma Net and there is one surviving son of this marriage Maung Tin, the appellant before us. Ma Net died in Waso 1272 B. E, corresponding to July 1910. In Tabodwe 1272 B. E. some seven months later Po Sa married Ma Mai Myint. After his mother's death Maung Tin went to live with his maternal grand-father, U San Ko, and has lived with him ever since. Po Saw was in debt to Chetties and a suit was filed against him by his Chetty creditor on the 28th July 1911. This was decreed on the 2nd September 1911. A second suit was filed against him on the 22nd November 1911. Po Saw confessed judgment, and a decree was passed on the 17th January 1912. On the 14th July 1911 Po Saw executed three deeds of partition in favour of his son Maung Tin who was then a minor, his maternal grandfather, U San Ko, acting on his behalf. At the same time Po Saw transferred certain other properties to his second wife as Kanwin or a gift or settlement made on marriage. These documents were executed some five months after the marriage, and it is alleged that they were *benami* transactions entered into merely to protect the property from being attached by Po Saw's creditors. In execution of their decrees the Chetties attached the lands that had been transferred to Maung Tin and on his behalf U San Ko applied to remove the attachment setting up the deeds of partition which were filed in Court. The Chetties on learning of these deeds withdrew the attachment and then proceeded to settle with Po Saw compounding their claims by accepting a fairly large reduction of the amount due. If, therefore, the transfers were made for the purpose

before us is what is the correct interpretation of the Will left by Har Sahai Ram. The material portions of the Will are as follows:—

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Furthermore, immediately before the phrase "*agar kisi kism se intikal hissa ka karna manzur ho*" we have the provision that if any of the widows does anything which would bring disgrace on the family the other widows will have the right to deprive her of her share (*unko ikhtiyar hoga ki us ko hissa se mahrum kar dewain*). It seems, therefore beyond question that in the phrase "*agar kisi kism se intikal hissa ka karna manzur ho*" the word "*hissa*" refers not to the whole 8 annas share left by the testator but to the share left to each of the widows I am clearly of opinion that under the terms of the Will none of the ladies was entitled to transfer her share or any portion of it without obtaining the consent of her co widows. It is further urged that each of the widows has in fact been making transfers without obtaining such consent, and it is urged that the plaintiffs are, therefore, estopped from questioning the right of *Musammat* Sukhrani to execute the deed of gift without their consent. I may note that this point was not taken in either of the lower Courts and in any case it is altogether without force. The mere fact that the plaintiffs have mortgaged portions of their shares without obtaining the express consent of *Musammat* Sukhrani cannot act as an estoppel against them from questioning the right of *Musammat* Sukhrani to execute a deed of gift in respect of her share without their consent.

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Sukhrani under the terms of the Will had no power to execute the deed of gift without the consent of the appellants it follows that the gift is invalid and that the plaintiffs-appellants are entitled to succeed.

The appeal is, therefore, allowed, the decree of the lower Appellate Court is set aside and the plaintiffs-appellants' suit is decreed with costs in all Courts.

J. P. *Appeal allowed.*

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 84 OF 1919.

February 22, 1921.

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versus

MA MAI MYINT—RESPONDENT.

Fraud—Party when may plead his own fraud—Fraud effectuated—Rule to be followed—Minor, whether can take advantage of guardian's fraud.

Where a fraud has been effectuated, the sound rule is to leave the parties exactly as they are, that is to say, to leave the property in the possession of whichever of the two parties it happens to rest with. [p. 462, col. 1.]

The Courts will not assist a party to a fraud to obtain possession of the subject of the fraud. Therefore, although a plaintiff will not be allowed to plead his fraud in order to obtain possession of the subject of the fraud, a defendant, who in spite of the fraud having been effectuated is still in possession, will be allowed to defend his possession by pleading the true nature of the transaction. [p. 461, col. 2.]

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First civil appeal against a decree passed by the Additional District Judge, Henzada.

Mr. *May Oung*, for the Appellant.

Mr. *Sin Hla Aung*, for the Respondent.

JUDGMENT.

ROBINSON, C. J.—These are appeals in two suits which were tried together and may be disposed of by one judgment. Maung Po Saw was married first to Ma Net and there is one surviving son of this marriage Maung Tin, the appellant before us. Ma Net died in Waso 1272 B. E, corresponding to July 1910. In Tabodwe 1272 B. E. some seven months later Po Sa married Ma Mai Myint. After his mother's death Maung Tin went to live with his maternal grand-father, U San Ko, and has lived with him ever since. Po Saw was in debt to Chetties and a suit was filed against him by his Chetty creditor on the 28th July 1911. This was decreed on the 2nd September 1911. A second suit was filed against him on the 22nd November 1911. Po Saw confessed judgment, and a decree was passed on the 17th January 1912. On the 14th July 1911 Po Saw executed three deeds of partition in favour of his son Maung Tin who was then a minor, his maternal grandfather, U San Ko, acting on his behalf. At the same time Po Saw transferred certain other properties to his second wife as Kanwin or a gift or settlement made on marriage. These documents were executed some five months after the marriage, and it is alleged that they were *benami* transactions entered into merely to protect the property from being attached by Po Saw's creditors. In execution of their decrees the Chetties attached the lands that had been transferred to Maung Tin and on his behalf U San Ko applied to remove the attachment setting up the deeds of partition which were filed in Court. The Chetties on learning of these deeds withdrew the attachment and then proceeded to settle with Po Saw compounding their claims by accepting a fairly large reduction of the amount due. If, therefore, the transfers were made for the purpose

of defeating the creditors, the fraud was completely effected. The second wife also applied for removal of the attachment so far as the property transferred to her was concerned. The properties have all along remained in the possession of Po Saw and he has drawn and enjoyed the rents and profits thereof. It is said that it was agreed that he should continue to manage the properties on behalf of his son and retain the profits which were to be handed over to the son on his attaining his majority. It is not denied that the net profits amount to Rs. 900 a year and that in the six years preceding the suits with which we are now concerned only Rs. 220 had been paid by Po Saw towards the maintenance of his son. Po Saw then brought a suit to have it declared that the three deeds of partition were merely *benami* transactions executed with intent to defeat his creditors and were void. U San Ko in reply on behalf of Maung Tin filed a suit for a declaration that the deeds of partition were valid, and for possession of the lands, and for the mesne profits that had accrued during the time they were in the possession of Po Saw. The learned District Judge has granted Po Saw a decree declaring the deeds to be void, and he has dismissed Maung Tin's suit. Appeals are filed from both these decrees. As regards Po Saw's suit it is not denied now that it must fail and should have been dismissed, and if it is established that these documents were executed merely to defraud the creditors, which is undoubtedly the case. As regards Maung Tin's suit it is urged that it is not open to Po Saw to plead in defence his own fraud and secondly that the minor was no party to that fraud and was ignorant of it and, therefore, that his suit is not tainted and should have been decreed.

It is perfectly clear that at the time these transfers were made Po Saw was heavily in debt. Whether he was absolutely insolvent or not cannot be decided on the material on the record but it is clear that his debts were considerable and that the deeds of partition related to a very large share of his landed properties. They conveyed some 105 acres out of 135. This is a much larger amount than the share of inheritance to which Maung Tin would have been entitled. In addition to the lands granted to his son other properties were granted to his wife, and it seems perfectly clear from other facts which cannot be disputed that the transactions were not *bona fide* ones. The Chetties were pressing for payment and it was from Po Saw that the suggestion first came that he should give his son at once his share in the joint estate of Po Saw and his mother. There is the fact that for many years the property has remained in Po Saw's possession and that he has kept the rents and profits thereof. Had this been a *bona fide* transaction, it is impossible to believe that U San Ko would not have taken possession of the lands and managed them himself on behalf of the minor as whose guardian he was acting. It is certainly most unusual to make a settlement on the wife several months after marriage and it is quite unnecessary to do so having regard to the relationship which exists between a Burmese husband and wife with reference to their property. The deeds themselves remained in Po Saw's possession and were apparently only handed over to San Ko in order that he might effect a removal of the attachments. After the attachments had been withdrawn Po Saw obtained the documents from the Court to the knowledge of San Ko who has allowed him to remain in possession of them ever since. Taking, therefore, all the facts into consideration it appears that Po Saw was heavily in debt, that his creditors were pressing him and that he made these most unusual transfers very shortly before the suits were filed, and we think there can be no doubt that these transfers were made merely to defraud the creditors by keeping these properties, if possible, out of their reach. The transfers, therefore, were *benami* and fraudulent, and it is settled law that a plaintiff cannot be allowed to come into Court and plead his own fraud in support of the claim that he makes. Po Saw's suit, therefore, should obviously have been dismissed and we accept the appeal as to his suit and set aside the decision of the Court below with costs in both Courts.

As regards Maung Tin's suit the question arises whether Po Saw can be allowed to plead that the transactions were *benami* in order to defeat the apparent title created

by the deeds. In *Babaji* v. *Krishna* (1) judgments of their Lordships of the Privy Council were cited and held to show that it is open to the defendant to defend his possession by showing that the real transaction between him and the plaintiff was to defraud, whether a third party or the defendant's creditors generally. In *Mandaya* v. *Ma E* (2) it was held that where the deed of sale was found to have been executed *benami* and with a view to defraud the creditors of the vendors it was not open to the purchaser to recover possession, and in that case it did not matter whether the object of the fraudulent transfer was actually effected or not. In the present case as in that case the Court is asked to take the property from the rightful owner and hand it over to the *benamidar*. That is a different case to one in which the real owner sues for possession which was the position in *Petherpermal Chetty* v. *Muniandy Servai* (3) in which their Lordships of the Privy Council held that the vendor could recover the property and to hold otherwise would have been to allow a pretended purchaser to retain the property from the rightful owner when no fraud had been effected in consequence of the fraudulent intention. Again in *Ireo Nath Koer* v. *Kazi Mahomed Shazid* (4) it was held that the reason of the rule laid down is that the Court will refuse relief to a party who sets up his own fraud and leave matters where they are. The same principle does not hold good where the defendant in possession seeks to show the real nature of a transaction to defend his possession. In *Sidlingappa* v. *Hirasa* (5) it was held to be the sounder policy to accept the rule which will be most apt to deter persons from frauds of this kind. In that case it was said that "the defendant is not resisting the enforcement of a contract, but is invoking the aid of the Court to enable him to escape on the strength of his own fraud from the consequences of the sale-deeds which ostensibly create a valid title in the plaintiff. In these circumstances, it is, we think, by not displacing the plaintiffs' apparent title that we give true effect to the maxim, 'let the estate lie where it falls.'" There was another ground in that case, *viz*, that it was the plaintiff's father and not the plaintiff who had joined the defendant in the fraud which may have influenced the Court though it was not decided or made an actual ground for the decision. In that case also it must be noted that the plaintiff alleged that he was in legal possession of the lands. This case was distinguished in *Maniram* v. *Ganesh* (6) where it was held that the fact that a creditor of the defendant has actually been defeated by the sale does not debar the defendant from pleading that the conveyance was *benami* to defeat the creditors. The maxim *in pari delicto potior est conditio defendentis et possidentis* was held to apply. It was further held that there was no reason why the Court should assist the transferee to perpetuate a new fraud by giving him the property. *Sidlingappa's case* (5) was further considered in the case of *Girdharilal* v. *Manikamma* (7). In this case the defendant's creditor had not been defrauded, and it was held that there was no reason why the Court should punish the defendant's intention to defraud by passing a decree against him. Mr. Justice Beamar, who was a party to *Sidlingappa's case* (5), explained it by pointing out that there the contract was not executory but executed and that the real basis of the decision in *Sidlingappa's case* (5) was that no fraud was actually effectuated.

The balance of authority is in favour of that which is, in my opinion, the true rule for decision in these cases, namely, that where the contesting parties have been parties to the fraud the maxim "Let the estate lie where it falls" should be enforced. In other words that the Courts will not assist a party to a fraud to obtain possession of the subject of the fraud and they will not allow him to succeed by preventing the other party to the fraud from showing the true nature of the transaction. It is one thing to forbid the pleading of a fraud to obtain an advantage

(1) 18 B. 372; 9 Ind. Dec. (N. s.) 756.
(2) 17 Ind. Cas. 918; 5 Bur. L. T. 166.
(3) 35 C. 551; 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 230; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98 (P. C.).
(4) 8 C. W. N. 620.
(5) 31 B. 405; 9 Bom. L. R. 542.
(6) 4 Ind. Cas. 283; 5 N. L. R. 143.
(7) 21 Ind. Cas. 50; 38 B. 10; 15 Bom. L. R. 805.

and quite another thing to refuse to allow a party to the fraud to plead the true nature of the transaction. In the one case the Courts would be lending themselves to helping a party to a fraud to obtain the benefit of his fraud, while in the other case it would be preventing a party to the fraud from pleading and thereby permitting a further fraud to be committed. Where the fraud had actually been effectuated the sound rule, in my opinion, is to leave the parties exactly as they are, that is to say, to leave the property in the possession of whichever of the two parties to the fraud it happened to rest with. I would, therefore, hold that even though the fraud had been effectuated where the defendant is still in possession of the property the plaintiff cannot be allowed to plead his fraud, and though the deeds may show a title in him the Court should not lend its assistance to enable him to recover possession, and that to enable the Court to dispose of the matter with justice and equity the defendant ought to be allowed to plead the true nature of the transaction. This is, I consider, the view their Lordships in *Petherpermal's case* (3) approved.

There remains the plea that Maung Tin was a minor and was not a party to the fraud. In *Eugene Pogose* v. *Delhi & London Banking Co., Ltd.* (8) it was laid down that if a guardian whilst acting for a minor is guilty of a fraud or illegality in contracts which he makes on the minor's behalf, the minor can no more enforce such contracts than the guardian could, if he were acting on his own behalf. It may be true that no suit can be brought against the minor for any fraud or misrepresentation of which his guardian has been guilty, but that is a different matter. A minor may not be answerable on the one hand for the fraud of his guardian, but on the other hand he cannot take advantage of it. That decision, as far as I know, had never been differed from, and in my opinion as U San Ko was perfectly aware of the object with which these transfers were made it is not open to Maung Tin by pleading infancy and ignorance to take advantage of the fraud of his guardian. These transfers were clearly *benami* and the property in these lands still remained in Po Saw and as Po Saw is in possession there is no ground whatever for decreeing Maung Tin's suit.

The appeal should be dismissed with costs.

HEALD, J.—I concur.

W. C, A.

Appeal dismissed.

(8) 10 C. 951; 5 Ind. Dec. (N. S.) 635.

LAHORE HIGH COURT.

CIVIL APPEAL No. 483 OF 1921.

June 10, 1921.

Present :—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

GOPI RAM—DEFENDANT—APPELLANT

versus

ACHHRU RAM—PLAINTIFF—RESPONDENT.

Hindu Law—Will, construction of—Devise in favour of widow—Estate taken, nature of.

A Hindu testator after reciting in his Will that the whole of his property was self-acquired, proceeded to devise the same in favour of his wife, saying that she would be his *waris* and *qabiz* with power to alienate in case of need. He went on to state that his wife would have the same power over the property as he himself had:

Held, that the wife obtained an absolute estate in the property devised. [p. 463, col. 2.]

Appeal from an order of the District Judge, Ludhiana, dated the 9th December 1920, reversing that of the Subordinate Judge, First Class, Ludhiana, dated the 14th February 1920.

Lala *Fakir Chand*, for the Appellant.

Pandit *Sheo Narain*, R. B., for the Respondent.

JUDGMENT.—The question involved in this appeal relates to the construction of a Will executed by one Babu Ram, a Brahman of Ludhiana City, on the 31st December 1894. After carefully reciting that all his property was self acquired he proceeded to devise the same in favour of his wife, *Musammat* Kishen Devi, saying she should be the *waris* and *qabiz* with power to

alienate *zarurat par* (upon necessity). The Will provided that on the death of *Musammat* Kishen Devi the testator's daughter, *Musammat* Lachhmi, was to succeed and then it further proceeded to declare that on the testator's death his wife should have all powers *kulli ikhtiarat misl mere hasil honge* and that after her death his daughter would have the same power. Finally a provision was made to the effect that in the event of a son being born to him he (the said son) would succeed to all the property. Babu Ram died after having made this Will and was succeeded by *Musammat* Kishen Devi who, on the 12th of September 1916, sold the house to one Gopi Ram. She died on the 1st October 1918 and on the 23rd October 1918 one Achhru Ram, claiming to be a collateral of Babu Ram, brought the suit out of which this appeal has arisen, alleging that *Musammat* Kishen Devi had only a limited estate and was not entitled to alienate the house in question, there being no necessity for the alienation. The Trial Court construed the Will propounded as conveying a full estate to *Musammat* Kishen Devi and dismissed the plaintiff's suit on the ground that he had no *locus standi* to challenge Kishen Devi's alienation. Achhru Ram thereupon appealed to the District Judge who took a different view of this document and coming to the conclusion that *Musammat* Kishen Devi only took a limited estate under the Will held that the plaintiff had a *locus standi* and acting under Order XLI, rule 23 remanded the case for decision on the merits.

Against this order of remand Gopi Ram has preferred this appeal to this Court through Mr. Fakir Chand who has contended that the learned District Judge has misconstrued and misinterpreted the Will in question. He has drawn our attention to *Wasir Devi* v. *Ram Chand* (1), *Mohan Lal* v. *Niranjan Das* (2), *Dhanpat Rai* v. *Badri Das* (3), *Ram Chand* v. *Dewan Chand* (4), *Ramachandra Rao* v. *Ramachandra Rao* (5) and *Suraimani* v. *Rabi Nath Ojha* (6). Mr. Sheo Narain for the respondent has not challenged the correctness of the law as enunciated in those rulings and it is, therefore, unnecessary to discuss them.

The question really narrows itself to the construction to be placed on the Will before us. It seems to us that the intention of the testator was to definitely exclude his collaterals from succeeding to property that he himself had acquired. In order to give effect to this it was necessary to create a full estate and it remains to be seen whether Babu Ram succeeded in giving effect to his intention. Mr. Sheo Narain contended that by using the word *waris wa qabiz* Babu Ram clearly intended to convey only a limited estate and that subsequent expressions giving *Musammat* Kishen Devi the same powers as the testator himself possessed were not intended to include the power of alienation at will. We are, however, not impressed by this contention. It seems to us that the expression *waris* was loosely used and was not intended to be an expression of limitation. When further the testator proceeded to state that Kishen Devi had full powers of alienation (*zarurat par*) (which we consider means as the need arose) and followed this up by a definite declaration that she was to be the owner in the same position as he himself was, the estate conveyed was a full one.

In this view of the case we are of opinion that the decision of the Trial Court was correct and we accordingly set aside the order of remand passed by the District Judge and restore the order of the Trial Court dismissing the plaintiff's suit. The appeal is accepted with costs.

Z. K.

Appeal accepted.

(1) 58 Ind. Cas. 988; 1 L. 415.
(2) 60 Ind. Cas. 619; 2 L. 175.
(3) 65 Ind. Cas. 455; 3 L. L. J. 1.
(4) 13 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W. R. 1912.
(5) 52 Ind. Cas. 94; 42 M. 283; 36 M. L. J. 306.
(6) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2539 OF 1919.

December 23, 1921.

Present :—Mr. Justice Broadway and Mr. Justice Martineau.

THE FIRM OF PROBHU DIAL BANWARI LAL OF DELHI—DEFENDANTS —APPELLANTS

versus

DINA NATH KAPUR—PLAINTIFF —RESPONDENT.

Contract Act (IX of 1872), s. 118—Sale of goods—Goods not in accordance with order—Return of goods—Reasonable time—Pleadings—Evidence, admission of—Appeal—Burden of proof.

A buyer of goods loses his right to reject the goods delivered to him under the contract, by any act amounting to acceptance. Mere receipt of goods, however, does not amount to acceptance; but it will become an acceptance if the goods are not rejected within a reasonable time. The buyer is entitled to have the goods in his custody for a reasonable time in order that he may examine them and see whether they comply with the warranty. What is reasonable time is purely a question of fact and has to be decided on the circumstances of each case. In this case, where the goods sold were five bales of *dhoties* it was held that a period of eighteen days was not a reasonable time within the meaning of section 118 of the Contract Act. [p. 467, col. 1.]

Kissendoyal Jitsaria v. *Askaran Chowthmull*, 34 Ind. Cas. 290; 23 C. L. J. 415, referred to.

In answer to a suit for the return of certain goods and to recover their price the defendant pleaded that the plaintiff was not entitled to return the goods. At the trial the defendant sought to lead evidence to prove that the plaintiff had pledged the goods to a Bank and had thus exercised an act of ownership in respect of them, which precluded him now from returning the goods. The plaintiff objected to the admission of this evidence on the ground that this specific act which the defendant sought to prove had not been pleaded by him :

Held, that the defendant having denied the right of the plaintiff to return the goods he was entitled to prove any fact which would disentitle the plaintiff from returning them and that, therefore, the evidence which the defendant sought to lead was admissible. [p. 466, col. 1.]

It is incumbent on an appellant to show that the judgment appealed from is wrong but where the decision of the lower Court on a point is arbitrary, the Appellate Court is entitled to come to an independent decision on the point. [p. 467, cols. 1 & 2.]

Fakrunissa v. *Izarus Sadik*, 63 Ind. Cas. 898; 25 C. W. N. 866; 17 N. L. R. 72 (P. C.), referred to.

Jones v. *Just*, (1868) 3 Q. B. 197; 9 B. & S. 141; 37 L. J. Q. B. 89; 18 L. T. 208; 16 W. R. 643, distinguished.

First appeal from a decree of the Senior Subordinate Judge, First Class, Delhi, dated the 14th November 1919.

Lala *Moti Sagar*, R. S., for the Appellants.

Pandit *Sheo Narain*, R. B, and Babu *Sadha Ram*, for the Respondent.

JUDGMENT.—This is an appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 14th November 1919, under which the defendants-appellants were directed to pay to the plaintiffs a sum of Rs. 15,322 8 0 and costs, with interest at Rs. 7-8-0 per cent. per annum on the sum of Rs. 15,125 from the date of suit to date of payment and to take back five bales of *dhotis*. The money had to be paid by the 14th of December 1919, and failing payment the five bales of *dhotis* were to be attached and sold the defendants-appellants being liable for any deficit that might arise from the sale. It appears that on the 9th of August 1918 a contract was entered into between the plaintiff and the defendants-appellants for the sale to plaintiff of five bales of certain piece-goods known as *dhoti joras* No. 84 *chirwa kanni* at Rs. 7-9-0 per pair. On the 4th of September 1918 the defendants-appellants informed the plaintiff of the arrival of the goods. The plaintiff thereupon paid the moneys due under the contract and took delivery of the five bales through an employee. According to the statement of the plaintiff these goods had been placed by him in certain godowns belonging to the Alliance Bank of Simla, Limited, for which he was paying rent. Somewhere about the 24th to 26th of September 1918 the plaintiff induced by certain rumours, he had heard, examined these five bales and found that they were not what he had bought according to his contract. He thereupon sent one Bishen Chand to the defendants-appellants with a message that the goods did not answer to the description of what he had bought and should be taken back, the money being returned. Prabhu Dial, defendant-appellant, is said to have seen the plaintiff and to have admitted that the goods were not in accordance with the contract and that he would take them back within a few days as soon as he had arranged for the re-payment of the money. As he had not

done so, however, Bishen Chand was again sent to the defendants-appellants somewhere in the beginning of October to inform them that as the money had not been paid, a suit would have to be filed. As the money had not been paid by the 10th of October 1918, a notice was sent to the defendants-appellants calling upon them to refund the money and take back the goods as they had been rejected. Finally, the plaintiff, on the 6th November 1918, instituted the present suit asking for a decree for Rs 15,322-8 0 with future interest at the rate of annas ten per cent, per mensem.

The defendants-appellants contested the suit. They admitted the contract alleged, but said that they had sold to the plaintiff goods which they themselves had purchased from the firm of Lehri Das-Banarsi Das. They denied liability for the refund of the money, and alleged that the plaintiff had taken delivery and that it was incumbent on him to have examined the goods before he took delivery thereof. It was denied that there was any defect in the goods, and alleged that, even if any such defect existed, the defendants were not responsible. It was also denied that the plaintiff had any right to claim godown rent or to return the goods.

After examining the parties the following issues were settled: —

"1. Whether the five bales of *dhotis joras* of which plaintiff took delivery were not of the quality or description specified in the contract?

"2. Whether there has been breach of warranty on the part of the defendant firm and plaintiff is entitled to reject the goods and to return of the price paid by him with interest at Rs. 7-8-0 per cent. per annum?"

The plaintiff's evidence was duly recorded on the 13th of March 1919.

The plaintiff went into the witness-box at the end of his case and in the course of his cross examination he was questioned as to whether the bales in suit had been pledged to the Alliance Bank. He denied that the said bales had in any way been hypothecated to the Bank or been used as security for any advances made to him. On the 15th of October 1919, the defendants appellants opened their case and wished to produce, as their first witness, a clerk in the Alliance Bank of Simla with certain papers relating to the accounts of the plaintiff with the said Bank, with the object of showing that the plaintiff had pledged the goods in suit with the Bank, and by so doing had exercised ownership over them and had thus lost his right of rejection. The plaintiff strongly objected to the admissibility of this evidence, urging that the exercise of ownership had never been pleaded and had not been put in issue. This objection was upheld by the Trial Court and evidence on this point was disallowed. An application made by the defendants appellants for leave to amend their pleas was also dismissed on the same date. The examination of the other witnesses was then proceeded with and the case continued to the 16th of October 1919, on which date further evidence was recorded and an application for review made by the defendants appellants for re-consideration of the order of the 15th of October 1919 "refusing to allow the evidence of the Alliance Bank and to permit an amendment of the pleas." This application was rejected on the 20th of October 1919 after which arguments were heard and in due course a decree, as stated above, was passed in the plaintiff's favour.

The Trial Court has held that the goods supplied by the defendants were not of the quality or description specified in the contract. This finding is supported by the evidence and Mr. Moti Sagar stated that he did not challenge its correctness. He, however, contended that the decision on issue No. 2 was wrong. Firstly, he urged that the order refusing to allow the defendants appellants to lead evidence to show that the plaintiff had exercised ownership of the goods was wrong. He maintained that the second issue was wide enough to include this question and that the defendants-appellants' plea that the plaintiff was not entitled to return the bales was sufficient to require the plaintiff to prove all the requirements of section 118 of the Contract Act on which he relied, one of these requirements being that he had not exercised any act of ownership over them. He, however, stated that the defendants-appellants did not ask for a remand on this point, as they were content with the evidence already on the record, which evidence consists of certain accounts printed at page 14—40 of the printed book. It was pointed out that, in order to establish a right to return the goods it was necessary for the

plaintiff to prove that he had kept the goods for a time which was reasonably sufficient for examining them and that during this period he had exercised no act of ownership over them. Mr. Sheo Narain contended that it was for the defendants-appellants to definitely plead some act of ownership, and Order VI, rule (6), Civil Procedure Code, was referred to. After hearing Counsel on this point we decided to accept the evidence, as, in our opinion the said evidence should have been admitted. It seems to us that the point in question had been sufficiently raised in the pleas. The plaintiff's right to return the goods had been definitely denied, although the specific act, namely, the making over of the goods to the Bank, had not been specifically pleaded and could not have been, as it was not known to the defendants appellants till about the 12th October 1919. In any event, however, the defendants appellants should have been allowed to lead this evidence in rebuttal of the plaintiff's case.

Mr. Moti Sagar then pointed out that at pages 14 and 15 the accounts showed that on the 5th and 6th September the plaintiff had taken in all a sum of Rs. 15,000 from the Bank and had evidently done so in order to pay for the goods. He further contended that the accounts at page 30 showed that these goods had been made over to the Bank on the 7th of September. He argues that, inasmuch as the plaintiff owed to the Bank a sum of over Rs. 20,000 on the 6th September, the making over of these goods on the 7th September to the Bank must have been by way of pledge. We are, however, unable to accept this contention. When the clerk filed these accounts, he filed along with them a letter from the Bank, printed at page 9, in which it is definitely stated that these goods did not appear to have been deposited with them as security against any advance. We must, therefore, hold that, so far as this incident is concerned, no act of ownership has been established. We would further note that the plaintiff himself unequivocally stated in his cross-examination that the five bales in suit had not been pledged to the Bank.

The next contention was, that the plaintiff had kept the goods for a period which was not reasonable and had, therefore, accepted the five bales and was precluded from returning them, being entitled to damages only. The Court below has held that the retention of goods for a period of 18—21 days was a reasonable time within the meaning of section 118 of the Contract Act.

The first point taken by Mr. Moti Sagar was, that the plaintiff had not intimated his rejection of the goods till he gave a notice in writing on the 11th October 1918. On the other hand, Mr. Sheo Narain contended that notice had been given not later than 26th of September and in support of his contention we were referred to the evidence of Dina Nath, plaintiff himself, at page 49, where he says that, as soon as he found that the goods did not agree with the contract, he sent Bishen Chand to the defendants with a message that they should take back the goods and return his money. He further stated that Bishen Chand had told him that Prabhu Diyal was coming to see him, and that Prabhu Diyal did come and had promised to take back the goods. Bishan Chand (P. W. No. 1) does not support the plaintiff's statement in all its details, but does say that he was sent by the plaintiff to the defendants, and that he went to them, and that Prabhu Diyal told him he would see the plaintiff. Prabhu Dial himself, as D. W. No. 6, denied that Bishen Chand ever came to him as alleged or that he had ever been to see the plaintiff. On the other hand, in the notice dated the 11th of October 1918, (page 3 of the printed book) the plaintiff wrote to the defendants asking them to take back the goods and return his money, saying "you have been already asked several times but you have been making evasive answers." The Trial Court has accepted this evidence as sufficient to prove that the plaintiff had called upon the defendants to take back the goods by the 26th of September, and, after a careful consideration of the evidence, we are unable to say that the Court below is wrong. We must, therefore, take it that the plaintiff informed the defendants-appellants that there had been a breach of warranty and that the goods were to be taken back by the 26th September 1919. There remains the question, however, whether this period of 18—21 days can be regarded as reasonable within the meaning of section 118 of the Contract Act. Mr. Moti Sagar drew our

attention to *Kissendoyal Jitsaria* v. *Askaran Ohowthmull* (1) in which section 118 of the Contract Act was considered, and it was held that if the goods had not been rejected within the period of 21 days they would not have been rejected within a reasonable time. It was further pointed out that, inasmuch as the goods had been delivered to the defendants, the onus of proving that they had in fact been rejected lay upon the defendants in that case. Mr. Moti Sagar then referred to Remfry's Sale of Goods, page 542, and urged that the goods in this case having been accepted such an acceptance barred a suit for non-delivery. At page 564 the learned author points out that the buyer loses his right to reject the goods by any act amounting to acceptance. It may be conceded at once that if the goods had been accepted in the full sense of that word the right to reject would be barred. But, as the same author points out at page 630, mere receipt of goods is no acceptance, but such receipt will become an acceptance if the goods are not rejected within a reasonable time. With this view we are in accord. It seems to us that a buyer is entitled to have the goods in his custody for a reasonable time in order that he may examine them and see whether they comply with the warranty. The plaintiff, therefore, was entitled to receive the goods and to keep them for such time as can be regarded reasonable for the purpose of satisfying himself that they were the goods he had contracted to buy. For the defendants-appellants it was urged that only such time could be regarded as reasonable as would be necessary for an examination of the goods themselves, and it was urged that as these five bales could have been opened and examined within a period of, say, three hours any retention beyond that period should be regarded as unreasonable. We do not think that such a narrow construction can be placed on this section. What is reasonable time is purely a question of fact and has to be decided on the circumstances of each case. Mr. Sheo Narain contended on the authority of *Fakrunissa* v. *Izarus Sadik* (2) that in an appeal it was incumbent upon the appellant to show some reason for holding that the judgment appealed from was bad, and it was urged that as the Trial Court had come to the conclusion after a consideration of all the circumstances that the period taken in this case of 18-21 days was reasonable, this decision should be maintained. Undoubtedly, it is incumbent on an appellant to show that the judgment appealed from is wrong, but an examination of the judgment of the Court below shows that the decision on this point is purely arbitrary. No reasons are given for the conclusion arrived at and there appears to be no evidence on the record to show that such a time would be regarded as reasonable. Both sides led evidence as to what the mercantile usage was, the plaintiff's witnesses fixing the period at 60 days and the defendants-appellants' witnesses fixing it at three days. No question of mercantile usage, however, really arises in this case and none was pleaded by either side. The question is entirely one that relates to section 118 of the Contract Act itself. Now, it would appear that the plaintiff, in taking over these goods, placed them at once into godowns belonging to the Alliance Bank. It certainly would not take very long to open and examine five bales. For a period of 18-21 days the plaintiff took no steps to examine these goods and, indeed, according to his own showing, there is reason to believe, that he would never have examined them, had it not been for the fact that he was advised to do so by persons unnamed. As has been said above, a buyer is entitled to have goods in his custody for a reasonable time for the purpose of examining them. It seems to us, however, that the period taken by the plaintiff in this case cannot be regarded as reasonable: As pointed out by their Lordships in *Kissendoyal Jitsaria* v. *Askaran Ohowthmull* (1), no body could except that business people with regard to a contract of this nature could sit still for three weeks after the goods were delivered, taking no action with regard to them and then come forward after that period and say "we reject the goods." It has to be borne in mind that goods such as these vary in price almost from day to day. Mr. Sheo Narain contended that market fluctuations should not be allowed to affect the question of whether time was reasonable or not and our attention was drawn to *Jones* v. *Just* (3).

(1) 34 Ind. Cas. 290; 23 C. L. J. 415.

(2) 63 Ind. Cas. 898; 25 C. W. N. 866; 17 N. L. R. 72 (P. C.).

(3) (1868) 3 Q. B. 197; 9 B. & S. 141; 37 L. J. Q. B. 89; 18 L. T. 208; 16 W. R. 643.

G. S. BHARGAVA v. B. KOBAYASHI.

That authority, however, does not appear to us to be in point.

After a careful consideration of all the circumstances in this case, we are of opinion that the plaintiff retained these goods for a time which cannot be regarded as reasonably sufficient for examining them. He, therefore, lost his right to reject them. We accordingly accept this appeal and dismiss the plaintiff's suit with costs.

Z. K.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1018 OF 1919.

April 23, 1920.

Present :—Mr. Justice Chevis, Acting Chief Justice, and Mr. Justice Wilberforce.

MESSRS. G. S. BHARGAVA AND COMPANY —PLAINTIFF—APPELLANT

versus

B. KOBAYASHI—DEFENDANT—RESPONDENT.

Principal and agent—Contract signed by agent—Liability.

In a case where a man is by profession an agent of some particular firm and describes himself as such, he may still be contracting in his personal capacity, but the mere fact that he fails to specify his capacity as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are clearly to the contrary. [p. 469, col. 1.]

Gadd v. *Houghton*, (1876) 1 Ex D. 357; 46 L. J. Ex. 71; 35 L. T. 222; 24 W. R. 975, referred to.

Second appeal from a decree of the District Judge, Delhi, dated the 2nd February 1919, affirming that of the Senior Subordinate Judge, Delhi, dated the 30th August 1918.

Mr. *J. C. Sethi*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Respondent.

JUDGMENT.—The plaintiff firm which does commission agency business entered into a contract apparently for its principals with a firm doing busine s in Japan. Some goods were delivered, but then a dispute arose as to the party liable for paying demurrage and other charges. According to the plaint, the defendant, who does business in Calcutta, acting on his personal responsibility, entered into an agreement with the plaintiff firm for the settlement of this dispute. As this settlement was not adhered to, the plaintiff sued for damages. The reply of the defendant was, that he was merely acting as an agent on behalf of the Japanese firm and that he was in no way personally responsible. His plea has been upheld by the lower Courts, and the plaintiff has perferred a second appeal which has been argued by Mr. Jai Gopal Sethi.

The facts of the dispute were that after the delivery of some goods, owing to a dispute over the liability for demurrage and other charges, the plaintiff refused to take delivery of further goods. The demurrage and other charges were increasing and a settlement was necessary. On this the plaintiff asked the defendant to come to Delhi to settle the matter and an agreement was drawn up and duly signed. The important part of this agreement has been given by the lower Appellate Court. This agreement begins by reciting that the plaintiff and defendant agree to settle the dispute as to the goods shipped by the Japanese firm. It then proceeds "that we both of us, on behalf of our respective clients, would each bear half of demurrage, etc. The contract was signed by the parties and there was no qualification that the defendant was acting as an agent, Counsel argues that from this agreement itself and from other correspondence between the parties it was clearly understood that the defendant was acting on his personal responsibility. He also urges that, under section 230 (1) of the Contract Act, the defendant was personally liable, and, finally, he referred to certain English authorities that, where an agent in signing any contract does not clearly specify himself as such, he can be sued as the principal. As for the first part of the argument, Counsel took us through some correspondence which passed between the parties, but we need not refer to this in detail as none of it, in our opinion, shows any intention that the defendant was to be personally responsible for the carrying out of the agreement. On the other hand, it is clear from the words of the agreement itself

"on behalf of our respective clients" that the defendant was merely acting as an agent and it is also clear that the plaintiff always understood that the defendant was merely an agent of the Japanese firm. In fact, there is a letter written by the plaintiff firm itself to the defendant addressing him as an agent of the Japanese firm. We, therefore, have no hesitation in agreeing with the lower Appellate Court that the agreement was entered into by an agent and that the plaintiff fully understood this to be the case.

As for the second part of the argument that section 230 (1) applies to this case, we may dismiss it with the remark that it is not alleged that the original contract, from which the present dispute arose, was made by an agent for the sale or purchase of goods for a merchant resident abroad. Indeed, it is admitted that it was made by the Japanese firm itself. This provision of law, therefore, clearly has no application.

Finally, Counsel contended that if an agent did not sign as such, he became personally liable for the carrying out of the contract. He referred to authorities quoted in Bowstead on Agency, Sixth Edition, page 388, and to obsolete English authorities in support of his argument. We fully agree that in a case where a man is by profession an agent of some particular firm and describes himself as such, he may still be contracting in his personal capacity, but we do not consider that the mere fact that he fails to specify his capacity as an agent in signing a contract raises any such presumption when the terms of the contract itself are clearly to the contrary. This view of the law is clearly laid down by five Judges in *Gadd* v. *Houghton* (1).

There are also numerous other authorities to the same effect.

We did not think it necessary to call upon Counsel for the respondent. We dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(1) (1876) 1 Ex. D. 357; 46 L. J. Ex. 71; 35 L. T. 222; 24 W. R. 975.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 455 OF 1919.

July 22, 1921.

Present:—Justice Sir N. R Chatterjea, KT., and Mr. Justice Newbould.

MONMOTHA PAUL CHAUDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOHENDRA NATH BOSE AND OTHERS—PLAINTIFFS AND ANOTHER - *Pro forma* DEFENDANT—RESPONDENTS.

Landlord and tenant—Bengal Tenancy Act (VIII of 1885), ss. 52, 154, 188—Enhancement of rent, suit for—One of several landlords, whether can sue—Merger—Transfer of Property Act (IV of 1882), s. 111, cl. (d)—Separate tenancy, creation of—Enhanced rate, from when payable.

One of several joint landlords of a *jote* cannot maintain a suit for enhancement of rent in respect of the *jote* or for additional rent for additional area comprised in the *jote*. [p 47¹, col. 2.]

Jatindra Nath v *Prasanna Kumar*, 8 Ind. Cas. 842; 38 C. 270; 15 C. W. N. 74; 9 M. L. T. 1; 13 C. L. J. 51; 8 A. L J. ; 13 Bom. L. R. 1; 21 M. L. J. 92; (1911) 2 M. W. N. 149; 38 I. A. 1 (P. C.), relied on.

Apart from Statute, a tenure does not necessarily merge in the proprietary right upon the union of the two interests. Even under section 111, clause (d), of the Transfer of Property Act, there must be an union of the entire interest of the lessor and the lessee in order that merger may take place. So, under that Act, there would be no merger by the purchase by a proprietor of the interest of a tenure-holder unless the proprietary interest and the interest as tenure-holder are co-extensive. [p. 71, col. 2.]

Hirendra Nath Dutt v. *Hari Mohan Ghose*, 22 Ind. Cas. 916; 18 C. W. N. 860 and *Rambishen Dutt* v. *Haripada Mukerjee*, 51 Ind. Cas 389; 29 C. L. J. 427; 23 C. W. N. 830, relied on.

The mere fact that a tenant agrees to pay rent separately to one of the co-sharer landlords would not constitute a separate tenancy. Where, however, there is a separate *kabuliyat* in favour of one of the co-sharer landlords, it may be held that there is a separate tenancy. The question whether a separate tenancy is created depends upon the circumstances of each case [p. 47¹, col 2: p 47², col. 1.]

The plaintiffs brought a suit for enhancement of rent for the lands of an original *jote* and for recovery of such rent for Pous *kist* of 1318 B. S. They also alleged that there had been accretion to the *jote* and that the defendants were liable to pay reasonable rent for the excess lands, which might be assessed for 1315—18 B. S.:

Held, (1) that having regard to the provisions of section 154 of the Bengal Tenancy Act the plaintiffs were not entitled to rent of the original lands of the *jote* at the enhanced rate for the Pous *kist* of 1318; [p. 47², cols. 1 & 2.]

(2) that there being no provision in section 52 such as is contained in section 154 the defendants

were liable to pay rent for the additional lands at the enhanced rate for the past period also. [p. 472, col. 2.]

Appeal against a decree of the District Judge, Nadia, dated the 3rd of December 1918, modifying that of the Subordinate Judge of that district, dated the 27th of May 1916.

FACTS appear from the judgment.

Babu *Mohendra Nath Ray* (with him Babu *Amarendra Nath Bose*), for the Appellants.—The defendants are the appellants. The appeal arises out of a suit for enhancement of rent and for additional rent for additional area comprised in a *jote*. The defence was that the *jote* was an occupancy holding and that rent was not enhanceable, that there was no accretion and that the present rent was fair and equitable, and that the present suit was not maintainable by the plaintiff inasmuch as he was a co-sharer landlord. The defendants have an 11-annas share of the landlord's interest and the entire interest of the tenant. The plaintiff has a five annas interest as a landlord. Prior to this suit there was an agreement between the plaintiff and the defendant as to the amount of rent payable which was fixed at Rs. 554-10-10. The first Court held that the *jote* was a tenure the rent being liable to enhancement and that there was some accretion. On appeal the learned Judge modified the first Court's decree. Hence the appeal has been preferred by us against that decision. I submit the present suit is not maintainable by the plaintiff alone. Refers to section 188, Bengal Tenancy Act. *Jutindra Nath* v. *Prasanna Kumar* (1), *Hirendra Nath Dutt* v. *Hari Mohan Ghose* (2), *Rambishen Dutt* v. *Haripada Mukerjee* (3); section 111 of the Transfer of Property Act. My next submission is that the agreement prior to the present suit between the plaintiff and the defendant does not create a new tenancy. There was no fresh *kabuliyat*. The parties merely agreed to pay the plaintiff's share of the rent separately. That cannot be taken to be the creation of a new tenancy. The plaintiff cannot claim enhanced rent from Pous 1318. Refers to section 154 of the Bengal Tenancy Act. The plaintiff is not entitled to get rent for the excess area at a rate higher than the original rate before 1321. The learned Judge having found 203 *bighas* to be the accreted area is wrong in taking 545 *bighas* to be the excess area upon which the rent is to be assessed. On these grounds I submit the judgment of the Court of Appeal below is wrong and ought to be set aside.

Babu *Bepin Behari Ghose* (with him Babu *Pyari Mohan Chatterjee*), for the Respondents. —I submit the appeal is concluded by findings of fact. As regards the first point the lower Appellate Court found that there was a merger of the 11-annas share of the *jote* right in the 11-annas proprietary right after the purchase of the *jote* by the defendants. In the present case there is no person interested in the land other than the plaintiffs and the defendants. They have been found to be tenure holders. As regards the second point, *viz*, whether there has been created a new tenancy by the agreement, the Courts below have found that, as a matter of fact, a new *jama* was created by the arrangement. As regards the excess area, the rent is being assessed for the first time. Therefore, there can be no question of enhancement of rent with respect to it. The learned Judge has committed no mistake because he has found that 545 *bighas* is the total addition to the tenure, the alluvial accretion being 203 *bighas*. We have also preferred cross-objections to the judgment. They are—that the learned Judge should have assessed 63 *bighas* of land covered by roads, with rent. He should also have assessed rent for 98 *bighas* of land. The last ground is that the Courts below did not take into account the rate paid for a big tenure in the vicinity and the settlement papers.

Babu *Mohendra Nath Ray* replied in brief.

JUDGMENT.—This appeal arises out of a suit for enhancement of rent, and for additional rent for additional area comprised in a *jote*.

The *jote* consisted originally of about 3,320 *bighas* of land, and was held by one Mr. Poulson at a rent of Rs. [illegible],163-13-5,

(1) 8 Ind. Cas. 842; 38 C. 270; 15 C. W. N. 74; 9 M. L. T. 1; 13 C. L. J. 51; 8 A. L. J. 1; 13 Bom. L. R. 1; 21 M. L. J. 92; (1911) 2 M. W. N. 149; 38 I. A. 1 (P. C.).

(2) 22 Ind. Cas. 966; 18 C. W. N. 860.

(3) 51 Ind. Cas. 389; 29 C. L. J. 427; 23 C. W. N. 689.

The defendants' father was the landlord in respect of the *jote* a 5-annas share in *patni* right and 11-annas share as a proprietor. He brought a suit for enhancement of rent of the *jote* in 1867 which went up to the Privy Council, and the *jama* was enhanced to Rs. 1,805-10 10 the lands of the *jote* being found to be 3,340 *bighas*. During the pendency of that litigation, one Khantokali Dasi obtained a decree against the defendants in respect of the 5-annas *patni* right of the village in which the lands are situate. She let out the 5-annas share to the plaintiffs in 1876. The defendants then purchased the entire tenancy from the heirs of Mr. Poulson. The defendants thus had a 11-annas share of the landlord's interest and the entire interest of the tenant, and the plaintiff had the landlord's interest in respect of a 5-annas share.

It appears that when the plaintiff was about to sue the defendants for his share of the rent at the enhanced rate, an arrangement was arrived at, and the defendants agreed to pay rent to the plaintiffs at the rate of Rs. 554-10 10.

The plaintiffs have brought the present suit on the allegation that there has been accretion to the *jote*, and that the defendants are liable to pay reasonable rent, for the excess lands, which might be assessed for 1315-13-8 B. S. They have also claimed enhanced rent for the lands of the original *jote* and for recovery of such rent for Pous *kist* of 1318 B. S.

The defence was that the *jote* was an occupancy holding; that the rent was not enhanceable; that there was no accretion, and the rent was being paid at a fair and equitable rate, and that the plaintiff was a co sharer landlord and, therefore, could not maintain the suit.

The Court of first instance held that the *jote* was a tenure the rent of which was liable to enhancement; that there was some accretion for which the defendants were liable to pay rent at the rate of Rs. 1-1-0 per *bigha*. On appeal, the learned Judge held that the plaintiff was entitled to enhance the rent, and fix the enhanced rate at 13½ annas per *bigha*; that 203 *bighas* 18 *chittaks* was the accretion to the *jote*, and in the result modified the decree of the Court of first instance. The defendants have appealed to this Court, and the plaintiffs have preferred cross-objections.

The first question for consideration is, whether the plaintiffs are entitled to maintain the suit. That depends upon whether the plaintiffs are the sole landlords or joint landlords of the 5 annas share of the *jote*. If they are joint landlords it is clear that they cannot maintain the suit. [See section 188, Bengal Tenancy Act and *Jatindra Nath* v. *Prasanna Kumar* (1)]. The learned District Judge is of opinion that there was a merger of the 11-annas share of the *jote* right in the 11-annas proprietary right after the purchase of the *jote* by the defendants. We do not think that there was merger by the purchase of the *jote* right by the defendants. Apart from Statute, a tenure does not necessarily merge in the proprietary right upon the union of the two interests. See *Hirendra Nath Dutt* v. *Hari Mohan Ghose* (2), *Rambishen Dutt* v. *Haripada Mukerjee* (3)]. In the present case the union of the two interests took place before the passing of the Transfer of Property Act. But even under the Statute, there must be an union of the entire interest of the lessor and the lessee. See section 111, clause (*d*), of the Transfer of Property Act. So that, even if the Transfer of Property Act applied, there would be no merger, as the proprietary interest of the defendants and their interest as tenure holders are not co-extensive.

But, although there was no merger, the question arises whether by the arrangement referred to above a new tenancy was created between the parties under the plaintiffs with respect to the 5 annas share of the tenure. The mere fact that the tenant agrees to pay rent separately to one of the co-sharer landlords would not constitute a separate tenancy. Where, however, there is a separate *kabuliyat* in favour of one of the co sharer landlords it has been held in some cases that there is a separate tenancy.

It is contended on behalf of the appellants that the arrangement arrived at was nothing more than an agreement on the part of the defendants to pay the rent payable in the plaintiffs' share *minus* certain amount as (*mahkup*) remission separately, and did not create a new *jama*. We were

referred to a *hisab* of the defendants of the year 1290 which states the total rent of the *jote*, the proportionate rent in plaintiffs' share and after deducting the amount of the *mahakup*, the balance is shown to be the *jama* in the plaintiffs' share. The *jama* agreed upon as payable to the plaintiffs is not proportionate to the original *jama*, as the sum of Rs. 38 was deducted as *mahakup*. We do not see how it can be said that the old *jama* continued to exist when the *jama* agreed upon to be paid to the plaintiffs was Rs. 34 less than what was proportionately payable in their 5-annas share. It does not appear that the *mahakup* of Rs. 24 was for a particular year of a temporary one. It also does not appear that there was any such *mahakup* in the defendants' share, nor could there be, having regard to the finding that there was no intention to keep that share of the tenancy alive. The *jama* is found to have been reduced at the time when the plaintiffs were about to sue the defendants for rent at the rate allowed by the Privy Council. It is true that the *hisab* is headed as 'Re Poulson's *jote*' but it might have been so written for the purpose of identifying the *jote*. The learned Pleader for the respondent contends that the *hisab* of 1290 is not the only evidence and there are other documents on the point.

As stated above, in the present case the interest of the defendants in the *jote* is found to be that of a tenure-holder, and, although the land of the 5-annas share is undivided, no question of undivided parcels of land arises as in the case of a holding. Then, again, in the present case there is no person interested in the land other than the plaintiffs and the defendants.

The question whether a separate tenancy is created, depends upon the circumstances of the case. The learned Subordinate Judge has, upon all the circumstances of the case, come to the conclusion that a new *jama* was created by the arrangement referred to above, and we are unable to hold that he was wrong.

The plaintiffs have claimed rent at the enhanced rate for the Pous *kist* of 1318. This they are not entitled to do having regard to the provisions of section 154 of the Bengal Tenancy Act. The enhanced rate will be operative from the year 1321 B. S. It is contended that the plaintiff is not entitled to get rent for the excess area also at a rate higher than the original rate before the year 1321. It is contended for the respondents that as the excess area was being assessed with rent for the first time, there could be no question of enhancement of rent. It is true that the accreted land must be considered as an increment to the tenure and governed by the same terms and conditions, and, in the absence of any special circumstances, the rate of rent payable for the accreted land would be the same as that for the land of the parent tenure. But no rent was paid for the accreted land, though, as stated above, in the absence of special circumstances, it was payable at the same rate as that for the parent tenure and there being no provision in section 52 such as is contained in section 154, we think that the defendants are liable to pay the enhanced rent, for the past period also. It is contended for the appellant that the learned Judge having found 203 *bighas*, 18 *cottahs* to be the accreted area, is wrong in taking 545 *bighas* to be the excess area upon which the rent is to be assessed. It is contended by the learned Pleader for the respondent that 545 *bighas* is the total addition to the tenure, 203 *bighas* being the alluvial accretion. There is nothing, however, in the judgment to show that there was any excess area other than by accretion and we are of opinion that additional rent should be assessed upon the basis of 203 *bighas*, 18 *cottahs* being the excess area.

The plaintiffs have preferred cross objections on three grounds. The first is, that 63 *bighas* of lands covered by roads in the tenure should have been assessed with rent. But the learned Judge practically finds that the roads did not come into existence after the creation of the tenure. He also finds that there is nothing to show that the defendants are in a position to make these lands yield any income to them and that it would not be equitable to assess rent on plaintiffs' share of these lands.

The next ground relates to 98 *bighas* which the defendants say do not appertain to the tenure. The learned Judge finds

that the plot of 98 *bighas* is separated from the lands of the tenure by another block of land, and the tenure admittedly is one compact block of land. He also finds that the evidence on behalf of the plaintiffs is not at all satisfactory to show that the plot is a part of the disputed *jote*. It is contended that no objection was taken with respect to it in their written statement. But the learned Pleader for the appellant explains it on the ground that the boundaries (west of Chaudhurie's *jote*) given in the plaint excluded these 98 *bighas*, and no objection was, therefore, taken in the written statement, but that when the Commissioner went to the spot and the plaintiffs pointed out the Chaudhurie's land (the 93 *bighas*) as part of the *jote* it was then that the defendants raised the objection before the Commissioner that it was not part of the *jote*.

The third ground relates to the rate of rent. The Court of first instance held the rate to be Rs. 1-1-0 per *bigha*. But that Court found that no customary rate had been proved with reference to which the rent of the tenure could be enhanced. The learned Judge on appeal observes that the evidence on the record justified that conclusion. The evidence of the only one witness on the point, as to the payment of rent at the rate of Rs. 1-1 0 per *bigha* to the defendants has been considered by the Judge, and he has given good reasons for holding that $13\frac{1}{2}$ annas per *bigha* is the fair and reasonable rate. It is contended that the learned Judge has not taken into account the rate paid for a big tenure in the vicinity and the settlement papers. But no ground is taken in the grounds of cross appeal that the Judge had omitted to consider any evidence.

We are accordingly of opinion that the cross objections should be disallowed. The decree of the Court below is modified as stated above. A fresh calculation of the rents will be made in this Court, and the costs of the lower Courts will be assessed accordingly. No order as to costs in this Court on the appeal or the cross-objections.

B. N.

Decree modified.
Cross objections disallowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1279 OF 1917.

June 14, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

LYALLPUR SUGAR COMPANY, THROUGH SURJAN DAS, MANAGER AND MATHRA DAS, PARTNER—PLAINTIFFS—APPELLANTS

versus

MUL RAJ, AGENT, SUGAR COMPANY AT JULLUNDUR CITY—DEFENDANT—RESPONDENT.

Principal and agent—Agent, when personally liable—Disclosure of principal's name, when necessary.

In order to make an agent personally liable under a contract entered into by him it must be clearly established that the agent had not disclosed the name of his principal. If, however, the name of the principal is already known to the other party to the contract who also knows that he is dealing with the agent as an agent, a mere formal disclosure is unnecessary. [p. 474, col. 1.]

Mackinnon Mackenzie & Co. v. *Lang, Moir & Co.* 5 B. 584; 3 Ind. Dec. (N. S.) 385, applied.

Soopromonian Setty v. *Heilgers*, 5 C. 71; 4 Ind. Jur. 517; 4 C. L. R. 377; 2 Ind. Dec. (N. S.) 657, *Bhargava* v. *Kobayashi*, 65 Ind. Cas. 468; 2 L. L. J. 374, *Gubboy* v. *Avertoom*, 17 C. 449; 8 Ind. Dec. (N. S.) 859, referred to.

Second appeal from a decree of the District Judge, Lyallpur, dated the 10th February 1917, affirming that of the Senior Subordinate Judge, Lyallpur, dated the 13th July 1916.

Dr. *Shu'a-ud-Din*, for the Appellants.

Kanwar *Dalip Singh*, for the Respondent.

JUDGMENT.—The Lyallpur Sugar Company sued one Mul Raj for recovery of Rs. 1,875 alleged to be due as damages for breach of contract. The defence set up by Mul Raj was, *firstly*, that no completed contract had been entered into between him and the plaintiff Company, and, *secondly*, that in any event he was acting as the agent of the Sewan Sugar Company and was, therefore, not personally liable. The Trial Court held that the contract to supply one thousand bags of Sewan sugar at Rs. 8-8 per maund had been completed, but that Mul Raj had been acting as the agent of the Sewan Sugar Company a fact that was known to the plaintiff Company, and that, therefore, having regard to the provisions of section 230 of the Indian Contract Act, Mul Raj was not personally liable. The Trial Court relied on *Mackinnon Mackenzie & Co* v. *Lang, Moir & Co.* (1). The

(1) 5 B. 584; 3 Ind. Dec. (N. S.) 385.

learned District Judge, without coming to any clear finding on the question whether the contract had been entered into between the parties, agreed with the Trial Court in holding that the plaintiff Company had full knowledge that Mul Raj was acting in this transaction as the agent of Sewan Sugar Company and that, therefore, he was not personally liable under the said contract.

The plaintiff Company have now come up to this Court on second appeal and we have heard Mr. Shuja-ud-Din on the firm's behalf, while Mr. Dalip Singh has addressed us on behalf of Mul Raj. Mr. Shuja-ud-Din has referred us to Pollock on Contracts, page 597, 3rd Edition, *Soopromonian Setty* v. *Heilgers* (2) Bowstead on Agency, 6th Edition, page 388 and *Bhargava* v. *Kobayashi* (3). He also drew our attention to *Gubboy* v. *Avetoom* (4). With these authorities we have no quarrel, but we are unable to see that they really affect the decision in the present case. Indeed, *Bhargava* v. *Kobayashi* (3) appears to us to be an authority against Mr. Shuja-ud-Din's contention. It seems to us that in order to make an agent personally liable under a contract entered into by him it must be clearly established that the agent had not disclosed the name of his principal. If, however, the name of the principal is already known to the other party to the contract who also knows that he is dealing with the agent as an agent, a mere formal disclosure appears to us to be clearly unnecessary, and the principles enunciated in *Mackinnon Mackenzie & Co.* v. *Lang, Moir & Co.* (1) would be applicable. It was held there that the essential point was the knowledge and that actual knowledge was equivalent to disclosure, the whole object of which would be to convey such knowledge. In the present case it has been found that the plaintiff Company had full knowledge that Mul Raj was the agent of the Sewan Sugar Company and that in the present transaction he was acting as agent of that Company. No formal contract was drawn up and, therefore, it was competent for the Courts below to arrive at a decision on this question by an examination of all the surrounding circumstances These circumstances are to be deduced from the correspondence on the record and this correspondence clearly supports the view taken by the Courts below.

We accordingly dismiss this appeal with costs.

Z. K.

Appeal dismissed.

(2) 5 C. 71; 4 Ind. Jur. 517; 4 C. L. R. 377; 2 Ind. Dec. (N. S.) 657.
(3) 65 Ind. Cas. 468; 2 L. L. J. 374.
(4) 17 C. 449; 8 Ind. Dec, (N. S.) 839.

PATNA HIGH COURT

LETTERS PATENT APPEALS NOS. 77 OF 1920 AND 1 OF 1921.

June 7, 1921.

Present:—Mr. Justice Coutts and Mr. Justice Ross.

Maharaja SIR RAMESHWAR SINGH BAHADUR—PLAINTIFF—APPELLANT

versus

YOUNUS MOMIN—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 105, 109—Settlement of rate of rent—Suit for rent decreed at another rate of rent—Decision as to rate of rent not res judicata *in subsequent suit.*

Where the rate of rent payable by a tenant has already been decided in a proceeding under section 105 of the Bengal Tenancy Act, a Civil Court deciding a suit for arrears of rent brought subsequently has no jurisdiction, by reason of section 109 of the same Act, to pass a decree fixing the rate of rent and if it does so the decision is not *res judicata* in any later suit for arrears of rent. [p. 475, col. 1.]

Letters Patent appeals against the judgment of Mr. Justice Das, in Appeal from Appellate Decree No. 835 of 1918, dated the 26th May 1920, reported as 57 Ind Cas. 48.

Messrs. *S. C. Mitter* and *Murari Prasad*, for the Appellant.

Mr. *Ram Prasad*, for the Respondent in Appeal No. 1 of 1921.

JUDGMENT.

COUTTS, J.—This Appeal (No. 77 of 1920) arises out of a suit for rent for the years 1319 to 1322. The rent is claimed at the rate of Rs. 10-11-6 which was the rate fixed on compromise in a proceeding under section 105.

It appears that previous to the present suit the plaintiff in the year 19 0 instituted a suit for rent at this rate. The suit was

contested by the defendant who relied on the Record of Rights in which the rent of the holding was shown as Rs. 9-11-7½. The suit was decreed at the rate admitted by the defendant. Subsequently, in the year 1915, there was another rent suit by the plaintiff, and the plaintiff again claimed at the rate fixed on compromise in the proceeding under section 105. This suit was not contested by the defendant and the plaintiff was given an *ex parte* decree at the rate claimed by him. He has now brought the suit out of which this appeal has arisen. The suit was decreed in the Court of first instance at the rate admitted by the defendant, namely, Rs. 9-11-7½, and on appeal to the District Judge this decision was upheld. There was a second appeal to this Court which was heard by a Single Judge and the decisions of both the lower Courts have been upheld. It is against this decision that the present appeal has been filed.

The basis of the decision appealed against is, that the rate of rent decreed in the rent suit of 1910 is *res judicata* and that, therefore, the plaintiff is not entitled to a decree at the rate of rent fixed in the compromise.

The only point which is urged before us in this appeal is, that the decree of the Court which decided the rent suit of 1910, in so far as it decided the rate of rent, was without jurisdiction and section 109 of the Bengal Tenancy Act is relied on. That section runs as follows: —

"Subject to the provisions of section 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made under sections 105 to 108 both inclusive."

There is no doubt that the Court which decided the rent-suit in 1910 had jurisdiction to pass a decree for the rent for the years which were in suit in that particular case but, in view of the provisions of section 109 of the Bengal Tenancy Act, it obviously had no jurisdiction to pass a decree fixing the rate of rent as this had already been decided in the proceeding under section 105, and, in so far as it did so, there is, in my opinion, no doubt that it was acting without jurisdiction. This being so, the decision, so far as this particular point is concerned, cannot be *res judicata*. In this view of the case, the contention urged on behalf of the appellant must, in my opinion, prevail. I would accordingly set aside the decision appealed against and decree the suit at the rate fixed in the compromise in the section 105 proceeding. In other words I would decree this appeal with costs throughout.

Ross, J.—I agree.

J. P. *Appeal decreed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3492 OF 1915.

May 16, 1919.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

NATHU SHAH AND ANOTHER, REPRESENTATIVES AND SONS OF GULAB SHAH, DECEASED—PLAINTIFFS—APPELLANTS

versus

HAVELI SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Findings of fact—Judgment of lower Appellate Court—Hindu Law—Separation.

It is not necessary for a Court of first appeal to refer in detail to every piece of evidence on the record. So long as its judgment leaves no doubt that all the available evidence has been given due weight to, its findings on questions of fact cannot be attacked in second appeal. [p. 476, cols. 1 & 2.]

Whether or not there has been a separation of a joint Hindu family is a question of fact. [p. 476, col. 1.]

Second appeal from a decree of the District Judge, Sialkot, dated the 13th October 1915, reversing that of the Subordinate Judge, Second Class, Sialkot, dated the 31st May 1912.

Mr. *Sunder Das*, for the Appellant.

The Hon'ble Bakhshi *Sohan Lal*, R. B, for the Respondents,

JUDGMENT.—The facts of the case out of which this appeal has arisen are given in detail in the judgment of the Courts below and need not be recapitulated. Briefly, they are as follows:—One Jwala Shah had eight sons and these eight at one time formed a joint Hindu family. On the 9th of April 1895, a partition took place and

the eight brothers separated. This fact was evidenced by an entry in an account-book, according to which entry certain land and debts still remained to be divided up. In 1908 an agreement was entered into between the other members of the family. Haveli Shah not being a party to it. According to this arrangement, the parties to the agreement divided up all their property, and one of them, Singha Shah, was given land in adjustment of his share in lieu of certain ornaments. Gulab Shah, son of Jwala Shah, instituted the present suit against the remaining descendants of Jwala Shah claiming possession of 1-6th of certain lands and Rs. 36-14. Most of these lands are in the possession of Haveli Shah who was the only defendant who contested the case. Gulab Shah alleged that, *qua* the land held by Haveli Shah, there had been no separation in the family. The learned District Judge, after having given the parties every opportunity, came to the conclusion that the plaintiff had failed to prove that he was entitled to any share in the lands in suit in the possession of Haveli Shah. He has held that Haveli Shah has definitely separated and that, so far as he was concerned, there had been a complete partition amongst the descendants of Jwala Shah in 1395. Against this decision Gulab Shah preferred this second appeal, and on his behalf we have heard Mr. Sundar Das, while Bakhshi Sohan Lal has addressed us on behalf of Haveli Shah.

Whether or not there had been a complete separation in 1895 is clearly a question of fact, but Mr. Sundar Das contended that, in arriving at his conclusions, the learned District Judge had omitted to consider certain evidence, documentary and oral. We are, however, unable to agree with this contention. It is perfectly clear that the accounts referred to by Mr. Sundar Das were examined and considered by the learned District Judge who distinctly says that these accounts prove nothing in themselves and, when read in the light of Gulab Shah's statements of the 4th of April 1912, might justly be said to disprove his claim, and, further, that there was no trace of any division of the produce of these lands which were alleged to be joint. We do not think that it is necessary in law for an Appellate Court, such as the District Judge, to refer in detail to every piece of evidence on the record. So long as his judgment leaves no doubt that all the available evidence has been given due weight to, we consider that his findings on questions of fact cannot be attacked in second appeal. We are satisfied that the learned District Judge has considered all the evidence on the record and we accordingly dismiss this appeal with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 540 OF 1921.
December 1, 1921.
Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.
GIRIBALA DASI—PETITIONER
versus
PRIANATH PAL—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 47, 115, O. XXI, r. 100—Relief sought for in revision—Other remedy open to petitioner—Practice—Application under r. 100, whether can be made by representative.

Where a party has got a remedy open to him to obtain the relief which he is seeking under section 115 of the Code of Civil Procedure, a High Court will not ordinarily interfere unless there has been a very serious miscarriage of justice. [p. 477, col. 2.]

Quære.—Whether a person who is a representative within the meaning of section 47, Civil Procedure Code, is competent to maintain an application under Order XXI, rule 100, Civil Procedure Code. [p. 477, col. 2.]

Panchratan Koeri v. *Ram Sahay*, 43 Ind. Cas. 989; 3 P. L. J. 579; 4 P. L. W. 129, referred to.

Rule against an order of the Munsif Second Court, Midnapur, in Claim Case No. 21 of of 1919.

FACTS appear from the judgment.

Babu *Mahendra Nath Roy* (with him Babu *Promode Kumar Ghosh* for Babu *Lalit Mohan Sanyal*), for the Petitioner.—The petitioner comes up before your Lordships in your revisional jurisdiction under section 115, Civil Procedure Code, as there has been

a failure to exercise jurisdiction. Refers to *Balakrishna Udayar* v. *Vasudeva Aiyar* (1). The lower Court is refusing to exercise jurisdiction vested in it by law on an erroneous view of the law. Refers to *Shew Prosad Bungshidhar* v. *Ram Ohunder Haribux* (2).

Babu *Durkanath Chakraverty* (with him Babu *Umes Chandra Banerjee*), for the Opposite Party.—I submit that your Lordships will not interfere under section 115, Civil Procedure Code. The adoption of a wrong view of law does not entitle your Lordships to interfere under section 115, Civil Procedure Code. The High Court's powers under section 115 are discretionary. Your Lordships will refuse to interfere under this section as there is another remedy open to the petitioner, the existence of such a remedy precludes your Lordships' interference. There has been no serious miscarriage of justice. Let the petitioner bring a regular suit. That is a conclusive remedy.

Babu *M. N. Roy* replied.

JUDGMENT.—This Rule arises out of an application under Order XXI, rule 100, Civil Procedure Code. The petitioner's case is that she had purchased the property, which is a non-transferable occupancy holding, in execution of a mortgage-decree against the tenant some time before the sale brought about by the opposite party in execution of a rent-decree. The opposite party who is a landlord has purchased the holding in execution of that rent-decree and has obtained possession of the property through Court dispossessing the petitioner.

The learned Munsif before whom the application was made has come to the conclusion that the applicant has no *locus standi*, that is, she is not competent to make the application under rule 100, Order XXI, Code of Civil Procedure. He has relied mainly upon the case of *Panchratan Koeri* v. *Ram Sahay* (3) in which it has been held that where a person is a representative within the meaning of section 47, Code of Civil Procedure; he is not competent to maintain an application under Order XXI, rule 100, Code of Civil Procedure. We are not prepared to go so far and might have come to a different conclusion if it were necessary for us to determine that question.

An objection has been made to the competency of this application by the opposite party on the ground that this Court should not interfere under section 115 because the Court below has adopted a wrong view of the law, and more so when there is another remedy open to the petitioner, namely, bringing a regular suit. We take it as a settled practice of this Court that, where a party has got a remedy open to him to obtain the relief which he is seeking this Court will not ordinarily interfere, unless there has been a very serious miscarriage of justice. We do not think that this is a case of that character and we are of opinion that it would not be right for us to interfere under section 115, Code of Civil Procedure.

The Rule is, therefore, discharged with costs. Hearing-fee two gold *mohurs*.

J. P.

Rule discharged.

(1) 40 Ind. Cas. 650; 40 M. 793 at p. 799; 15 A. L. J. 645; 2 P. L. W. 10; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

(2) 23 Ind. Cas. 977; 41 C. 323.

(3) 43 Ind. Cas. 939; 3 P. L. J. 579; 4 P. L. W. 129.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 5 OF 1919.

January 25, 1921.

Present:—Mr. Hallifax, A. J. C.

RAMPRASAD—DEFENDANT No. 3—APPELLANT

versus

Musammat IMARATBAI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 41—Consent—Evidence Act (I of 1872), s. 115—Intention and consent, whether include those based on mistake—Estoppel.

The consent mentioned in section 41 of the Transfer of Property Act, or the intention mentioned

in section 115 of the Evidence Act include a consent or intention which is based on a mistake. [p. 479, col. 1.]

Sarat Chunder Dey v. *Gopal Chunder Laha*, 20 C. 296; 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201, followed.

A Jain died leaving his widow *B.* and daughter *I.* *B.* died in 1906 but before her death declared *S.*, the son of her husband's separated nephew, as her heir. This was accepted as a valid adoption by *I.* and other relatives of *B.* One *R.* purchased in 1903 in execution of money-decree in his favour one of the houses of *B.*'s estate. *I.* did not object to the attachment and sale, being under the mistaken belief that *S.* was validly adopted. Thereafter, in several suits brought by *S.* on bonds executed in favour of *B.*'s husband, it was held that *S.* was not the adopted son. On this *I.* filed a suit for possession of her father's estate and obtained a decree including the house purchased by *R.* On appeal by *R.*:

Held, that *R* was a *bona fide* purchaser for value and *I.* was estopped from disputing his right to the house. [p. 478, col. 2.]

Sheokuarbai v. *Jeoraj*, 61 Ind. Cas 481; 16 N. L. R. 170; (1920) M. W. N. 627; 2 U. P. L. R. (P. C.) 161; 25 C. W. N. 273 (P. C.), referred to.

Appeal against a decree of the Sub-Judge, Narsinghpur, dated the 30th August 1918, in Civil Suit No. 46 of 1916.

Dr. *H. S. Gour*, for the Appellant.

Mr. *B. R. Pendharkar*, for the Respondent.

JUDGMENT.—The facts are simple and no longer in dispute, as the learned Counsel for the appellant has expressly abandoned all his appeal except the contention that the transfer of a house to him by sale in execution of a decree is not voidable under section 41 of the Transfer of Property Act. One Bakshiram, an Oswal Bania, that is to say, a Jain, owned all the property in suit. He died in 1897 leaving a widow, Bhuri Sethani, and a daughter, Imaratbai, who is the plaintiff. *Musammat* Bhuri died in 1906 and a few days before her death she said that Suganchand, the son of her husband's separated nephew Nathuram, was to succed her as owner of all the property. This was apparently accepted by the members of the family and of the caste as an adoption of Suganchand as the son of Bakshiram, and, shortly after the death of Bhuri Sethani, a turban was plaed on his head by them in token of his sucession and he took possession of all the property. Imratbai did not hear her mother's declaration but was told that Suganchand had been adopted and accepted it as true as indeed she appears to do still. She seems to have been given something out of her father's property. There was clearly no valid adoption, but everybody accepted Suganchand as the adopted son of Bakshiram, or rather as his heir, there being no very great difference between the two among Jains as was pointed out in *Sheokuarbai* v. *Jeoraj* (1).

In 1913 the appellant Ramprasad attached one of the houses of Bakshiram's estate of which Suganchand and his father Nathuram were the ostensible owners, in execution of a decree against them both. No objection was made and the house was sold by auction and purchased by Ramprasad himself. Thereafter, several suits filed by Suganchand on bonds executed in favour of Bakshiram were dismissed on the plea taken by the various defendants that he was not the adopted son of Bakshiram. On this Imaratbai filed the present suit against Suganchand and his father and Ramprasad for possession of the whole of Bakshiram's property, stating quite honestly in the plaint that she had been under the impression that Suganchand was the adopted son of her father, but this had been found not to be so in the suits filed by him. She obtained a decree for possession of the whole of the property, including the house purchased by Ramprasad, and he alone has appealed.

As has been said, the only question that arises is, whether he is protected by section 41 of the Transfer of Property Act. To say that the question is one of estoppel under section 115 of the Evidence Act is merely to put the same matter in different words. Whether Imaratbai is prevented by section 115 of the Evidence Act from denying that Suganchand was the owner of the house when Ramprasad attached and bought it, or is prevented by section 41 of the Transfer of Property Act from avoiding the sale to Ramprasad, the final result would be the same and would arise from the same cause. In one view, because she intentionally allowed Ramprasad to believe that Suganchand was the owner of the house and to buy it under that belief, she cannot plead that Suganchand was not the owner and her suit, in respect of that house, must be dismissed. In the other view, she can take the plea, but because she

(1) 61 Ind. Cas. 481; 16 N. L. R. 170; (1920) M. W. N. 627; 2 U. P. L. R. (P. C.) 161; 25 C. W. N. 273 (P. C.).

consented to Suganchand being the ostensible owner she cannot avoid the transfer, so that the plea must fail and her suit must equally be dismissed.

The question then is narrowed down to this. Does the consent mentioned in section 41 of the Transfer of Property Act or the intention mentioned in section 115 of the Evidence Act include a consent or an intention which is based on a mistake? This is fully and finally answered by the ruling of their Lordships of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (2). That deals only with section 115 of the Evidence Act but applies equally to the section of the Transfer of Property Act. The facts, indeed, are very similar to those of the present case. For these reasons, the decree of the lower Court will be modified by the deletion of the orders that the fourth defendant shall put the plaintiff in possession of the house at Gadarwara and that he shall pay a portion of the plaintiff's costs, and the substitution therefor of an order that the plaintiff's suit against the fourth defendant Ramprasad shall be dismissed and that the plaintiff shall pay all his costs. The costs of this appeal will also be paid by the plaintiff-respondent.

G. R. D.

Appeal allowed.

(2) 20 C. 296; 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 416 OF 1920.

December 5, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

BIPIN BEHARI CHATTAPADHYA AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

JOGENDRANATH BANDOPADHYA AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 11, provisions of, whether controlled by those of r. 21—Appeal, summary dismissal of—Judgment.

Where an order of a lower Appellate Court dismissing an appeal under Order XLI, rule 11 of the Civil Procedure Code ran as follows:—"Heard Pleader. The appeal is summarily dismissed:

Held, that as the provisions of Order XLI, rule 11, were controlled by those of Order XLI, rule 31 of the Civil Procedure Code, the judgment of the lower Appellate Court was defective and should be set aside. [p. 480, col. 2.]

Rami Deka v. *Brojo Nath Saikia*, 25 C. 97; 1 C. W. N. 692; 13 Ind. Dec. (N. S.) 66, *Rakhal Chunder Tewari* v. *Satindra Deb Rai*, 5 C. L. J. 348, *Pachi Dasi* v. *Bala Das*, 2 Ind. Cas. 405; 13 C. W. N. 1031, followed.

Puttapa v *Yellappa*, 5 Bom. L. R. 233, *Tanaji Dagde* v. *Shankar Sakharam*, 12 Ind. Cas. 564; 36 B. 116; 13 Bom. L. R. 1002, *Hanmant Rukhmaji* v. *Annaji Hanmant*, 20 Ind. Cas. 966; 37 B. 610; 15 Bom. L. R. 765, *Samin Hasan* v. *Piran*, 30 A. 319; 5 A. L. J. 300; A. W. N. (1908) 115, referred to.

Appeal against an order of the Additional District Judge, Hooghly, dated the 16th September 1920, affirming that of the Subordinate Judge, First Court, at Howrah, dated the 26th July 1920.

FACTS appear from the judgment.

Babu *Biran Kumar Mukerjee*, for the Appellants.—The decree holder is the appellant. The appeal arises out of certain execution proceedings. The decree was for possession. The judgment debtor resisted the execution of a certain portion of the decree. The Appellate Court erroneously dismissed the appeal summarily under Order XLI, rule 11, Civil Procedure Code, without giving any judgment. I submit he is bound to write out a judgment, however short. Order XLI rule 11 is controlled by Order XLI, rule 31. In a case in which second appeal lies a judgment must be delivered. Refers to *Rami Deka* v. *Brojo Nath Saikia* (1), *Rakhal Chunder Tewari* v. *Satindra Deb Rai* (2). In the latter case there was judgment written but it was very short. Refers to *Pachi Dasi* v. *Bala Das* (3). There Coxe, J., was of opinion that the case in *Rami Deka* v. *Brojo Nath Saikia* (1) was not correct. But in that case there was a difference of opinion between him and Richardson, J., on that point. The case was, however, disposed of on another ground. Refers to *Puttapa* v. *Yellappa* (4) and *Tanaji Dagde* v. *Shankar Sakharam* (5). The latter case was against me but it was reversed by a Full Bench of that Court reported in *Hanmant Rukhmaji* v. *Annaji Hanmant* (6). Refers to *Samin Hasan* v. *Piran* (7). In

(1) 25 C. 97; 1 C. W. N. 692; 13 Ind. Dec. (N. S.) 66.

(2) 5 C. L. J. 348.

(3) 2 Ind. Cas. 405; 13 C. W. N. 1031.

(4) 5 Bom. L. R. 233.

(5) 12 Ind. Cas. 564; 36 B. 116; 13 Bom. L. R. 1002.

(6) 20 Ind. Cas. 966; 37 B. 610; 15 Bom. L. R. 765.

(7) 30 A. 319; 5 A. L. J. 300; A. W. N. (1908) 115.

the present case the learned Judge simply says "Heard Pleader. The appeal is summarily dismissed." I submit that is no judgment according to law.

Babu *Manmatha Nath Ganguli*, for the Respondents.—Order XLI, rule 11, is not controlled by rule 31. There cannot be any doubt that the Judge has power to dismiss an appeal summarily. Rule 31 applies when the respondent appears. Then the Judge, after hearing both sides, has got to write out a judgment I would rely on *Samin Hasan* v. *Piran* (7).

Babu *Bijan Kumar Mukerji* replied in brief.

JUDGMENT.—In this case, the lower Appellate Court dismissed the appeal evidently under Order XLI, rule 11. The order runs as follows:—"Heard Pleader. The appeal is summarily dismissed."

It is contended on behalf of the appellant before us that the provisions of Order XLI, rule 11, are controlled by those of Order XLI, rule 31.

There is a divergence of opinion on the point in the several High Courts in India. In our Court, in the case of *Rami Deka* v. *Brojo Nath Saikia* (1), where the judgment was "Suit laid at Rs. 430, value of buffaloes. Appeal rejected under section 551, Civil Procedure Code", it was held that the dismissal of an appeal under section 551, Civil Procedure Code, by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment which, according to the provisions of section 574 of the Code, should show the points raised, the decision upon those points and the reasons for deciding them. In the next case in our Court, *Kakhal Chandra Tewari* v. *Satindra Deb Rai* (2), Maclean, C. J., (Caspersz, J., agreeing with him) quoted with approval the above case of *Rami Deka* v. *Brojo Nath Saikia* (1), but distinguished it on the ground that in the case before them there was substantial compliance with the requirements of section 574 of the Code. In the case of *Pachi Dasi* v. *Bola Das* (3) Coxe, J., was of opinion that section 551 of the Code was not controlled by section 574. Richardson, J., on the other hand, fully accepted the view of law taken in the two earlier cases. Both the learned Judges, however, were of opinion that in the case before them the judgment recorded by the Subordinate Judge was sufficient. It appears from pages 1032-33* of the report that the facts of the case, the points for determination and the reasons for deciding them were stated, though briefly. The question whether the provisions of section 551 are controlled by those of section 574, therefore, did not arise for determination in that case and the observations of the learned Judges on the point must be taken as *obiter*.

In the Bombay High Court, in the case of *Puttapa* v. *Yellappa* (4), the same view was taken as in the two earlier Calcutta cases. A contrary view was taken later in the case of *Tanaji Dagde* v. *Shankar Sakharam* (5). That decision, however, was overruled by a Full Bench of the Bombay High Court in *Hanmant Rukhmaji* v. *Annaji Hanmant* (6). But the decision of the Full Bench proceeded upon the ground that there was a Circular Order of the Bombay High Court by which the lower Courts were bound.

The Allahabad High Court, in the case of *Samin Hasan* v. *Piran* (7), dissented from the view taken by this Court in *Rami Deka* v. *Brojo Nath Saikia* (1) and held that the provisions of section 574, Civil Procedure Code, are not applicable in their entirety to the case of an appeal dismissed under section 551 of the Code. In that case also, as appears from the report, there were some reasons stated for the judgment and not merely that the appeal was summarily dismissed.

We think we ought to follow the decisions of this Court and hold that the judgment of the lower Appellate Court in this case is defective and should be set aside.

The case will accordingly go back to the lower Appellate Court. As the Additional District Judge who summarily dismissed the case is not now at Howrah, the appeal must be heard by the lower Appellate Court under Order XLI, rule 11 and disposed of according to law.

The costs of this appeal, which we assess at one gold *mohur*, will abide the result of the appeal to the lower Appellate Court if the appeal is admitted under Order XLI, rule 11. If the appeal is not admitted, the parties will bear their own costs.

J. P. *Case sent back.*

*Pages of 13 C. W. N.—[*Ed.*]

POHUMAL *v.* EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 48 OF 1919.

July 29, 1919.

Present.—Mr. Kincaid, J. C., and Mr. Raymond, A. J. C.

POHUMAL AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 190—Order of District and Sessions Judge to subordinate Magistrate to try certain persons for robbery—Ultra vires—*Procedure.*

An order of a District and Sessions Judge to a Magistrate subordinate to him, to try certain persons sent to him in custody, on charges of robbery and abetment of robbery is *ultra vires* and no proceedings can be taken on that order inasmuch as none of the requirements of section 190, Criminal Procedure Code, for initiation of prosecutions are fulfilled by that order. [p. 483, col. 2.]

Aparao Jhaverilal, In re, 48 Ind. Cas. 682; 20 Bom. L. R. 1018; 20 Cr. L. J. 42, *Emperor* v. *Sundar Sarup*, 26 A. 512; A. W. N. (1904) 90; 1 Cr. L. J. 35, *Saheb Tewari* v. *Emperor*, 49 Ind Cas. 919; 20 L. J. 247, *Queen-Empress* v. *Manu*, 11 M. 442; 2 Weir 238; 4 Ind. Dec. (N. S.) 309, *Queen-Empress* v. *Murphy*, 9 A. 63; A. W. N. (1887) 141; 5 Ind. Dec. (N. S.) 881, *Girdhari Lal* v. *Emperor*, 10 Ind Cas. 156; 12 Cr. L. J. 217; 11 P. R. 1911 Cr.; 32 P. W. R. 1911 Cr.; 146 P. L. R. 1911, *Muso* v. *Emperor*, 25 Ind. Cas. 977; 15 Cr. L. J. 649; 8 S. L. R. 41 and *Sital Das* v. *Emperor*, 8 Ind. Cas. 247; 11 Cr. L. J. 602; 87 P. L. R. 1910; 61 P. W. R. 1910 Cr., referred to.

Application for quashing proceedings pending before Resident Magistrate, Rohri.

Mr. *F. J. de Verteuil*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.

KINCAID, J. C.—The facts of the case are more or less undisputed and are shortly as follows :—

Pohumal, applicant No. 1, appears to have obtained in the Court of the Second Class Sub-Judge Rohri, a decree against four Sikhs named in the application before us and a warrant of attachment of their moveable property in execution of his decree. He went with Vishnu and Kouro, applicants Nos 2 and 3, and one Khial to Lakhsing's village where the Sikhs lived, but they were absent. On or about the 17th or 18th March the District Judge of Sukkur received two or three vernacular petitions in which three persons, Parmsing Lakhsing, Mithusing Harsosing and Rupsing Sidhusing, complained that the four applicants had with the bailiff Pitomal entered their houses, although they were not judgment-debtors, and had taken therefrom certain ornaments. The District Judge sent these petitions to the Second Class Sub Judge of Rohri for enquiry and report. Before the Sub-Judge had reported thereon, Parmsing Mithusing and Rupsing presented themselves in person before the District Judge and tendered to him petitions written in English, complaining that the Nazir of the Sub-Court had relied on an endorsement made by the bailiff on the warrant that nothing had been realised owing to the judgment-debtor's absence and had ordered that the matter to be dropped The District Judge believed the applicant's story and decided to enquire into the allegations himself. On the 25th March he examined them as well as Pitomal, the bailiff, and, believing that there existed a *prima facie* case against Pohumal, Vishnu, Kouro and Khial "and other Banias," issued a search warrant for the search of Pohumal's house. At the same time, he told Mithusing to bring to him Morusing and Jaising, who, as Mithusing alleged, had witnessed the entry into the house of Mithusing and Rupsing. On the 27th March the search warrant was returned with an endorsement that nothing had been found in Pohumal's house. On the 29th March Mithusing brought Morusing and Jaising before the District Judge who examined them as well as two other eye-witnesses, Khunosing and Ramsing. After their examination he issued bailable warrants to secure the attendance of Pohumal, Vishnu, Kouro and Khial, and one Jetho, presumably one of the other Banias, and asked the Mukhtiarkar of Rohri to go to the village of the judgment-debtors and examine the wives of Parmsing and Rupsing. On the 1st April, Pohumal, Vishnu, Kouro, Khial and Jetho appeared before the Judge, who examined them and formed the conclusion that Pohumal and Vishnu had committed robbery and that Kouro and Jetho had abetted them in the offense. He did not think that Khial had committed any offense. Acting on this conclusion the Judge on the same day wrote an order directing that Pohumal, Vishnu, Kouro and Jetho should "be taken in custody to the Court of the Resident

Magistrate, Rohri" on charges of robbery and abetment of robbery. He concluded the order with the words: "As to the enquiry, evidence will be given by R. E. A. Elliot, District Judge."

The Resident Magistrate seems to have examined Mr. Elliot on the 2nd April and then to have adjourned the enquiry granting bail to Pohumal, Vishnu, Kouro and Jetho. On the 17th April the latter filed an application in this Court asking that the proceedings should be quashed. The Court stayed the proceedings and sent for the record.

At the hearing Mr. De Verteuil appeared for the applicants. The Public Prosecutor, Mr. Elphinston, appeared for the Crown.

We may at the outset say that we are unable to find any section in either the Civil Procedure Code or the Criminal Procedure Code which justified the learned Judge in ordering the arrest of the applicants and in sending them in custody to be tried on charges of robbery and abetment of robbery before the Resident Magistrate of Rohri. Section 476, Criminal Procedure Code, empowers any Civil, Criminal or Revenue Court to send persons in custody to the nearest First Class Magistrate when it is of opinion "that there is ground for enquiry into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding." But robbery and abetment of robbery are not offences referred to in section 195. Indeed, the learned Judge himself seems afterwards to have felt the same difficulty that we feel because, when cross-examined, he admitted that he had acted "without reference to any particular law at the time" and under powers inherent in the District Judge. It is, however, unnecessary to labour this point, because the learned Public Prosecutor informed the Court that he was unable to support the action of the learned Judge. He, however, opposed the application to quash proceedings on the ground that it was open to this Court to treat the Judge's order of the 1st April as a complaint under section 190 (*a*), Criminal Procedure Code. It is true, he argued, that the Magistrate had not examined the complainant under section 200, Criminal Procedure Code, but the failure to examine the complainant under section 200, Criminal Procedure Code, had been made good by the Court's examination under section 252, Criminal Procedure Code, and that in any case, a failure to examine the complainant under section 200, Criminal Procedure Code, was a mere irregularity that could be cured by section 537, Criminal Procedure Code. He relied on in *Aparao Jhaverilal, In re* (1), *Emperor* v. *Sundar Sarup* (2), *Saheb Tewari* v. *Emperor* (3), *Queen-Empress* v. *Monu* (4), *Queen-Empress* v. *Murphy* (5), *Girdhari Lal* v. *Emperor* (6) and *Muso* v. *Emperor* (7).

We do not propose to decide the questions whether a failure to examine the complainant under section 200, Criminal Procedure Code, can be cured by his examination under section 252, Criminal Procedure Code, or whether it can be cured by the provisions of section 537, Criminal Procedure Code. For the purposes of this case, it is unnecessary to do so, as we cannot hold that the order of Mr. Elliot was within the meaning of the Criminal Procedure Code a "complaint." In the case of *Aparao Jhaverilal, In re* (1), on which the Public Prosecutor mainly relied, the facts were entirely different. The District Judge called the District Magistrate's attention by letter to certain remarks of his as regards the forgery and suggested that, in the interests of justice, there should be a prompt investigation of a will. As their Lordships, Heaton and Hayward, JJ., observed, the District Judge's letter fulfilled "in every particular the requirements of the definition of "complaint" in the Criminal Procedure Code. Nor is the case of *Emperor* v. *Sundar Sarup* (2) more pertinent. There an Assistant Collector came to the conclusion that in a rent suit before him the plaintiff had committed perjury. He stated his reasons in a letter and sent the record to the Collector "for starting a case under section 193, Indian Penal Code." The Collector ordered

(1) 48 Ind. Cas. 682; 20 Bom. L. R. 1018; 20 Cr. L. J. 42.
(2) 26 A 514; A. W. N. (1904) 90; 1 Cr. L. J. 35.
(3) 49 Ind. Cas. 919; 20 Cr. L. J. 247.
(4) 11 M. 443; 2 Weir 238; 4 Ind Dec. (N. S.) 309.
(5) 9 A. 666; A. W. N. (1887) 141; 5 Ind. Dec. (N. S.) 851.
(6) 16 Ind. Cas. 156; 12 Cr. L. J. 217; 11 P. R. 1911 Cr; 32 P. W. R. 1911 Cr; 146 P. L. R. 1911.
(7) 35 Ind. Cas. 977; 15 Cr. L. J. 649; 8 S. L. R. 41.

a case under section 193, Indian Penal Code, to be initiated against the plaintiff. When the matter came up before the High Court, Knox, J., held that the Assistant Collector's letter was a "complaint to the District Magistrate." The mere fact that it was addressed to the Collector instead of to the District Magistrate was a mistake which could not affect his jurisdiction. But in this case Mr. Elliot himself issued an "order" that certain persons should be taken in custody to the Court of the Resident Magistrate on the charges of robbery and abetment of robbery. Now, can such a document be deemed to be a "complaint"? The definition of this word will be found in section 4 (*h*) of the Criminal Procedure Code. It runs as follows:—

"'Complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action, under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a Police Officer."

Now, Mr. Elliot made no mere allegation to the Magistrate with a view to his taking action. He issued an order that the Magistrate should try the accused persons. The Public Prosecutor has argued that the order only referred to the taking of the accused persons into custody and not to their trial. We do not think that he is correct. The entire document is headed "order". It is true that the word "trial" does not occur in the order but that was the only object for which the accused could have been taken to the Magistrate in custody. On receiving the said order the Magistrate, unless he refused to obey it, was bound to proceed to try the accused. It was not open to him to pass an order of dismissal under section 203. He had at once to proceed to hear the complainant under section 252 and that is the course which the Magistrate actually followed. A case very similar to the present one is of *Sital Das* v. *Emperor* (8). Therein, the District Judge directed the prosecution of a guardian of a minor named Sitaldas and the District Magistrate ordered the case to be tried by the Additional Magistrate. The Chief Court of the Punjab held that the District Judge had no power to order the prosecution of Sitaldas. It also held that the said order could not be treated as information under section 190 (1) (*c*). The plea that the order could be treated as a complaint does not seem to have been advanced by the Crown. Chevis, J., observed: "The order of the District Judge being *ultra vires* goes for nothing ..... I find that up to the present no criminal case has been properly instituted, and I direct that no further proceedings be taken on the District Magistrate's order of 17th January 1910. At the same time, I note that nothing in the present order is to be regarded as a bar to any further prosecution which may be directed against Sitaldas, either on complaint or otherwise; I express no opinion whatever on the merits as to whether such a prosecution should or should not be started, but I merely point out that, if a prosecution is to be brought, proceedings must be duly initiated as required by section 190, Criminal Procedure Code."

In the same way we find that the "order" of the District Judge of Sukkur was made *ultra vires*. The result is, that none of the requirements of section 190, Criminal Procedure Code, have been fulfilled. No legal proceedings, therefore, have been initiated against the applicants and we order that they at once be discharged, and that no further proceedings be taken against them on the Judge's order of 1st April 1919. At the same time we wish to express no opinion whatever on the merits as to whether legal proceedings, as required by the Criminal Procedure Code, should or should not be initiated against them.

RAYMOND, A. J. C.—I concur. I think the action of the District Judge in this case is as unwarranted in law as it is unprecedented, and the Public Prosecutor was quite right in expressing his inability to support it. The main question in the case is, whether the proceedings against the accused before the Resident Magistrate, Rohri, were initiated in any manner prescribed by section 190, Criminal Procedure Code, which prescribes the conditions requisite for the inititation of proceedings. Section 476, Criminal Procedure Code, has

(8) 8 Ind. Cas. 247; 11 Cr. L. J. 602; 87 P. L. R. 910; 61 P. W. R. 1910 Cr.

clearly no application, nor have clauses (*b*) and (*c*) of section 190. It has been contended by the Public Prosecutor that clause (*a*) to section 190 is applicable and that the proceedings were instituted on complaint. Complaint is defined in clause (*h*) to section 4 as the allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person whether known or unknown has committed an offence. Now, when a Magistrate takes cognizance of an offence on complaint, he may do one of three things, he may either dismiss the complaint, or fix it for preliminary inquiry or issue process. He has to exercise his judgment, and determine whether the complaint ought to be entertained or not. His position is one of responsibility, for on his determination the interests of one person or the other may be prejudicially affected. The right of the Magistrate to consider the complaint when an "allegation', is made to him that some person has committed an offence cannot be fettered, and he must decide, according to the circumstances of each case, whether a particular complaint should be admitted or dismissed. Now, what the Public Prosecutor describes as a complaint in this case, is headed an "order". It is true that it embodies an allegation that certain persons described therein have committed certain offences, but the allegations are coupled with a mandate that those offences should be enquired into, and with that object the persons complained against are sent in custody to stand their trial before the Resident Magistrate, Rohri. The latter himself must have understood that that there was no option left to him but to immediately start with the trial of the accused and this is what he precisely does, for he records the evidence of the Sessions Judge as the first witness in the case. The fact of the written order of the Sessions Judge and the sending of the accused in custody to the Resident Magistrate were tantamount to a direction to the Magistrate to try the accused irrespective of the fact whether any complaint had been filed before him and whether it disclosed the commission of any offence. I feel it impossible to describe the order in this case, emanating from the Sessions Judge, to a Magistrate subordinate to him as a complaint. It is, for all practical purposes, what it purports to be, *viz.*, an order. The fundamental requisite for the initiation of proceedings is absent. The Magistrate's right of exercise of his judgment upon the presentation of a complaint to him is taken away from him and he had been directed to proceed with the trial in a way unknown to the law. The proceedings of the Magistrate are vitiated at their very root and must, therefore, be quashed.

J. P.

Proceedings quashed.

PATNA HIGH COURT.

CRIMINAL REVISION NOS. 335 AND 337 OF 1921.

December 2, 1921.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Ross.

IN CR. R. No. 335 OF 1921

JAI SAO AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

IN CR. R. No. 337 OF 1921

JHARI LAL AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 117 (4 —Accused persons—Joint trial—Evidence of association, necessity of—Trial, legality of—Prejudice to accused.

The legality of a joint trial does not depend on what is alleged for the prosecution, but on the facts subsequently found to be true. [p. 490, col 1.]

Jogendra Kumar Nag v. *Emperor*, 61 Ind. Cas. 233; 25 C. W. N. 334; 22 Cr L. J. 377, dissented from.

Godhan Ahir v. *Emperor*, 47 Ind Cas 95; 4 P. L. J. 7; 19 Cr. L. J. 89, from followed.

In order to entitle a Magistrate to try several persons jointly for offences under section 110, Criminal Procedure Code, the circumstances mentioned in section 117 (4), namely, the association of several persons in the commission of the offences mentioned in section 110, Criminal Procedure Code, must be established. [p. 490, col. 2.]

In a case under section 110, Criminal Procedure Code, in which the evidence of bad character of the accused persons and of the individual nefarious acts committed by them form the integral parts of the offence the evidence led against one will prejudice

the case of the other accused persons assembled together in the same dock, and in such a case the joint trial of accused persons is illegal. [p. 430, col. 2.]

IN CR. R. No. 335 OF 1921.

Messrs. *S. N. Haq* and *J. N. Gupta*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

IN CR. R. No. 337 OF 1921.

Mr. *Yusuf*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

JWALA PRASAD, J.—The petitioners, eight in number, Raja Ram Sao, Jhari Lal, Balgovind Lal, Gajoo Sao, Chilhauri Sao, Jai Sao, Parshadi Sao, Chamru Sao, of village Aunta, near Mokameh Ghat Station, have been directed by the Sub-Divisional Officer of Barh, by his order dated the 29th of April 1921, to execute bonds of Rs. 100 each, with two securities of Rs. 100 each, to be of good behaviour for one year or in default to undergo rigorous imprisonment for one year each under section 110 (*b*) of the Criminal Procedure Code. This order has been based upon the finding of the Magistrate that the accused habitually "dealt in goods which they knew to have been stolen from railway goods shed at Mokameh Ghat."

Upon the report of the Police at Mokameh, dated the 15th of October 1920, the Magistrate drew up the following proceeding: "Whereas from the report of G. R. Police, Mokameh, dated the 15th of October 1920, it appears that the above named eight accused persons are by habit receivers of stolen property knowing the same to have been stolen, I, therefore, order the above eight accused to show cause at 10 A. M. on 8th November 1920 why they should not be bound down for three years to be of good behaviour under section 110, Criminal Procedure Code, in terms given below—Raja Ram a bond of Rs. 1,000 with two sureties of Rs. 500 each—other seven defendants bonds of Rs. 100 each with two sureties of Rs. 100 each."

Now, the circumstances set forth in the report of the Police referred to above are as follows:—

1. That about 302 bags of linseed and other articles were found short at destination from Mokameh Ghat although seals on the waggons were intact, leading to a conclusion that the thefts occurred at Mokameh Ghat before the waggons left the place.

2. That the coolies, who mostly came from the village Aunta, have been generally found concealing the grains from the Ghat Station and disposing them off to their receivers at Aunta.

3. That one gang of receivers, under the leadership of Jhari Sao, was prosecuted in the year 1913 under section 110, Criminal Procedure Code, and Jhari and Balgovind were convicted.

4. That it came to light during enquiry of the proceedings in 1913, that the stolen property received by the then accused receivers was despatched by them by rail to Lakhisarai Station under different fictitious names.

5. That the remnants of the above mentioned gang gradually formed afresh the present gang of receivers under leadership of accused Raja Ram. This time they changed their *modus operandi* to defy the Police and to avoid detection, that is, they began to send away their stolen property by carts or boats towards Lakhisarai, Barh, and other places across the river.

6. In the year 1919 there was an abnormal increase of crime at Mokameh Ghat and about 27 coolies were arrested red-handed carrying property in almost each case towards the village of the accused. Eighteen coolies were similarly arrested in 1918 and eleven in 1920 with more or less the same result.

7. That during the enquiry of this case, it transpired that present accused are mainly responsible for the thefts as receivers and that they actually sent large consignments from time to time to Lakhisarai and Barh per carts and boats.

8. That the accused Raja Ram, Jai, Parshadi and Chamru have transacted in linseed to the extent of Rs. 20,250, in spite of the fact that none of them has got even a small plot of land producing linseed, nor have they been known to have ever imported it from other places.

9. That the accused have been maintaining each a nominal shop only to screen their *mala fide* dealings with the coolies and to afford the latter opportunities, to frequent their shops with the ulterior object of purchasing things.

In order to show that the accused persons had facility in perpetrating the

offences of receiving stolen property, the Sub-Inspector in his report has given a description of the situation of the village Aunta, their shops and the Railway transhipment platform, which shows that they are all in close proximity. In his report the Sub-Inspector says that "Aunta is a large village inhabited mostly by Babbar and low class people. Almost every adult male member of the latter class works as a cooly in the Mokameh Ghat Goods Shed where transhipment of goods from B. & N.W.Ry. and E.I. Ry., and *vice versa*, is carried on on a very grand scale. The accused have got nominal shops of groceries. Their shops and houses are located on the outskirts of the village just outside the Railway fencing within easy reach of distance from the Railway Shed. The Mokameh Ghat shed is one of the biggest transhipment stations in India. Some times about three hundred waggons are transhipped in one day. The commodities passing through the shed are of a variety, but chiefly rice, wheat, grain, linseed, sugar, salt and the like. The yard is about two miles in length. A portion of that is tinned,—known as the shed—but without any enclosure. The goods are usually detained for one day, sometimes for two or more, for being transhipped. About 250 coolies are always at work. About 100 of them hail alone from Aunta. A considerable number of these coolies have got every facility of pilfering from the consignments in the shed or carrying away a bag or two as opportunity offers." The plan of the Mokameh Ghat Station, the transhipment platform and the Aunta village, where the shops of the accused are, has been appended to the report of the Sub-Divisional Officer dated the 15th of January 1921. In order to show that the accused are members of one gang associated together for the purpose of carrying on the offence of receiving stolen property from the coolies, the Sub-Inspector says in his diary: "The accused live in one village and are intimate with each other. They have been seen often associating together and with the coolies working in the shed who are admittedly bad characters. They have also been found transacting together with one and the same Mahajan at Lakhisarai, Barh and Mokameh. They were given an opportunity but could not explain satisfactorily about their transaction and the sudden change in their circumstances. A few years back they were men of no means but now they are men of thousands living comfortably in a high style."

The evidence laid in the present case is enormous. As many as 148 witnesses for the prosecution and 48 witnesses for the defence have been examined, and no less than 115 Exhibits, excluding their sub-numbers, have been produced. By means of the aforesaid evidence the prosecution has tried to establish what is contained in the report of the Sub-Inspector upon which the proceeding under section 110, Criminal Procedure Code, was come to. The report of the Sub-Inspector does not itself show any specific instance of receiving stolen property in which all the accused were acting jointly and in concert. No doubt, the Sub-Inspector's report says that the accused persons belong to a gang of receivers of stolen property, the conclusion is not justified by the material set forth in the report. The report refers to one gang of receivers of stolen property in 1913 headed by Jhari in which Jhari and Balgobind were convicted but nothing has been stated in report, nor anything shown in the evidence, that the remaining six accused were members of that gang. The present gang is said to have been formed under leadership of Raja Ram and the only circumstances mentioned for thinking that the remaining seven accused were also members of that gang is the fact that four of the accused, Rajaram, Jai, Parshadi and Chamru, have transacted in linseed, etc., to the extent of an enormous sum of rupees, namely Rs. 20,280 with the Mahajans in Lakhisarai, Mokameh and Barh. This circumstance, again, even if accepted as an evidence of association, leaves out of account the remaining four of the accused. It has not been stated in the report, nor shown in the evidence, that the remaining four of the accused had any concern with the transaction referred to above. The facts and incidents relied upon by the prosecution do not establish an association of all the accused in the nefarious act of receiving stolen property. There are, no doubt, certain facts, namely, that they were carrying on shops in the close proximity of the Railway transhipment shed; that they were residents of a village from

where Railway coolies are largely recruited; that they were carrying on shops affording facilities to the coolies in disposing of the stolen grains through them, and also giving facility in receiving the stolen goods. Each of the accused holds separate shops in that locality. There is nothing to show that these accused have associated together and received any stolen goods from the coolies. The coolies coming from the village Aunta, as shown above, are about 100 in number. Some of these, as set forth in the report of the Sub Inspector, have been convicted for theft. No particulars have been given as to which of the coolies have formed into a league with the accused in the present case. The reasons, therefore, for the Sub-Inspector to report that these accused persons formed a gang do not hold good. Therefore, upon his report, the Magistrate could not draw up a charge under section 117 (4) for the joint trial of the present accused upon the ground that they had associated together for the purpose of receiving stolen property. The report of the Police, therefore, if truly analysed, leads only to the conclusion that the accused were receivers of stolen property but not necessarily the fact that they were members of a gang having associated themselves under a common leader, Raja Ram, for the purpose of carrying on this nefarious act. The Magistrate, in his proceeding under section 110, Criminal Procedure Code, apparently does not accept the report of the Police as being sufficient to frame a charge of association of these accused persons; for he only says in the proceeding that "the accused are by habit receivers of stolen property." The fact that they are members of a gang or have associated together for the purpose of carrying their profession of receiving stolen property, is a very material fact which ought to have been clearly stated in the proceeding in question. The proceeding stands in the position of the charge and on the principle of framing a charge, the proceeding must have mentioned the material facts of the accused having associated together or being members of a gang to carry out the offence of receiving stolen property in order to give the accused notice of this so as to enable them to meet it. Upon the charge, therefore, thus framed, I very much doubt whether the accused could be jointly tried. At the very initial stage of trial, that is, just when the accused appeared before the Magistrate in pursuance of the notice served upon them of the proceeding, they took objection to the joint trial of all of them. This application was refused by the Magistrate in the following words: "application for separate trial disallowed without giving any reason for doing so." This is not the judicial determination of the legal question raised in the accused's petition. The prayer appears to have been pressed again in the course of the argument before the Magistrate who, again, for the reasons set forth in his judgment rejected the contention. In this connection, reference may profitably be made to the petition of Rajaram and Jai Sao, made before the Court of the Sub-Divisional Officer of Barh and the order passed thereon by that officer. The petition runs thus:

"That your petitioner's Pleader from the very beginning of the case has been objecting to your petitioner's joint trial along with other accused persons. That your petitioners understand that your Honour once expressed your Honour's opinion that after the close of the case your Honour would consider the propriety or otherwise of your petitioners separate trial. That now, as the prosecution has closed its case except to examine two or three formal witnesses, your petitioners beg to request your Honour to order separate trials. That the *prosecution also applied for the separate trial of each accused.* That the joint trial is illegal and greatly prejudicial to your petitioners." The order passed on this petition runs thus: "The application is refused. 145 witnesses have been examined and 54 have been cross-examined. The hearing has occupied 19 days already. My opinion has been misunderstood and the words 'after the close of the case' must be understood literally and not to mean after the close of the case for the prosecution." I have underlined (*italicised*) the passage in the aforesaid quotation for showing that prosecution also applied for separate trial. Thus, both the prosecution and the accused persistently asked the Magistrate to try the accused separately but the Magistrate had been putting off his decision thereon. The objection was pressed before the lower Appel-

late Court but was overruled on the finding that there was evidence of joint association of the accused in the commission of the offence of receiving stolen property, and that the Magistrate had properly exercised the discretion in him by the section 117 (4) of the Code of Criminal Procedure. The plea has been taken pointedly before us.

We have been taken through the long and voluminous evidence of both the parties in the present case. The learned Counsel for the petitioners has urged strenuously that the evidence, such as that has been adduced in the present case, does not show that there was any association of the accused persons for the purpose of perpetrating the offense of receiving stolen property. The learned Assistant Government Advocate, on the other hand, has read the evidence with his comments throughout for the purpose of refuting the argument of the defense and for saying that the evidence was sufficient for establishing that the accused were acting in concert for the purpose of committing the offense for which they have been charged. We have given our anxious consideration to the points urged before us on both sides and we have come to the conclusion that the evidence given in the case, voluminous though it is, has not carried the case of the prosecution an inch further than what was stated in the report of the Sub-Inspector upon which the proceeding under section 110 of the Criminal Procedure Code had been founded, and what has been shown to us already is insufficient for establishing any criminal association. The learned Assistant Government Advocate has relied upon the same witnesses that have been referred to in the judgment of the Trial Court for the purpose of showing association of the accused persons for committing the offence in question, and I am extremely indebted to my learned brother for furnishing me with an analysis of that evidence which I here quote *in extenso* with his kind permission: "The witnesses to whom the learned Government-Advocate referred on the question of association were Nos. 5, 6, 7, 33 to 38, 41 to 48, 110 and 111.

"Witnesses Nos. 5, 6, and 7, are Chaukidars of Aunta and Mokameh Ghat. I take witness No. 5 as a sample of this part of evidence. He says that the accused are of bad character and receive stolen property from goods shed coolies at the Ghat and that all the eight accused persons sit and associate together. Evidently, this statement is not relevant to proof of association 'in the matter under enquiry' required by section 117 (4).

"The other witnesses are chiefly cultivators of Aunta. I shall give some sample of their evidence. P. W. No. 33 says that all the accused associate together and send goods together by boat and by cart. This is not evidence of the required association. P. W. No. 34 speaks generally about the accused; he says that they receive stolen property and that they associate together and consult together about the despatching of the property by boat and by bullock cart. In cross-examination, however, he refers specifically only to Jai, Rajaram and Balgobind as sitting together at each other's house and says that he does not remember about the other accused persons and that he only referred in his examination in chief to these three. This is, therefore, no evidence of general association. P.W. No. 35 only says that they associate jointly and send their goods by boat and cart. P. W. No. 36 admits that he has never seen the accused purchasing from coolies and consequently his evidence comes to nothing. P. W. No. 37 says that the accused associate together and when they have got consignments together, they send them together by boat and cart. The value of this evidence is shown in his cross-examination by Pershadi where he said that he had been seeing Pershadi taking goods by cart and when asked what he was taking he said that it was Rainchi and Tissi that he was sending to Lakhisarai. The strongest statement is that made by witness No. 46, who says that the accused associate and consult together in purchasing and disposing of property. This statement, however, disappears completely in cross-examination where he says, referring to a meeting of Jai, Jhari, Pershadi and Rajaram, that he did not hear what they were saying or whether they were saying any thing. That is why I said they associate and consult togther in purchasing and disposing of the property."

The evidence of all the witnesses of this

group is similar in character and is equally vague and indefinite.

Witness No. 110 says that the accused associate together and consult together and send their goods away together. In cross-examination he admits that he has never seen Balgobind sending away goods by cart: the specific instance that he gives of despatch of goods affects only five of the accused: and this statement is difficult to credit. He says the bags of grain were taken from the houses of Parshadi, Jhari, Raja Ram, Gajoo, Chilauri, and that he saw this from his house; but he admits that Parshadi's house is not visible from his, nor is Jhari Lal's nor are any of the other accused's. P.W. No. 111 says nothing about association in his examination in chief. The learned Assistant Government Advocate referred to a passage in his cross examination where he said that Parshadi sends goods jointly with the other accused and that he saw him last Bhado. If this witness had been a witness to the association of the accused it is difficult to understand why he was not examined in chief on the point, and this single instance which he referred to can hardly be seriously regarded as evidence of association. My estimate of the evidence has been the same.

There is, therefore, no evidance of association of the accused to justify a joint trial.

The learned Assistant Government Advocate, however, contends that the proceeding cannot be quashed even if it has transpired during the trial that the evidence given to prove such an association falls short of what is required in law. He contends that there is an allegation and, perhaps, an assertion in the report of the Police, that the accused belong to a gang whose main profession was to receive stolen property and, therefore, the charge or proceeding which was founded upon that report cannot be questioned in the subsequent stage of the trial, although the prosecution might have failed to establish it by evidence. This contention is based upon the decision in the case of *Jogendra Kumar Nag* v. *Emperor* (1). No doubt, in the judgment of Beacheroft, J., in the case referred to, the following passage occurs: "The legality of a joint trial must depend upon what is alleged for the prosecution not on the facts subsequently found to be true. In the very nature of things that must be so. Otherwise, we should be driven to this state of things, that in many cases, there could be no determination whether the joint trial was legal or not till the result of the case was known, a proposition which has only to be stated to be rejected. The case for the Crown was, that certain facts existed; the existence of such facts would undoubtedly prove such association as was necessary to justify joint trial; the legality of the trial could not depend on whether the Crown succeeded in proving those facts." With great respect to the learned Judge, I have no hesitation in dissenting from the view expressed therein. No doubt, in that case, the learned Judge came to the conclusion that there was evidence which, if believed, would justify a joint trial. The facts of that case are different from the present one where we find that there is no evidence of joint association which would justify the joint trial. If, therefore, there was evidence in that case, the question did not arise as to whether the joint trial would not be vitiated merely because there was an allegation on the part of the prosecution which was not established by evidence at the trial. The observation of the learned Judge is, therefore, an *obiter dictum*. Apart from it, if the mere allegation of the prosecution were to determine the legality of a trial there is no reason why an allegation by the accused refuting the prosecution allegation at the very outset of the trial should not be accepted and the accused tried separately. In the present case, the Police Officer, in the report, stigmatised the accused as belonging to a gang of receivers of stolen property. The accused, at the very first hearing, refuted this charge and said that they were not members of any gang and that the joint trial was illegal. Why should the allegation of the prosecution be preferred to that of the accused for the purpose of initiating a joint trial? There is no justification in principle for this differentiation. What is sauce for the gander is sauce for the goose. We are, on the other hand, fortified in our opinion by the decision of a Divisional Bench of this Court in the

(1) 61 Ind. Cas. 233; 25 C. W. N. 331; 22 Cr. L. J. 877.

case of *Godhan Ahir* v. *Emperor* (2): At page 10* Mullick, J., observed as follows: "It has been strongly contended that there is no evidence of habitual mischief to bring the petitioners within the operation of section 110 (*d*) of the Criminal Procedure Code, nor of any association such as would justify a joint trial, nor any specific finding as to the part which each of the accused took in the acts which have been held to constitute habitual mischief. These are matters, however, which must be the subject of the new trial, which we now direct the Magistrate to hold. The Magistrate, of course, will bear in mind that a joint trial is not permissible *unless there is evidence of something in the nature of conspiracy or of concert in respect of the various acts of habitual mischief to which the witnesses have deposed.*" In the above quotation the lines have been underlined (*italicised*) by me. We, therefore, hold that the joint trial of the accused persons was illegal.

The learned Assistant Government Advocate then contends that section 117 (4) is permissive and gives ample discretion to the Magistrate to try the accused persons under section 110 of the Criminal Procedure Code either individually or jointly. This is the argument which has also been advanced by the lower Appellate Court in support of this trial. Clause (4) of section 117 of the Code of Criminal Procedure runs as follows: "Where two or more persons have been associated together in the matter under enquiry, they may be dealt with in the same or separate enquiries as the Magistrate shall think just." Ordinarily, under section 110 of the Code of Criminal Procedure every person has to be tried separately for the offences enumerated therein. Clause (4) of section 117, Criminal Procedure Code only permits the Magistrate to try "two or more persons jointly when they have associated together in the matter under enquiry."

In other words, a joint trial is only permissible when two or more persons have been associated for the purpose of committing the offences mentioned in section 110, clauses (*a*) to (*f*), which are under enquiry. But for clause (4) of section 117 of the Code of Criminal Procedure a joint trial would not have been in any case permitted. The circumstances mentioned therein, namely, the association of several persons in the commission of the offences mentioned in section 110 of the Criminal Procedure Code must be established in order to entitle the Magistrate to try several persons jointly. This contention of the learned Assistant Government Advocate is, therefore, also overruled.

Lastly, it has been contended that the joint trial of the accused cannot be set aside unless it has prejudiced the accused persons. This argument cannot be advanced seriously, for, in a case under section 110 of the Criminal Procedure Code in which the evidence of bad character of the accused persons and of the individual nefarious acts committed by them from the integral parts of the offence, it is impossible to conceive that the evidence led against one will not at all prejudice the case of the other accused persons assembled together in the same dock.

Looking into the evidence, we are satisfied that the accused have been seriously prejudiced in the trial by the evidence in the present case just in the same way as the Sub-Inspector of Police was prejudiced against all the accused on account of having found evidence against some of them. We, therefore, hold that the joint trial in this case was illegal and without jurisdiction. The convictions of the accused persons and the order passed against them under section 110 of the Criminal Procedure Code must be set aside. It will be open to the Magistrate to try the accused separately if he finds that the evidence is sufficient in the case of each accused person.

All the trouble would have been saved had the Magistrate not persisted in trying the accused persons jointly in spite of repeated objections at every stage of the trial on their behalf and notably on behalf of the prosecution itself. The Magistrate in such matters should not brush aside the suggestion of the Public Prosecutor in charge of the case who knows how far he can establish criminal association by actual evidence which the Magistrate cannot anticipate. This is a salutory principle which the Magistrate ignored in this case and took upon himself the responsibility of acting both as a Public Prosecutor and as a Judge with the result

(2) 47 Ind. Cas. 95; 4 P. L. J. 7; 19 Cr. L. J. 899.

*Page of 4 P. L. J.—[Ed.]

that the calculation of the Magistrate to save time and trouble of trying the accused persons separately has come to naught and there has been serious waste of time and possibly prejudice to the case.

Ross, J.—I agree.

J. P.

Application allowed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 527 OF 1921.
November 4, 1921.
Present:—Mr. Justice Piggott and
Mr. Justice Walsh.
BIRJU MARWARI AND OTHERS
—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 9, 531—Appeal made over to Additional Sessions Judge for hearing—Appeal ultimately heard by Sessions Judge himself—Jurisdiction, question of.

Where a Sessions Judge makes over a criminal appeal for decision to an Additional Sessions Judge working in the same jurisdiction as himself and empowered to try cases or appeals made over to him by the Sessions Judge but subsequently, after notice to the parties, hears the appeal himself, he does not act outside his jurisdiction inasmuch as the making over of a case is not a "transfer" of the case.

The absence of any provision corresponding to section 531, Criminal Procedure Code, in respect of cases tried within the same Sessions Division by a lawfully appointed Judge of that Sessions Division whether he be the Sessions Judge or an Additional Sessions Judge shows that the Legislature did not think that any doubt as to the jurisdiction of such Judges could arise in view of the wording of section 9 of the Criminal Procedure Code.

Criminal revision from an order of the Sessions Judge, Gorakhpur, dated the 2nd of August 1921.

FACTS.—This case first came up for hearing before Mr. Justice Linsday who was of opinion that the learned Sessions Judge having once transferred the case to the Second Additional Sessions Judge, had no authority to withdraw the case and to dispose of it himself, but as His Lordship considered that this question would become up for decision again in view of the numerous Judgeships in which Additional Judges are employed he referred the matter to a Bench of two Judges. The matter then came up for hearing before Mr. Justice Piggott and Mr. Justice Walsh.

Mr. *T. N. Ohadha*, for the Applicants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—In the Court of Session of Gorakhpur, as established under section 9 of the Code of Criminal Procedure, there is a Sessions Judge and there are, or have been, also two Additional Sessions Judges. There was a criminal appeal filed by Birju and others against their conviction by a Magistrate. So far as the provisions of the Code of Criminal Procedure go, any one of the Judges of the Court of Session competent to exercise jurisdiction in the said Court could lawfully have heard that appeal. For the convenience of the administration, the Local Government had limited the powers of the Second Additional Sessions Judge to the trial of cases or appeals made over to him by the Sessions Judge. This particular appeal was made over to the Second Additional Sessions Judge, but circumstances subsequently occurred which made it more convenient for the Sessions Judge to hear the appeal himself. After proper notice to the parties he proceeded to do so. The question has been raised whether in so doing he acted outside his jurisdiction. We find nothing in the Code of Criminal Procedure to suggest that the jurisdiction of the Sessions Judge of Gorakhpur in respect of this appeal had been ousted in consequence of any arrangement which he might previously have made for the convenient disposal of the work of that Sessions Court. We do not think this is a case of transfer. The expression used in the Notification is "made over to be tried," and section 9 of the Criminal Procedure Code simply gives jurisdiction to all Judges and Additional Sessions Judges of each Court of Session to which they may be appointed. If this appeal had been heard by a Judge who was not a Judge of the Sessions Division of Gorakhpur, section 531 of the Criminal Procedure Code would have prohibited interference except upon the ground that a failure of justice had been occasioned by the hearing of the appeal in the wrong Sessions Division. We see no reason what-

ever for holding that there has been a failure of justice in this case. From one point of view, it might be said that the provisions of section 531 aforesaid applied *a fortiori* to the present case. We are more inclined to hold that the absence of any corresponding provision in respect of cases tried within the same Sessions Division by a lawfully appointed Judge of that Sessions Division, whether he be the Sessions Judge or an Additional Sessions Judge, shows that the Legislature did not think that any doubt as to the jurisdiction of such Judges could arise in view of the wording of section 9 of the Code. We are satisfied that there is no cause for our interference. We dismiss this application.

J. P. *Application dismissed.*

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 70 OF 1921.

January 5, 1922.

Present :—Mr. Justice Jwala Prasad.

LAKSHUMI PRASAD—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 420, 511—Cheating, offence of—Attempt to cheat and preparation, distinction between.

A clerk employed to weigh the carts of sugar-canes upon a machine and enter the (1) Gross, (2) Tare and (3) Net weights in a register, weighed a cart of sugar-cane and entered its gross weight as 16 maunds, 30 seers but soon after the cart was re-weighed by a superior officer and found to be only 14 maunds, 20 seers. The clerk had not filled up the other columns fixing the liability absolutely upon the Company when he was intercepted and charged for cheating and convicted:

Held, that the writing of the false figure in the register had not passed from the stage of preparation into that of an attempt to commit the offence of cheating and that, therefore, the conviction under section 420, Indian Penal Code, was wrong. [p. 494, col. 1.]

Hurjee Mull v. *Imam Ali Sircar*, 8 C. W. N. 278; 1 Cr. L. J. 124, *Queen-Empress* v. *Dhundi*, 8 A. 304 at p. 306; A. W. N. (1886) 125; 5 Ind Dec. (N. S.) 129, *Rezina* v. *Padala Venkatasami*, 3 M. 4; 1 Weir 543; 1 Ind. Dec. (N S.) 559, *Queen-Empress* v. *Paku*, 24 B. 287; 1 Bom. L. R. 678; 12 Ind. Dec. (N. S.) 727, referred to.

There is a wide difference between the preparation and an attempt to commit an offence. The preparation consists in devising or arranging means necessary for the commission of an offence; an attempt is the direct movement towards the commission after preparations are made. [p. 494, col. 1.]

Criminal reference by the Session Judge, Darbhanga.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a reference by the Sessions Judge of Darbhanga recommending that the conviction of and the sentence passed upon the accused under section 420/511, Indian Penal Code by the Sub-Divisional Magistrate of Samastipore be set aside.

The accused was a clerk employed at the Samastipore Central Sugar Company and as such in charge of weighing the carts of sugar canes upon the machine and to enter the weights thereof in the Weighment Register prescribed for the purpose. That register contains a column headed "Weighment" and is divided into three sub-columns (1) Gross, (2) Tare, and (3) Net. Carts with sugar canes loaded thereon used to be weighed upon the machine and the gross weight of the sugar-canes and the carts used to be entered in sub-column (1). The carts were then emptied and were again weighed, and this weight entered in sub column (2). In sub column 3 was shown the net weight of sugar-canes by substracting the weight of empty carts noted in sub-column (2) from the gross weight entered in sub-column (1). Upon the net weight of sugar-canes mentioned in column No. 3 payments used to be made to the sellers according to the current market rate of sugar canes.

The accused went on leave for three days towards the end of February 1921, and one Hirdai Narain acted for him during those days. Hirdai Narain suspected that the accused was showing more weight of the carts in the Register than the actual weight with a view to cause loss to the factory and that this he used to do in collusion with the suppliers of sugar-canes probably on receiving some illegal gratification from them. Hirdai Narain (P. W. No. 6) reported his suspicion to the Head Clerk, Kanto Choudhry, (P. W. No. 2) who in his turn reported the matter to

the Assistant Superintendent (P. W. No. 1). Under the directions of the Assistant Superintendent the Head Clerk awaited the arrival of the cart of one Nathuni on the 2nd of March. Nathuni's cart was weighed by the accused and the gross weight thereof was entered in the register as 16 maunds, 30 seers. As the cart passed, the Head Clerk stopped it from being emptied and took it back to the weighment machine and re-weighed it. He found that the weight was 14 maunds, 20 seers. While the Head Clerk was weighing the cart, the accused changed the figure ".6" in the register into "12" by altering "6" into "2". The matter was then reported to the Assistant Superintendent who sent the letter (Exhibit 1) to the Sub-Inspector of Police. After investigation, the accused was put on his trial.

The Magistrate found the facts summarised above as having been satisfactorily proved by evidence. The learned Sessions Judge also has accepted the facts as having been proved, but he is of opinion that upon the facts the accused is not guilty of an attempt to cheat. He has accordingly referred the case to this Court, under section 438 of the Code of Criminal Procedure, for quashing the conviction of the accused.

The case appeared to be somewhat important and intricate, and I, therefore, requisitioned the assistance of the learned Assistant Government Advocate, which he has very gladly rendered to me.

I have considered the authorities relied upon by the learned Sessions Judge: *Hurjee Mall* v. *Imam Ali Sircar* (1) and *Queen-Empress* v. *Dhundi* (2) and those cited by the learned Assistant Government Advocate *Regina* v. *Padala Venkatasami* (3) and *Queen-Empress* v. *Paku* (4).

There is no doubt that the accused did enter false figures in the register showing a greater quantity of sugar-canes than was actually supplied by Nathuni. There is also no doubt that by so doing he intended to cheat the Company by making it pay a higher sum to Nathuni than he was entitled to. The clerk was in charge of writing the Register and making entries in all the columns. He had written the first sub-column under the heading "Weight" namely, the gross weight of the sugar canes along with the cart. He had still to find out the net weight of the sugar-canes for which the Company was liable to pay the price to the supplier. This, no doubt, was a mere matter of arithmetic, inasmuch as the weight of Nathuni's cart, namely, 5 maunds and 30 seers, was a constant quantity as found from the entries on the previous dates for the whole of the month of February up to the 1st of March. Before the remaining two sub-columns, that is, "Tare" and "Net" weight were filled in, the Head Clerk intercepted and the accused was not able to write those columns. It is not known when the clerk was to make out this net weight, whether after the close of the weighment for the whole day of all the carts of sugar-canes supplied or at the end of the month, or as each cart was being weighed. The evidence on this point is not sufficient. At any rate, the time had not come and nothing was done by the accused to show that he was going to carry out his intention of cheating by entering those sub-columns of "Tare" and "Net" weight and fixing the liability absolutely upon the Company. Until that was done, the Company could not be said to have been cheated. Again, until that was done and the register had passed out of the control of the clerk and submitted to the Company as evidence of the liability of the Company, there was yet time for the clerk to change his mind or intention and, as put by Brodhurst, J., in the case of *Queen Empress* *Dhundi*, (2) "from prudence, if not from penitence". We have to assume that better reasons would prevail at any moment and the man would change his intention to commit a sin or crime before the actual consummation thereof; and until he has done all in his power to let his action be out of his control, so that the commission of the sin or the crime would be a natural effect of the actions already committed, there is still a mere preparation for the commission, and not an attempt to commit the offence or the sin. That learned Judge, in the decision referred to above, says: "It is

(1) 8 C. W. N. 278; 1 Cr. L. J. 124.
(2) 8 A. 501 at p. 506; A. W. N. (1886) 125; 5 Ind. Dec. (N. S.) 122.
(3) 3 M. 4; 1 Weir 543; 1 Ind. Dec. (N. S.) 559.
(4) 24 B. 287; 1 Bom. L. R. 678; 12 Ind. Dec. (N. S.) 727.

to be noted that the act or omission must be one that causes, or is likely to cause, damage to such person, damage or loss, etc. But here the mere certificate by itself and until endorsed, and until further action had been taken upon it, could not possibly have caused loss or damage to any person." This is also the view supported by the decision in the case of *Regina* v. *Padala Venkatasami* (3). Mr. Mayne in his commentary has also laid down the dictum of an American Jurist that there is a wide difference between the preparation and an attempt to commit an offence. He says the preparation consists in devising or arranging means necessary for the commission of an offence, an attempt is the direct movement towards the commission after preparations are made.

I, therefore, agree with the view taken by the learned Sessions Judge that the writing of the false figure in the register had not passed from the stage of preparation into that of an attempt to commit the offence of cheating. It appears to me that the accused was tried under a wrong section. The accused came clearly within the purview of section 477 (*a*) of the Indian Penal Code, which relates to the falsification of an account-book by a clerk or a servant and I wonder why this section was not taken advantage of.

In view, however, of the age of the accused and of its being the first offence, I do not think any advantage will now be gained by re trying the accused. The Magistrate, while giving a lenient punishment to the accused, observed that the accused is a young man and does not appear to belong to a class of confirmed criminals. The accused has already been in Jail for about five or six days, and I hope this will be a warning to him and he will reform himself and really repent for what he did and would try to lead an honest life.

I accept the reference and set aside the conviction and the sentence.

J. P.

Conviction set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 232 OF 1920.

May 21, 1920.

Present:—Mr. Justice Sultan Ahmed.

JHUMAK SINGH—PETITIONER

versus

TOTA MAHTO AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 517—Property in custody of Police—Delivery to one party—Return to another party.

Section 517 of the Criminal Procedure Code is not applicable to a case where the property has already passed out of the custody of a Court.

Therefore, a party who has taken delivery from the Police of crops attached cannot be ordered to return the same to the opposite party.

Application against an order passed by the District Magistrate, Monghyr, dated the 28th April 1920.

Mr. *Akbary*, for the Petitioner.

Mr. *G. C. Pal*, for the Opposite Party.

JUDGMENT.—This is an application against an order passed by the District Magistrate of Monghyr, dated 28th April 1920, directing the first party to return certain crops to the second party of which they had taken delivery from the Police. The order, as it stands, cannot be supported under the law.

The learned Vakil appearing for the opposite party seeks to justify this order under section 517 of the Criminal Procedure Code. Section 517 of the Criminal Procedure Code, however, is not applicable to a case where the property has already passed out of the custody of the Court. It is perfectly clear, on the order of the Magistrate himself, that the petitioner had taken delivery of the property from the Police. Whether the delivery of this property to the petitioner by the Police was right or wrong under the law, is not a matter which can in the least affect the question which I have to decide. The fact remains that the property had already been restored to the first party and neither the Court nor the Police had the custody of that property. That being so, section 517 cannot apply. Section 517 does not contemplate double restoration. There was nothing in the custody of the Court which could be restored. Therefore, the order of the Magistrate directing the petitioner to return the crops to the second party of which the petitioner has taken delivery from the Police must be set aside.

J. P.

Order set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 527 OF 1921.

July 18, 1921.

Present :—Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

NGA KHAN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 300, thirdly—Death caused by single blow—Offence—Criteria for determining.

Where a person causes the death of another by a single blow from a stick, the criteria for determining whether or not he has committed the offence of murder, are, the nature of the weapon used, its size and weight, the manner in which it is used, and the actual injuries caused; if the injuries are so severe and uncommon as to indicate the use of terrific force, the offence falls under section 300, thirdly, of the Penal Code, *i. e.*, that he intended to cause injury sufficient in the ordinary course of nature to cause death, even though the weapon used is not such as would of necessity have caused fatal injury. [p. 496, col. 2.]

Shwe Hla U v. *King-Emperor*, 2 L. B. R. 125; 1 Cr. L. J. 184, *Shwe Ein* v. *King-Emperor*, 3 L. B. R. 122; 3 Cr. L. J. 355, *Nga Na Ban* v. *King-Emperor*, U. B. R. (1904-06), Penal Code, 33; 5 Cr. L. J. 306, referred to.

Appeal against a capital sentence passed by the Sessions Judge, Prome.

Mr. *Maung Lat*, for the Appellant.

JUDGMENT.—The appellant, Nga Khan, had been away from home for a few days and on his return his uncle in-law, Tha Dun E, went to see him. They sat in Nga Khan's house. Then, Aung Kin, who is his uncle twice removed, joined them. Shortly after, Po Khaing, the deceased, joined them. After the four men had chatted for a while deceased went down followed by Aung Kin and Tha Dun E They had only gone a few yards when Nga Khan followed, picked up the exhibit bamboo and struck Po Khaing a heavy blow on the head from behind. He then ran off to the headman's house. Po Khaing fell and died almost immediately. To the headman Nga Khan said that Po Khaing and Aung Kin had come into his compound armed with *dahs* and he wanted the headman to come and enquire. Almost immediately after, Aung Kin arrived and told the headman that Nga Khan had struck Po Khaing and he did not know whether he would live or die. The headman told Pan Tha who was there to watch Nga Khan and went to Po Khaing. He found him dead and took charge of a bamboo lying near him which Aung Kin told him was the weapon used. Nga Khan was arrested and sent with deceased and the bamboo to the Police Station where Pan Tha made a clear report.

There is no ground for doubting the evidence. The two principal witnesses are connections of accused and it is not suggested that either has any ground for falsely charging him. Another witness, Tha Han, who was in a house near by corroborates them. No motive for the assault is forthcoming and none is suggested. In cross-examination it was suggested that the men had been drinking, but there seems to be no substance in this and it is clear that none of them were to any extent affected by drink. The defence is the right of private defence. Nga Khan says Aung Kin and Po Khaing entered his compound armed with *dahs* and the latter demanded a debt of ten pies and then thrust at him with a *dah*. He jumped down, picked up a small bamboo lying there as his house was being built and waved it and ran to the headman for protection. That any of the men had *dahs* is denied by all. Nga Khan did mention *dahs* to the headman but it is significant that he did not tell this story to the headman. It seems to be an afterthought and it is clearly a false tale as the blow that killed Po Khaing was dealt from behind.

Only one blow was struck and with a hollow bamboo 5 feet, $11\frac{1}{4}$ inches long and $4\frac{1}{2}$ inches in circumference. It weighed 116 tolas. There was a contused lacerated wound $3\frac{1}{2}$ inches long and 1 inch broad and scalp deep exposing the underlying bone on the right parietal bone 5 inches above the right ear. The sagittal suture was so loosened that the skull could be practically divided into two parts. On the right side there was a lineal fracture of both tables of the skull 4 inches long and 4 inches from the right ear. The skull was of normal thickness and presented no sign of being abnormally brittle. The loosening of the whole

suture is extremely uncommon and indicates that very great force was used.

That Nga Khan caused the death of Po Khaing is clearly established and, indeed, having regard to the defence set up, it can only be taken to be admitted. The question, therefore, is whether, in striking him this one blow on the head, he intended to cause bodily injury sufficient in the ordinary course of nature to cause death, or merely injury that was likely to cause death. Having regard to the weapon used, the violence of the blow inflicted, and the part on which the blow was given, an intention to cause any lesser injury cannot be considered.

In the present case the weapon used was not one that would of necessity cause fatal injury but it was, nevertheless, a very dangerous weapon to use on a man's head. The length gives a leverage that enables a very serious blow to be given. It weighed 116 tolas. Very great force was employed in giving the blow. How capricious are injuries to the head in their after effects is pointed out in *Shwe Hla U* v. *King Emperor* (1) and we agree with the opinion expressed in *Shue Ein* v. *King Emperor* (2) that, speaking generally, where a man strikes another on the head with a not very formidable weapon, one blow only, no greater intention can be attributed to him than that of causing injury likely to cause death. But each case must depend on its own facts, on the circumstances surrounding the assault, on the motive and the particular weapon used. If accused had been actuated by a fierce motive urging him on to commit serious hurt and if he had used a heavy male bamboo, or a weighted stick or club, then, having regard to the injury actually caused and to the great violence used, we should have had no course open to us but to hold him guilty of murder. As it is, the case is very near the border line, and requires careful consideration. We do not know the motive, and something seems to us to have been concealed by the more important prosecution witnesses.

We would note, once more, that the weapon used was a long and heavy one, and that uncommonly great force must have been used by appellant, as evidenced by the actual injuries caused by him in the case of a normal skull. The case thus differs very materially from the case of *Shwe Ein* v. *King-Emperor* (2) and *Nga Na Bin* v. *King Emperor* (3) in which it was held that death caused by a single blow with a stick was, in those specific instances, not murder but an offence punishable under the first portion of section 304 of the Indian Penal Code.

In our judgment it would be most unsafe to suggest that, in all cases where death is caused by a single blow from a hollow bamboo, the offence is not murder, *i. e.*, that the sole criterion is the nature of the weapon used. The size, and the weight of the stick, the manner in which it is used, and the actual injuries caused by the blow must all be considered. Here the injury caused was so severe and uncommon, and the force used must have been so terrific, that we are of the opinion that the offence of the appellant fell under section 300, thirdly, Indian Penal Code, *i. e.*, that he intended to cause injury sufficient in the ordinary course of nature to cause death. He was, therefore, rightly convicted of murder. However, since he is a young man, and we do not know the motives which actuated him, and we are not certain that we are in possession of all essential facts, we do not consider it necessary to confirm the sentence of death.

The conviction is maintained and the sentence reduced to one of transportation for life.

N. H. & W. C. A.

Sentence reduced.

(1) 2 L. B. R. 125; 1 Cr. L. J. 184.
(2) 3 L. B. R. 123; 3 Cr. L. J. 355.

(3) U. B. R. (1904-06), Penal Code, 33; 5 Cr L. J. 306.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 28 OF 1919.

July 18, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

FIRM MANSA RAM-GORDHAN DAS —DEFENDANTS—APPELLANTS

versus

FIRM MANGAL SAIN-DUNI CHAND —PLAINTIFFS—RESPONDENTS.

Appeal, second—Finding of fact—Evidence ignored—High Court, power of, to interfere—Arbitration—Award, when binding—Contract Act (IX of 1872), s. 73—Breach of contract—Damages, measure of—Assessment, how to be made.

Where a finding of fact is arrived at upon no evidence, the finding is liable to be set aside in second appeal. [p. 500, col. 2.]

A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, a High Court will interfere and should interfere in second appeal. [p. 500, col. 2: p. 501, col. 1.]

Debi Lal Singh v. *Hriday Mahto*, 58 Ind. Cas. 482; 2 U. P. L. R. (Pat.) 60, *Sheikh Mohammad* v. *Janki*, 56 Ind. Cas. 529: 2 U. P. L. R (B. R.) 55, *Maharaj Singh* v. *Pitambar Singh*, 54 Ind. Cas. 768; 2 U. P. L. R (A.) 44 and *Nathu Shah* v. *Haveli Shah*, 65 Ind. Cas. 475; 1 L. L. J. 72, relied on.

Before a party can be held bound by an award, it must be shown that it was a valid award and that all the requirements of the law with respect to the appointment of an arbitrator and with regard to the actual reference to arbitration, had been duly fulfilled. The proceedings of the arbitrators must also be above board, and it must be shown that they had given full opportunities to both parties to appear and represent their case to him. [p. 501, col. 2: p. 502, col. 1.]

In a suit for breach of contract to deliver goods on a certain date the market price *on that date* is the standard for the computation of compensation and not on a later date on which the goods may have been demanded and refused. [p. 502, col. 2.]

Second appeal from a decree of the District Judge, Delhi, dated the 30th September 1918, reversing that of the Subordinate Judge, Second Class, Delhi, dated the 16th March 1918.

Lalas *Sardha Ram* and *Rup Ram*, for the Appellants.

Bakshi *Tek Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for damages for breach of a contract brought by the plaintiffs appellants Messrs. Mangal Sain Duni Chand, a firm of cloth-merchants at Delhi, under the following circumstances: On the 17th November 1916 the parties entered into a contract under which the defendants' firm undertook to supply to the plaintiffs' firm twenty-five cases of flowered Italian of the firm of Messrs. S. Sundar and Company of February and March shipments at a certain price, which is not in dispute in the present case. The contract was made on the Delhi-Hindustani Mercantile Association indent form and the material portions of the contract on which the parties were at issue are the following :—

Clause (8) "Should the goods of the contract or any portion of them not be shipped by the specified time, the contract for the quantity so delayed shall at our (plaintiffs') option if exercised within three days either be cancelled without an allowance or such extension of time as you (defendants) may ask for shall be granted by us as allowances as under, otherwise the goods shall be cancelled."

Clause (15) "Any claim on dispute arising in connection with this contract unless an amicable settlement can be arrived at must be referred to arbitration in Delhi in accordance with the survey and arbitration rules of the Delhi-Hindustani Mercantile Association (except when we refuse to accept and pay the draft in which case the goods may be surveyed at the port of discharge). When the arbitrators or the surveyors disagree and do not appoint an umpire, the Delhi-Hindustani Mercantile Association if applied to by either party to the dispute shall appoint an umpire. The decision of the arbitrators or surveyors or of the umpire shall be final and binding on both parties.

"It is further agreed that if within twenty clear days (should the 20th be a Sunday it shall not count) after being requested by letter addressed to their usual place of business, either party fail to appoint an arbitrator or surveyor ready and willing to act the decision of the arbitrator or surveyor appointed by the other party shall be in like manner binding on both parties. It shall be obligatory on the party raising a dispute to see that a survey takes place within twenty clear days from the date of their letter raising the dispute, failing which they lose the right to survey."

The defendants had purchased these goods from Messrs. S. Sundar and Company, and on being informed by their sellers that their shipment would be delayed, they wrote to the plaintiffs on the 18th November 1916, a letter, marked as Exhibit P 3, informing them of the late shipment, and calling upon them to exercise their option of either cancelling the goods or of allowing them (defendants) an extension of time for delivery as required by clause (8) of the indent. It was also stated in this letter that if no reply was received within two hours from the receipt of that letter, it will be understood that the goods had been cancelled. The plaintiffs' case is, that they agreed to the extension applied for, and that they gave intimation of this fact to the defendants by a telegram of the same date, which has, however, not been produced. The defendants deny the receipt of this telegram, and, beyond the bare statement of one Ram Gopal, who was examined as a party on behalf of the plaintiffs before the settlement of the issues, there is no evidence on the record direct or otherwise showing that such a telegram had ever been sent to the defendants. It is obvious that this statement is not evidence in the case, and does not, therefore, in any way help the plaintiffs in proving their contention that an extension had been agreed upon. The contention is certainly inconsistent with the letter which the plaintiffs allege to have written to the defendants on the same date, and a copy of which they themselves have placed on the record, marked as Exhibit P-12. This letter is to the following effect:—"*Kal mal kharida tha aj late mangte ho, tar dikhao jab jawab dunga*, i. e., "We had purchased the goods only yesterday, to-day you want late shipment, show us the original telegram when we will give you our final answer." This clearly shows that the plaintiffs were not agreeable to an extension of time, or, at any rate, they were not prepared to give a final answer until they were satisfied that it was really a case of genuine and *bona fide* late shipment. Defendants do not admit the receipt of this letter, and it is beyond dispute that, like the telegram, this letter has also not been proved, but it is clear that, though the defendants may not be bound by this letter, the plaintiffs, who have produced it as one of the Exhibits in the case, are certainly bound thereby, and cannot repudiate it. It is, however, admitted by the defendants that, in spite of the fact that no reply was received by them to their letter (P 3) requiring plaintiffs to exercise their option under clause (3), the contract for some reason or other was allowed to remain subsisting and was not cancelled. No correspondence appears to have passed between the parties until the 18th June 1917, when the defendants again wrote to the plaintiffs that out of the 25 cases indented for 20 cases will be shipped in June and July, and that the plaintiffs should cancel the goods or extend time for delivery owing to the late shipment thereof. This was in consequence of a similar letter received by the defendants from their own sellers Messrs. Sham Sundar—Sham Lal, on the same date, giving them 3 days' time, as required by clause (8) of the indent, to exercise their option. On the 20th June the plaintiffs replied to this letter saying that the defendants' letter of the 18th June had been received by them on the 20th, and that they had written to their own vendees giving them intimation of the late shipment and that they would finally send their answer after they had heard from the latter in reply. On the 22nd June plaintiffs sent another letter to the defendants saying that they had heard from their vendees who wanted to see the original papers and the letters connected with this contract received from the manufacturers at home, and that they were not prepared to cancel the goods. On the 28th June the defendants wrote to the plaintiffs the letter, marked as Exhibit (P 5), intimating that as they had failed to exercise their option within three days, the time allowed by the indent, the contract with respect to 20 cases had *ipso facto* come to an end. Invoices and patterns with respect to four of the remaining five cases were sent to the plaintiffs along with this letter. In reply to this the plaintiffs wrote the following important letter to the defendants, which is marked as Exhibit P-15, and which has been entirely ignored by the Court below:—

"*Apki chithi kal mili, apne likha bijak pattern bheite hain magar bijak hamain koi nahin mila,' aur pattern apka wapis kara jata hai, kyun yeh mal ham cancel karte hain, isko*

note karna." The heading of this letter is "25 cases flowered Italian.' Translated literally into English, the letter reads "Received your letter yesterday, you write that you are sending invoices and patterns but we have not received any invoice, and we are returning the patterns to you, the reason being that we are cancelling these goods. Note this fact." In reply, the defendants again returned the invoices and patterns with respect to the four cases to the plaintiffs saying that these four cases were not late, and that the plaintiffs were consequently bound to accept delivery thereof. After some correspondence, and a notice on the part of the defendants that if delivery was not taken with respect to these four cases, they will be sold at plaintiffs' risk, the latter took delivery and made payments to the defendants on the 23rd August 1917. One of the cases was admittedly sunk in transit, and there is no dispute now with respect to this case or the remaining four cases of which delivery had been accepted by the plaintiffs.

Now, there is evidence on the record that in the months of June and July which, according to the terms of the contract, "would be the proper time for the arrival of the February and March shipments there was no demand for these goods and that the prices prevailing in the market were lower even than the contract prices. It was only towards the end of July and the beginning of August that the prices began to rise, and we, accordingly, find the plaintiffs writing to the defendants on the 5th September 1917 demanding invoices and patterns of the two cases which, according to their own letter P. 15, dated the 28th June 1917, had already been cancelled. On the 12th September, the defendants wrote back in reply that the goods had been cancelled and that the plaintiffs were consequently not entitled to demand delivery thereof. Upon the receipt of this letter plaintiffs sent a registered notice to the defendants on the 19th September denying that any cancellation of the goods had taken place and intimating that they were appointing Mr. S. Sundar as their surveyor and that the defendants should also nominate their surveyor within twenty days as required by clause (15) of the indent, failing which they will proceed to have an *ex parte* survey held. On the 8th October 1917 Mr. S. Sundar sent the following letter to the defendants :—

Delhi, 8th October 1917.

To

Messrs. Mansa Ram-Gordhan Das,
Delhi.

From

S. Sundar and Co,
Delhi.

Re: Your dispute with Messrs. Mathra Parshad-Bishambar Nath, *Dyed Brocades*.

Dear Sirs,

I, as you know, represent the buyers, and to-day, being the last day of survey, I beg to tell you that if you fail to nominate your surveyor within seven days hence, I am prepared to write my report on the basis of your papers to be sent to me and on the basis of those produced before me by the buyers, otherwise I will proceed *ex parte* after seven days.

Yours faithfully.
S. Sundar and Co."

No reply was admittedly sent by the defendants to this notice, presumably because there was nothing to survey and also because they had no dispute with Messrs. Mathra Parshad-Bishambar Nath which could possibly be referred to the surveyors. Curiously enough, however, the surveyor, Mr. S. Sundar, gave an *ex parte* award on the 16th October 1917 holding defendants liable for damages to the extent of Rs. 225 per case, and declaring plaintiffs entitled to a decree for Rs. 4,500 for the twenty cases originally indented for but which had remained undelivered. On the basis of this *ex parte* survey or award the plaintiffs instituted the present suit for the recovery of Rs. 4,537, which amount is composed of the following three items :—

Rs.	
4,500,	damages awarded by the surveyor for non delivery of 20 cases.
32	fees paid to the surveyor.
5	stamp for the survey report.
4,537	TOTAL.

The main points on which the suit was resisted were (1) that no extension of time for late shipment had been allowed by the plaintiffs either in November 1916 or in June 1917 and that the contract was consequently *ipso facto* cancelled with respect to

the twenty cases in question according to the provisions of clause (8) of the indent; (2) that the plaintiffs had cancelled the contract by their letter P. 15 dated the 18th June 1917, and were consequently not entitled to claim any damages for non delivery; (3) that the survey was invalid and of no binding effect on the defendants and that consequently no suit could be maintained thereon, and (4) that even if the contract with respect to the twenty cases in question was not cancelled the plaintiffs were not entitled to claim damages at a rate higher than that prevailing in the months of June and July, the date on which the breach according to the terms of the contract had taken place. In the months of June and July there was admittedly no market for these goods and the rates were lower than the contract prices, and consequently plaintiffs were not entitled to any damages in this suit.

The Trial Court found on all points in favour of the defendants and dismissed the plaintiffs' suit. The learned District Judge took a most extraordinary view of the case and, reversing the findings of the Trial Court, decreed the claim in full. Against this decision of the lower Appellate Court the defendants have preferred a second appeal to this Court and we have heard Mr. Sardha Ram on behalf of the appellants, while Mr. Tek Chand has addressed us on behalf of the respondents.

There can be no doubt that, so far as the merits of the case are concerned, the plaintiffs-respondents have no case. Admittedly, the defendants asked for an extension for the first time on the 18th November 1916 and unless the plaintiffs can show that an extension was allowed, it must be held that the contract remained subsisting in its original form without any modifications as to the time for delivery. It has been contended by Bakshi Tek Chand that the lower Appellate Court has found that the time for the shipment of the goods had been extended, and that this being a finding of fact cannot be challenged in second appeal. Now, we do not find any evidence on the record in support of this finding. The telegram of the 18th November 1916, alleged to have been sent in reply to the defendants' letter of the same date, has not been proved and there is no other evidence, circumstantial or otherwise, on which this finding could be sustained. It has been repeatedly held that, where a finding of fact is arrived at upon no evidence, the finding is liable to be set aside in second appeal. We accordingly hold that it has not been established that any extension of time was granted in the month of November 1916. Plaintiffs do not allege any extension in the month of June 1917, and it is consequently unnecessary to discuss the question of the alleged extension any further.

The next question for consideration is, whether defendants have proved that the goods had been cancelled. In our opinion the whole correspondence, beginning from the 18th June 1917 and ending with the plaintiffs' letter P. 15 of the 28th June 1917, conclusively shows that a cancellation of the twenty cases in question had taken place. It may be because the market for flowered Italian had gone down in these months and the plaintiffs wanted to protect themselves from all possible loss that they cancelled the goods, or it may be for some other unexplained reason, but the fact remains that the plaintiffs did send the letter marked as Exhibit P-15, dated the 28th June 1917, to the defendants and thus put an end to the contract. This letter is not denied by the plaintiffs, and Bakshi Tek Chand has not been able to explain how the contract could be held to be subsisting with respect to the twenty cases in the face of this direct admission on the part of his clients that the contract had been cancelled. The only ground he has been able to urge in support of the learned District Judge's finding to the contrary is that, here also, the finding as regards the non-cancellation of the goods is a finding of fact, and that we, sitting here as a Court of second appeal, are precluded from going behind this findings, however erroneous this finding may be. Now, we are quite prepared to concede that, ordinarily, grounds which impugn findings of fact cannot be entertained in second appeal: but where an Appellate Court bases a finding of fact upon one piece of evidence alone without considering the whole of the evidence bearing upon the point the finding is not, in our opinion, binding on a Court of second appeal. A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consider-

ation of the whole of the evidence, and where it appears that all the available evidence has not been considered, the High Court will interfere and should interfere in second appeal. See *Debi Lal Singh* v. *Hriday Mahto* (1), *Sheikh Mohammad* v. *Janki* (2), *Mahraj Singh* v. *Pitambar Singh* (3), *Nathu Shah* v. *Haveli Shah* (4). In the present case the letter of the plaintiffs of the 28th June 1917, which was really the sole foundation of the defendants' case, and which conclusively proved the cancellation of the contract, has been entirely ignored by the learned District Judge for which there is absolutely no justification. Other evidence on the record, more especially clause (8) of the indent and the letters which were sent by the defendants to the plaintiffs in the month of June 1917, have been completely misread and misapprehended by the learned Judge. Under these circumstances, we do not think that the findings of fact arrived at by the learned District Judge, vitiated as they are by an utter disregard of all rules of evidence, can be held to be binding on us in second appeal. After a careful review of all the correspondence that passed between the parties we cannot come to any other conclusion but that the contract with respect to the twenty cases in question was cancelled by the plaintiffs, and that they were consequently not entitled to claim any damages for their non-delivery. But even if we were to keep the letter of the 28th June aside, there can be no doubt whatever that the contract with respect to these goods was otherwise put an end to by the parties in view of the provisions of clause (8) of the indent. The plain meanings of this clause are that the purchasers, on receiving information from their sellers that there will be a late shipment, will either cancel the goods or extend time for their delivery as may suit them best, and that they shall have three days time within which to make their choice. If an election is not made within three days, it will be understood that the purchasers are not willing to extend the time and that the contract is rescinded. This clause is generally inserted in commercial contracts in the interest of both the parties, the sellers as well as the purchasers. The object is to have a speedy decision as to whether the purchasers will accept late shipment or not. If the purchasers are unable to make up their minds speedily the law will take its own course, and the contract will be deemed to have been cancelled. It seems to us that there is no room for any doubt as to the construction of this clause. The defendants in this case gave an intimation to the plaintiffs on the 18th June that the goods were late. According to plaintiffs' own showing, this letter reached them on the 20th June. They could have made their choice up to the evening of the 23rd, either to cancel the goods or to accept late shipment. They did neither, but kept on shilly shallying. The fact that the defendants gave them 24 hours within which to make their choice is of no importance and does not affect the contract itself under which the plaintiffs had three days to make an election. In our opinion, the plaintiffs having failed to make their choice by the evening of 23rd June, the contracts *ipso facto* came to an end, and we are wholly at a loss to understand how, under these circumstances, the plaintiffs could treat the contract as still subsisting and claim performance when they by their own silence had allowed it to be rescinded.

The next point urged by Bakhshi Tek Chand is, that the question as to whether plaintiffs were or were not entitled to claim damages, in view of the defendants' plea that the goods had been cancelled was a dispute within the meaning of clause (15) of the indent, and that it could be decided only by arbitration as provided for by this clause. It was contended that the plaintiffs had, in accordance with the provisions of clause (15), appointed Mr. S. Sunder as their arbitrator, and that the defendants had failed to nominate one in spite of the fact that a notice had been given to them requiring them to do so. The *ex parte* award given by the arbitrator was, under the circumstances, claimed to be a perfectly good award, and it was contended that the defendants having committed a default were not entitled now to challenge its validity. We are unable to agree with this contention. Before a party can be held bound by an award, it must be shown that it was a valid award and that all the requirements of the law with respect

(1) 58 Ind. Cas. 482; 2 U. P. L. R. (Pat.) 60.
(2) 56 Ind. Cas. 529; 2 U. P. L. R. (B. R.) 55.
(3) 54 Ind. Cas. 768; 2 U. P. L. R. (A.) 44.
(4) 65 Ind. Cas. 475; 1 L. L. J. 72.

to the appointment of an arbitrator and with regard to the actual reference to arbitration, had been duly fulfilled. The proceedings of the arbitrators must also be above board, and it must be shown that the arbitrator had given full opportiunities to both parties to appear and represent their case to him. In the present case, we do not understand what matters were referred to the arbitration of Mr. Sundar, and where was, in fact, the necessity to arbitrate? The contract with respect to the 20 cases now in suit had already been rescinded by mutual consent on the 28th June, and unless the whole thing was a huge swindle from beginning to end, one fails to see why the matter should have been at all referred to arbitration. Again, the notice given by Mr. Sundar to the defendants on the 8th October 1917 to nominate a surveyor within seven days was most defective and the defendants were fully justified in ignoring it. They had no dispute with Messrs. Mathra Parshad Bishambar Nath, and were consequently not bound to nominate a surveyor or an arbitrator on this notice in respect of a dispute with the *plaintiffs* which had been settled long before in June 1917. In our opinion, both the appointment of the arbitrator as well as the reference to arbitration were bad and not in accordance with the provisions of clause (8) of the indent. The arbitrator also does not appear to us to have acted quite fairly and squarely in this matter. His award is wholly one-sided and does not at all deal with the matter in dispute. He gives no finding as to whether an extension had or had not been agreed upon, and, if so, to what extent. He gives no finding as to whether the goods had or had not been cancelled in view of clause (8) of the indent and plaintiffs' own letter of the 28th June 1917. He gave no opportunity to the defendants to appear and to place their own version of the case before him. His letter of the 8th October 1917 related to some dispute with Messrs. Mathra Parshad-Bishamber Nath and cannot be taken as a valid notice to the defendants in respect of the matter in question. In short, the whole proceedings were most irregular, if not actually dishonest, and we have no hesitation in holding that the defendants are not bound by them.

There is only one more point which remains to be noticed. It has been contended on behalf of the defendants-appellants that the plaintiffs having failed to prove that they had agreed to late shipment or that they had granted an extension of time, they were still not entitled to claim any damages in this suit, even if the plea of cancellation of the goods put forward by the defendants was not established. Briefly put, the argument is that in a contract for the sale of goods the measure of damages upon a breach by the seller is the difference between the contract price and the market price on the *date of the breach* and not on any subsequent date. In the present case it is contended that the breach, if any, was in the months of June and July when, in accordance with the terms of the contract, the goods ought to have been supplied and were not delivered. Admittedly, the market price was lower than the contract price in these months and consequently plaintiffs had suffered no damages and were not entitled to claim any. In our opinion this is a perfectly valid contention. It is well settled that in a suit for breach of contract to deliver goods on a certain date the market price *on that date* is the standard for the computation of compensation and not on a later date on which the goods may have been demanded and refused. The position of a seller would be very precarious, indeed, if such were the case. He would be entirely at the mercy of his purchaser who could demand goods on any date he liked after the breach and then claim damages on the basis of the rates prevailing on that date if the goods remained undelivered. We are unable to hold that such could have been the intention of the Legislature in enacting section 73 of the Contract Act which is the only section under which compensation could be claimed and awarded in the present case and we, accordingly, find that the plaintiffs' suit was, in any case, bound to fail even if the plea of cancellation of the goods set up by the defendants was not established.

After a careful review of all the evidence and the circumstances of the case, we are of opinion that this appeal must be accepted and the order of the lower Appellate Court set aside.

We accordingly accept the appeal and, reversing the order of the District Judge, dismiss the plaintiffs' suit with costs throughout.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 370 B OF 1918.

Present :—Mr. Macnair, A. J. C.

SHEORAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JAMNABAI—DEFENDAT—RESPONDENT.

Mortgage—Foreclosure decree without impleading subsequent transferee—Suit to eject transferee, maintainability of—Proper remedy.

Where a purchaser from a mortgagee obtains a foreclosure decree without impleading a transferee from the mortgagor, for example a tenant whose rights were created subsequent to the mortgage, he cannot subsequently sue to eject him. His only remedy is to file a fresh suit for foreclosure against the transferee who would have an opportunity of redeeming him. [p. 504, col. 1.]

Hargu Lal Singh v. *Gobind Rai*, 19 A. 541; A. W. N. (1897) 154; 9 Ind Dec. (N. S.) 350 (F. B.), *Entholi Kizhakkikandy Kanaran* v. *Vallath Koylil Unnooli*, 30 M. 500, 17 M. L. J. 431, *Radha Pershad Misser* v. *Monohur Das*, 6 C. 317; 7 C. L. R. 293; 3 Ind. Dec. (N. S.) 207, referred to.

Appeal against a decree of the District Judge, Amraoti, in Civil Appeal No. 175 of 1915, dated the 31st July 1918.

Mr *R. N. Mudholkar*, R. B., for the Appellants.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—The *izara* village of Takli was mortgaged to certain persons in 1899. The plaintiffs in 1910 purchased the rights of the mortgagors. Later, they also purchased the right of the mortgagees who had in the meantime obtained a preliminary decree for foreclosure. In 1911 the plaintiffs obtained a final foreclosure decree. In the present suit the plaintiffs sue for possession of nine fields alleging that the deceased husband of the defendant (Paramsukh) was a yearly tenant whose tenancy has terminated.

The defendant pleaded that he was a permanent tenant in virtue of a permanent lease granted previous to 1899. The learned District Judge has held that Paramsukh was a permanent tenant but that his tenancy was created in 1900 by a deed (Exhibit D-1). He holds that the creation of this tenancy was not an ordinary act of management.

The position then is, that the owners of the village executed a mortgage in 1899. Subsequently, they transferred certain rights in the village to the defendant. The plaintiffs foreclosed in a suit to which the defendant was not a party. They now sue to oust the defendant. The learned District Judge has held that this suit as laid will not lie. The plaintiff must file a fresh suit for foreclosure impleading the defendant. The defendant can then redeem the plaintiffs if he chose. The suit for possession has, therefore, been dismissed.

The first ground of appeal is not pressed. It is admitted that a question of law may be raised in first appeal.

It is next urged that as the Transfer of Property Act was not applicable to Berar in 1899 the mortgagees were not bound to implead subsequent transferees. It is sufficient to say that the Act was extended to Berar in 1907, and the suit for foreclosure was brought subsequent in 1907.

Ground No. 3 has no force.

It is next urged that the plaintiffs, in virtue of the foreclosure decree, obtained all the rights of the mortgagors at the date of the mortgage. They are, therefore, entitled to oust subsequent transferees and do not require to bring a fresh suit for foreclosure.

This question was considered in *Hargu Lal Singh* v. *Gobind Rai* (1). In that case the plaintiff had brought a suit for sale on a simple mortgage and had purchased the property at the sale held in execution. Their Lordships held that the decree for sale being in a suit to which the defendants, who had purchased part of the mortgaged property after the date of the mortgage, were not parties, had no effect as against them and the plaintiff's purchase at the sale held under the decree conferred on him no title as against these defendants. This decision was followed in *Entholi Kizhakkikandy Kanaran* v. *Vallath Koylil Unnooli* (2). The case of *Radha Pershad Misser* v. *Monohur Das* (3) deals with facts which bear a similarity to those in the case I am considering. *A*

(1) 19 A. 641; A. W. N. (1897) 154; 9 Ind. Dec. (N. S.) 350 (F. B.).

(2) 30 M. 500; 17 M. L. J. 431.

(3) 6 C. 317; 7 C. L. R. 293; 3 Ind. Dec (N. S.) 207.

mortgaged certain property to *B*, agreeing not to grant a *zarpeshgi* lease of the mortgaged property. He subsequently granted a *zarpeshgi* lease to *C*. *B*, obtained a sale decree against *A*. on his mortgage and at the sale became the purchaser of the property. He brought a suit against *C*. to set aside the *zarpeshgi* lease and to obtain *khas* possession. His suit was dismissed. The learned Judge has remarked that the only course for the plaintiff would be to bring a suit against the *zarpeshgir* to have his right declared to sell the property to satisfy his mortgage-debt so as to give the *zarpeshgir* an opportunity of redeeming.

I see no reason to dissent from the decisions of three High Courts. The plaintiffs came into Court with the allegation that defendant was a yearly tenant; that is, they urged that the mortgagor could have ejected the defendant, and, therefore, they as his successors-in-title could do the same. Throughout the suit they have claimed a right to eject the defendant. Had the suit been for foreclosure other defences might have been raised. The defendant might have claimed the right to redeem and might have put forward various pleas regarding the amount due on the mortgage. If the defendant is a transferee the suit of the plaintiff must fail.

The only other point urged is, that Exhibit D-1, although a legal document, did not constitute a lease, but was merely an admission that the defendant had rights as lessee. This point has been considered by the learned District Judge. It seems quite clear that the parties intended to execute a legally binding document. There was no need for such a document if the executant merely intended to admit an existing state of things. This ground, therefore, fails. The appeal fails and is dismissed. The appellants must bear all costs in this Court. No argument was put forward in support of the cross-objection filed by the respondent. It is then sufficient to say that I do not see reason to interfere with the discretion of the lower Appellate Court with regard to costs. The objector must bear the costs of the cross-objection.

N. H. & G. R. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1146 OF 1920.

December 13, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

ISAP ALI—DEFENDANT No. 2—APPELLANT

versus

SATIS CHANDRA ROY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 49—Ejectment—Under-raiyat, whether can acquire occupancy right in homestead—Admission of evidence at appellate stage, propriety of—Civil Procedure Code (Act V of 1908), O. XLI, r. 27.

A settled *raiyat* of a village holding a homestead, though as an under-*raiyat* or under a *raiyat*, acquires a *raiyati* right in that homestead. It is not necessary that the homestead should be the only residential place of the *raiyat* of the village. [p. 505, col. 2.]

Krishna Kanta Ghosh v. *Jadu Kasya*, 28 Ind. Cas. 839; 21 C. L. J. 475; 19 C. W. N. 914, relied on.

It is not proper for an Appellate Court to admit evidence after the close of arguments. If it is necessary to admit evidence at the appellate stage for the proper adjudication of a case the Court may do so in strict observance of the provisions of Order XLI, rule 27, Civil Procedure Code. [p. 506, col. 1.]

Kessowji Issur v. *G. I. P. Railway Co.*, 31 B 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435; 34 I. A. 115 (P. C.), referred to.

Appeal against a decree of the Additional District Judge, Noakhali, dated the 23rd January 1920, revereing that of the Munsif, First Court at Lakhipore, dated the 23rd July 1918.

FACTS appear from the judgment.

Babu *Jatindrakumar Sen Gupta*, for the Appellant.—I beg to submit that my client cannot be evicted inasmuch as he is a settled *raiyat* having a right of occupancy. Section 49 of the Bengal Tenancy Act can have no operation against my client. It is a mistake on the part of the learned Judge to think that a homestead must, as a matter of course, be the only residential place of the *raiyat*. My point is that my client has his residence there. The Commissioner's report says that there is a hut on this homestead which is used for residential purposes. The learned Judge has erred in not following the authority of the case of *Krishna Kanta Ghosh* v. *Jadu Kasya* (1). A settled *raiyat* holding a

(1) 28 Ind. Cas. 839; 21 C. L. J. 475; 19 C. W. N. 914.

homestead though as an under-*raiyat* acquires a *raiyati* right in that homestead.

Babu *Komesh Chandra Sen*, for the Respondent, reads section 182, Bengal Tenancy Act. 'Homestead' is not used as a generic term. It means a group of houses where a man has his habitation. The very word *home* imports the idea of permanent residence. 'Home' is defined in Oxford Dictionary as the fixed residence of a family. I submit that it is not his homestead as it is meant for his temporary use only.

Refers to *Bhikariram Bhagat* v. *Maharaj Bahadur Singh* (2).

As to admission of evidence I admit that there has been some impropriety.

Babu *J. K. Sen Gupta*, was not called upon to reply.

JUDGMENT.—This appeal arises out of an action of ejectment under section 49 of the Bengal Tenancy Act. The Court of first instance dismissed the plaintiff's claim for ejectment on the ground that the defendants are settled *raiyats* in respect of the homestead from which the plaintiff wanted to eject them and that as such they could not be ejected under section 49 of the Bengal Tenancy Act. On appeal, the learned Additional District Judge held that the defendants had no occupancy right in the land in suit and were, therefore, liable to eviction under section 49.

The defendants have appealed and attacked the judgment of the Court of Appeal below on the ground that the finding arrived at by it with regard to the character of the homestead is not sufficient for the disposal of the issue. The learned Judge says in his judgment that "only a hut has been erected in this land for temporary use. It may exist from a long time as shown by Exhibit B. Still, it cannot be said to be the indispensable homestead of the defendants." The learned Judge seems to be under the impression that a homestead must necessarily be the only residential place of the *raiyat* of the village. He does not seem to be positive with regard to the character of the hut standing on this homestead.

It appears that in the Court of first instance a Commissioner was appointed to hold a local investigation and his report speaks of the existence of a hut on this homestead which is used for residential purposes by one of the defendants. The learned Judge does not refer to this piece of evidence. We are not sure if he has taken that into consideration in coming to a finding on this point.

The Court of Appeal below seems to have erred on another point. He states that an under-*raiyat* holding a homestead even if he happens to be a settled *raiyat* of the village can only acquire right of occupancy in the homestead by local custom or usage. As there is no evidence of such local custom or usage, the learned Judge has held that the defendants have failed to prove their *raiyati* right to the homestead. On this point there is sufficient authority of this Court for holding that a settled *raiyat* of the village holding a homestead, though as an under-*raiyat* or under a *raiyat*, acquires a *raiyati* right in that homestead, *Krishna Kanta Ghosh* v. *Jadu Kasya* (1).

The judgment of the Court of Appeal below not being satisfactory and the Court not having come to a distinct finding with regard to the character of the hut on the homestead in consideration of the whole evidence on the point, we are of opinion that this case ought to be remanded to that Court for a re-hearing of the appeal. We accordingly set aside the decree of the Court of Appeal below and send the case back for re-hearing on the merits.

There is one other point to which we like to draw the attention of the lower Appellate Court. On the 22nd January 1920 the learned Judge passed the following order: "Arguments heard. Copy of decree in T. Suit No. 210 of 1892 marked Exhibit 5 received in evidence subject to objection for the plaintiff appellant. Judgment will be delivered on 23rd January 1920." It is not clear from this order whether the evidence was admitted by the learned Judge before or after he had heard the arguments in the case. The order as it stands indicates that the additional evidence was received after the arguments. Apart from the impropriety of admitting evidence at that stage of the case, we may refer the learned Judge to the provisions of Order XLI, rule 27, Civil Procedure Code, and the observation of the Judicial Committee in the case of *Kessowji Issur* v.,

(2) 34 Ind. Cas. 152; 43 C. 195; 25 C. L. J. 357.

G. I. P. Railway Co. (3). If the lower Appellate Court still thinks it necessary to admit that piece of evidence for the proper adjudication of the case he may do so in strict observance of the provisions of Order XLI, rule 27, Civil Procedure Code.

Costs will abide the result.

B. N.

Case sent back.

(3) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435; 34 I. A. 115 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 41 OF 1919.

July 14, 1921.

Present:—Mr. Hallifax, A. J. C.

GOPIKISAN AND OTHERS—DEFENDANTS Nos. 3, 4, 5 AND 8—APPELLANTS

versus

BULAKIDAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 7 (3)—Suit in forma pauperis—*Court-fee, payment of, during inquiry into pauperism, effect of—Withdrawal of application.*

Where a person applies for leave to sue as a pauper, and along with his application presents a plaint, but during the course of the inquiry into his pauperism, he files the requisite Court-fee, the suit, for the purposes of limitation, must be treated as having been instituted on the day on which the original application for leave to sue as a pauper was made, and not on the day when the Court-fee was filed. The withdrawal of the application to sue as a pauper which is involved in the subsequent payment of the Court-fee is not equivalent to a refusal of permission such as is contemplated by rule 7 (3), Order XXXIII of the Civil Procedure Code. The withdrawal is an admission of nothing more than that at the time of payment the applicant is no longer a pauper. It is a submission to an order of dispauperisation under rule 9 (*b*), not to one of refusal of his original application. [p. 507, col. 1.]

Appeal against a decree passed by the Subordinate Judge, Balaghat, dated the 28th April 1919, in Civil Suit No. 48 of 1918.

Mr. *K. V. Deoskar*, for the Appellants.

Messrs. *G. L. Subhedar* and *Abdul Rahim*, for the Respondent.

JUDGMENT.—The plaintiffs sued as reversionary heirs of one Anupchand, a Maheśri Bania, who died about 1883. They alleged that his widow, Bakhtawar Bai, died on the 13th of August 1905; and on the 13th of August 1917, which was a Monday, they filed an application to be allowed to sue as paupers and a plaint with it. The other party denied their pauperism and an enquiry was opened. After the examination of some of the witnesses of both sides the plaintiffs, on the 9th of August 1918, put in the Court-fee stamps required for their plaint and the suit was registered. The claim was resisted on three points, the allegation that Bakhtawar Bai died on the 11th and not on the 13th of August 1905, the contention that as the application for leave to sue *in forma pauperis* was withdrawn the suit must be taken to have been instituted on the 9th of August 1918 and not on the 13th of August 1917, and the allegation that Sheodas, deceased, father of the defendant Gopikishan, had been adopted by Bakhtawar Bai as a son to her husband Anupchand in 1887.

It will be convenient to consider, first, the question of the date on which the suit is to be taken to have been instituted. In *Skinner* v. *Orde* (1) it was held by the Judicial Committee of the Privy Council, in circumstances which can in no way be distinguished from those of the present case, that the suit must be treated as if the plaint had been filed and registered on the day on which the original application for leave to sue as a pauper was made. This ruling was distinguished by the Allahabad High Court in *Abbasi Begam* v. *Nanhi Begam* (2) as having been given under the previous Civil Procedure Code, Act VIII of 1859, and not applying to the Code then in force, which was Act XIV of 1882. The latter Act was still in force when the Calcutta High Court, dissenting from the Allahabad

(1) 2 A. 241; 4 C. L. R. 331; 6 I. A. 126; 3 Ind. Jur. 334; 4 Sar. P. C. J. 31; 3 Suth. P. C. J. 627; 1 Ind. Dec. (N. S.) 708.

(2) 18 A. 206; A. W. N. (1896) 33; 3 Ind. Dec. (N. S.) 843.

view, held in *Janakdhary Sukul* v. *Janki Koer* (3) that, in this respect, there was no difference between the provisions of the two Acts. The correct decision of these two, whichever it may be, is still the correct decision under the present Code (Act V of 1908), which has made no change in the law in this particular matter. The learned Subordinate Judge preferred the Calcutta view, and I agree with him. But even if the decision in *Skinner* v. *Orde* (1) ought to be considered obsolete, there seem to me to be cogent reasons for thinking the same view is the correct view of the provisions of the present Procedure Code. The learned Judges of the Allahabad High Court seem to have regarded the withdrawal of the application, which is involved in subsequent payment of the Court-fees, as equivalent to a refusal of permission by the Court such as is contemplated by rule 7 (3) of Order XXXIII of the Code; that is to say, they regarded the payment as an admission that the applicant was not a pauper at the time he put in the original application. But the payment is an admission of nothing more than that the applicant is, at the time of payment, in possession of means to make it and is no longer a pauper, and the withdrawal is a submission to an order of dispauperisation under rule 9 (*b*), not to one of refusal of his original petition. Now, in the case of dispauperisation rule 9 and rule 11 clearly contemplate the continuance of the suit as a suit filed on the day on which the original application for leave to sue as a pauper was made. I hold, therefore, that the present suit was instituted on the 13th of August 1917.

Note.—The rest of this judgment is not material for the purposes of this report—[*Ed.*]

W. C. A.

Appeal allowed.

(3) 28 I C. 427.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 377 OF 1920.

January 16, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

Thakur BECHU SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BALDEO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Rent Act (XII of 1881), s. 9—Succession—Sharing in cultivation—Hindu Law—Reversioners.

Where succession to the estate of an occupancy tenant opened out prior to the passing of the Agra Tenancy Act, the succession is governed by the Agra Rent Act, XII of 1881, and not by the ordinary rule of Hindu Law, and a collateral can only inherit if he was joint in cultivation with the deceased tenant. [p. 509, col. 1.]

Bisheshar Ahir v. *Dukharan Ahir*, 32 Ind. Cas. 771; 14 A. L. J. 127; 38 A. 197, *Bhup Singh* v *Jai Ram*, 46 Ind. Cas. 387; 16 A. L. J. 459; *Nathu* v. *Gokulia*, 30 Ind. Cas. 215; 37 A. 658; 13 A. L. J. 947 referred to.

Second appeal from a decree of the Additional Judge, Allahabad, dated the 8th January 1920.

Mr. *Pearey Lal Banerji*, for the Appellants.

Dr. *Kailash Nath Katju*, Messrs. *Haribans Sahai* and *Kanhya Lal*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows:—

One Ram Kirpal was an occupancy tenant of 31 *bighas* 9 *biswas*. He mortgaged 14 *bighas* 17 *biswas* in 1896 and in 1897; that is to say, there were two mortgages in favour of Sheonandan Singh. Ram Kirpal died before the present Tenancy Act came into force, that is, before 1902, and he was succeeded in the tenancy by his widow *Musammat* Suneta. It appears that the rent for the years 1309 and 1310 Faeli fell into arrears and the Zemindar brought a suit to eject *Musammat* Suneta and the mortgagees. This was decreed by the Trial Court and on the 16th of April 1904 the Zemindar got possession. Afterwards, however, on the 13th of September 1905, the ejectment proceedings were quashed by the Board of Revenue and the possession of *Musammat* Suneta, or rather, she having died, that of Baldeo Prasad as her representative, was restored on the 13th of October 1905. Thereafter, the mortgagees in 1908 brought a suit against Baldeo Prasad to recover possession. That suit was compromised and according to the compromise it was agreed

that the mortgage money was ascertained to be Rs. 600 and the mortgagees were given possession of some of the original mortgaged plots. In 1916 Baldeo Prasad redeemed the mortgage and recovered possession of the whole. This suit was brought in 1917 by the plaintiffs who alleged that they were members of a joint undivided family with Ram Kirpal Singh at the time of his death 18 years ago and also, apparently, that on the death of *Musammat* Suneta Kunwar they were the next reversioners. They pleaded in paragraph 10 of the plaint that the cultivatory holding in dispute was jointly held by Ram Kirpal Singh and the plaintiffs and the said land was jointly cultivated and the defendants had nothing to do with it and were in wrongful possession. They, therefore, prayed for possession of the mortgaged property on payment of Rs. 600, the mortgage-money paid by the defendants. They also claimed mesne profits. The defendants denied that the plaintiffs were the next reversioners, or that they had been joint with Ram Kirpal Singh. They also denied that the plaintiffs were in joint cultivation of the land with Ram Kirpal Singh. They further pleaded that Ram Kirpal Singh had adopted defendant No. 1 as his son.

The Trial Court came to the conclusion that the plaintiffs and Ram Kirpal were not members of a joint Hindu family. It also found that the defendant No. 1 was not the adopted son of Ram Kirpal Singh. It was admitted in the Trial Court that the plaintiffs were the next reversioners to Ram Kirpal Singh. The Court then went on to hold that as Ram Kirpal Singh had died before the present Tenancy Act came into force the succession to the holding after the death of his widow would be governed by the provisions of the ordinary Hindu Law, purporting to rely on the case of *Bisheshar Ahir* v. *Dukharan Ahir* (1). In the result, the Munsif decreed possession to the plaintiffs on payment of Rs. 600 within three months from the date of his decree. Both parties went up in appeal. The learned Judge of the lower Appellate Court has confirmed the findings of the Trial Court on questions of fact involved in the case but has held that the case of *Bisheshar Ahir* v. *Dukharan Ahir* (1) did not lay down that the proviso to section 9 of the Rent Act (XII of 1881) did not apply and that the plaintiffs having failed to prove joint cultivation with Ram Kirpal Singh, deceased, were not entitled to succeed.

The plaintiffs come here in second appeal and the contention urged by their learned Vakil comes to this, that, having regard to a series of decisions of this Court, the ordinary Hindu Law had to be applied and not the old Rent Act (XII of 1881) and reference was made to the cases of *Bisheshar Ahir* v. *Dukharan Ahir* (1), *cf. Bhup Singh* v. *Jai Ram* (2) and *Nathu* v. *Gokalia* (3). In our opinion, none of these cases decides the point raised in this appeal. The question is, whether in the case of a tenant who had died before the present Tenancy Act came into force succession was to be governed under the new Tenancy Act. Having regard to the provisions of that Act it has been decided that the present Tenancy Act would have no retrospective effect so as to affect a succession to the holding of such a tenant. But the point whether the succession to such a tenancy would be governed by Hindu Law proper or by the Hindu Law as modified by the Rent Act (XII of 1881) has not, so far as we know, been the subject of decision in any case in this Court.

In the case of *Bisheshar Ahir* v. *Dukharan Ahir* (1) the dispute was between the sons of two daughters who had succeeded their mother to an occupancy holding which had been left by their father who had died before the Tenancy Act came into force. The Judges in that case held that, in cases where the Tenancy Act was silent, the succession would be governed by the ordinary Hindu Law.

In that case the daughters' sons only became entitled to the tenancy after the death of the last surviving daughter which happened long after the present Tenancy Act had come into force. Their rights did not come into existence on the death of the last full holder, the original tenant, their maternal grandfather. That case, therefore, does not help us in the case now before us.

In the case of *Bhup Singh* v. *Jai Ram* (2) it seems to have been assumed or taken for

(1) 32 Ind. Ca. 771; 14 A. L. J. 127; 38 A. 197.

(2) 46 Ind. Cas. 387; 16 A. L. J. 459.
(3) 30 Ind. Cas. 215; 37 A. 658; 13 A. L. J. 947.

granted that, if the Tenancy Act (II of 1901) did not apply, succession would be governed by the Hindu Law. Section 9 of the Rent Act of 18 1 does not seem to have been brought to the notice of the learned Judges who decided that case and it certainly was not considered.

The case of *Nathu* v. *Gokalia* (3) is beside the point, inasmuch as in that case, whether the Hindu Law applied or section 9 of Act XII of 1881 applied, the result would have been the same. In that case, too, section 9 of Act XII of 1881 was not discussed.

In the present case it appears that the original tenant, Ram Kirpal, died before the Tenancy Act came into force. The succession to his estate was governed by Act XII of 1881 and a collateral could not inherit his property unless he was joint in cultivation with him. The plaintiffs founded their claim on the ground that they were members of a joint Hindu family with the deceased tenant and were as such interested in the cultivation. This issue has been found against them. It is true that there is no finding by the lower Appellate Court that they were not joint in cultivation with the deceased tenant. If the plaintiffs were not joint with Ram Kirpal the whole fabric of their suit collapses. We do not see how they can claim a title to the tenancy. As we have stated above, the succession opened out to the estate of Ram Kirpal when the Rent Act of 1881 was in force. The actual possession of the plaintiffs, if they were then in existence, was merely postponed during the lifetime of the widow [See *Dulari* v. *Mulchand* (4)]. If the widow had not been in existence they could not have succeeded unless they had a share in the cultivation. If they were not in existence at that time, they could not certainly come in as reversioners who had shared in the cultivation. Their rights arose then and as their joint cultivation was based on the family being joint which has been found against them we think the lower Appellate Court was right in dismissing their suit. We, therefore, dismiss this appeal with costs including in this Court fees on the higher scale.

W. C. A. *Appeal dismissed.*

(4) 5 Ind. Cas. 384; 32 A. 314; 7 A. L. J. 293.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1546 OF 1919.

December 8, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

Syed MOHAMMED NURAL HUQ—DEFENDANT No. 1—APPELLANT

versus

BAKSU MANDAL—PLAINTIFF AND KORBAN CHOUDHRY AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

Easement—Waste land, right of easement on, whether can be acquired—Question of right, determination of—Court, duty of—Appeal—Appellate Court, duty of, in reversing judgment of first Court.

The mere fact that land is waste does not necessarily show that no right of easement can be acquired over it. [p. 510, col. 2.]

Shaikh Mahomed Ansur v. *Shaikh Sefatoollah*, 22 W. R. 340, relied on.

In determining the question whether an user of way over waste land was as of right or not, a Court has to consider the character of the land, the relation between the parties and the circumstances under which the user took place. [p. 510 col. 2.]

Shaikh Khoda Buksh v. *Shaikh Tajuddin*, 8 C. W. N. 359 at pp. 360, 361, relied on.

In reversing the judgment of a first Court an Appellate Court should take into consideration the evidence relied upon by the Court of first instance. [p. 510, col. 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Burdwan, dated the 16th of May 1919, reversing a decree of the Munsif, Fourth Court, at that place, dated the 28th of May 1918.

FACTS appear from the judgment.

Dr. *Jadunath Kanjilal*, for the Appellant.—The defendant No. 1 is the appellant. The appeal arises out of a suit for recovery of possession of the land in dispute after declaration of his title thereto. First Court decreed the suit. On appeal the suit was remanded. On remand the first Court held that there was a pathway and that I have got a right of easement over it. The lower Appellate Court has reversed that decision. My point is that it is not a case under section 26 of the Indian Limitation Act. I set up a customary right. The first Court referred to the documents produced by the plaintiff in upholding my plea. The Appellate Court has overlooked those documents as well as the oral evidence adduced in the case. It has also ignored the report of the Commissioner

It further says that the land being waste there could be no right of easement over it at all. I submit continual user is not necessary at all on the part of each and every villager where the right set up is customary. It would be necessary only in cases of right of private way. Refers to *Shaikh Mahomed Ansur* v. *Shaikh Sefatoolla* (1).

Babu *Sarat Chandra Mookerjee*, for the Respondents.—The learned Judge distinctly finds that the manner in which the path has been used by the villagers does not constitute and establish customary right. Where there is an easement right conferred by Statute, the customary right would not prevail. Whereas unreasonableness of right by custom has got to be looked into. Refers to *Syed Ali* v. *Sarjan Ali* (2).

Dr. *Jadunath Kanjilal* replied in brief.

JUDGMENT.—The plaintiff brought the suit, out of which this appeal arises, for recovery of possession of the land in dispute after declaration of his title thereto.

The defendants, representing the villagers, set up a right of passage for men and cattle over the land, they further set up a right of passage of rain water of the village through the disputed land to the Sana tank to its west from which water is taken for irrigation of neighbouring lands and also a right to bale out water from it for purposes of irrigation.

The Court of first instance held that the defendants had proved the rights set up. Accordingly, the plaintiff's title to the land was declared subject to the rights found in favour of the defendants.

On appeal, the learned Subordinate Judge reversed that decision, and gave the plaintiff a decree for possession. He has come to the conclusion that the defendants failed to prove the rights set up by them. That would, no doubt, be conclusive in second appeal. But it appears that the Court of first instance relied not only upon the evidence of the defendants but also upon certain evidence adduced on behalf of the plaintiff himself in coming to the conclusion that the defendants had proved their right.

(1) 22 W. R. 340.
(2) 19 Ind. Cas. 390; 18 C. W. N. 735.

The learned Munsif refers, in the first place, to a *kabuliyat* in which the disputed land is described as *gopath nala patit jayga*.

Secondly, he refers to the statement of the plaintiff's witness Serajuddi, *viz.*, that the villagers and their cattle used to pass over the disputed land. And, thirdly, he refers to the Commissioner's report which describes the physical features of the land.

The learned Subordinate Judge on appeal refers to the evidence adduced on the defendant's side and then says: "I do not understand how that evidence can lead to the conclusion that defendants and villagers of Bhota have got a right of way over the disputed land and a right to take water from the same." Evidently, therefore, the learned Judge had not considered some of the materials upon which the Court of first instance relied in coming to the conclusion in favour of the defendants. Having regard to the fact that the judgment was one of reversal, we think that the evidence relied upon by the Court of first instance should have been taken into consideration by the learned Subordinate Judge.

Then the Subordinate Judge says: "It is an admitted fact that the disputed land was waste land—and it is well-known how such lands are used in the Mofussil. Such possession does not ordinarily create any right in the persons using the same."

The mere fact that the land is waste, however, does not necessarily show that no right can be acquired over such land. If that were so, the right of user over almost every pathway in the Mofussil would be lost, inasmuch as almost every pathway lies over waste land: see *Shaikh Mahomed Ansur* v. *Shaikh Sefatoollah* (1)].

In determining the question whether an user of way over waste land was as of right or not, the Court would have to consider the character of the land, the relation between the parties and the circumstances under which the user took place. We may, in this connection, refer to the case of *Shaikh Khoda Buksh* v. *Shaikh Tajuddin* (3). These questions do not seem to have been considered by the Subordinate Judge.

(3) 8 C. W. N. 359 at pp. 360, 361.

Lastly, the learned Subordinate Judge refers to the fact that there is no evidence as to from which house or lands, or to which place, men and cattle pass over the disputed land. Evidently, he treated the case as if it was one of prescriptive right under section 26 of the Limitation Act. There is no doubt that in an earlier passage in his judgment he referred to the fact that the right was claimed on behalf of the defendants and the villagers, but after discussing the evidence he seems to have forgotten it and come to the conclusion that the defendants had wholly failed to prove *public* or *private* right over the disputed land.

No right, however, on behalf of the *public*, meaning thereby the *general public*, was set up nor does it appear that any individual right was claimed. The right set up was a customary right on behalf of all the villagers.

It is contended by the learned Pleader for the respondent that such a right is more difficult to prove than a right of easement under section 26 of the Limitation Act. That may be so, but the question has to be gone into by the lower Appellate Court.

We think the learned Judge should consider the case as set up by the defendants and decide the case upon the whole evidence on the record.

The case will, therefore, go back to the lower Appellate Court in order that it may come to a decision in accordance with the observations made above and dispose of the appeal according to law.

Costs to abide the result.

J. P. & B. N.

Case sent back.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 536 OF 1920.

January 18, 1922.

Present :—Mr. Justice Gokul Prasad and Mr. Justice Stuart.

BADRI PARSHAD—DEFENDANT—APPELLANT

versus

MOHAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Explanation IV—Res judicata—*Suits by Hindu son to avoid father's debts—Want of necessity and immoral nature of debts, pleas of—Precedent—Dutys of Courts to follow rulings of own High Court in preference to other Courts.*

In execution of simple money-decrees against *L. B.* put the immoveable properties of *L.* and his son *M.* to sale. *M.* brought a suit for a declaration that the properties were joint family properties and there being no legal necessity, they could not be sold. *M.*, however, did not allege that he was not liable as the debts were of a nature which he was not liable under the Hindu Law to pay. The suit was dismissed. The property was sold and *M.* brought the present suit for a declaration that the debts were tainted with immorality and he was not liable. The first Court dismissed the suit holding that it was barred by *res judicata*, the lower Appellate Court held that it was not barred. On appeal of the defendant:

Held, that the suit was barred by *res judicata* as the present ground of attack that the debt was tainted with immorality ought to have been made a ground of attack in the previous suit if *M.* wanted to avoid the sale of family property. [p. 512, col. 1.]

A Court is bound to follow the ruling of the High Court to which it is subordinate in preference to the ruling of other High Courts where the two Courts differ. [p. 512, col. 1.]

Second appeal from a decree of the Subordinate Judge, Badaun, dated the 31st January 1920.

Mr. *Harnandan Prashad*, for the Appellant.

Mr. *Benoy Kumar Mukerjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for a declaration that the property in suit was not liable to sale in execution of two decrees. The facts appear to be as follows. One Badri Prasad had two simple money-decrees against Lal Singh, the father of the plaintiff, and two other persons. He put those decrees in execution, had the property in dispute sold at auction on the 22nd of April 1919 and purchased it himself. Before this sale, however, Mohar Singh, the present plaintiff, and one of the

sons of he judgment-debtor had brought a suit for a declaration that the property in dispute was joint family property and as such was not liable to sale in execution of those decrees. In that suit the plaintiff's allegation was that the debts were not taken for family necessity but were taken by other persons for whom the plaintiff's father stood surety. In that suit the question of the non liability of the son to pay the amount of the decrees on the ground of the father's immorality, or that the debts were of a nature for which the son was not liable under the Hindu Law was not raised. That suit was dismissed. The decree was allowed to become final and afterwards the present suit was brought to avoid the sale on the ground that the debts were tainted with immorality. The first Court came to the conclusion that the present suit was barred by the rule of *res judicata*. It might be mentioned here that the plaintiff is a minor, and the present suit was brought through a next friend other than the one through whom the first suit had been filed. The learned Judge of the lower Appellate Court has come to the conclusion, following a ruling of the Madras High Court in preference to a ruling of this Court, that the present suit is not barred by the rule of *res judicata* and has decreed the claim for setting aside the sale. He has not come to any finding on the question whether the debts were tainted with immorality or not. We think it necessary to invite the lower Court's attention to the recognised principle that it is bound to follow the ruling of this Court in preference to the ruling of other High Courts where the two Courts differ. We think that the Judge of the Court below was distinctly in error in trying to follow a rule of law laid down by the Madras High Court saying that, where there are mixed questions of law and fact, the rule of *res judicata* would operate but it would not so operate if there is a wrong decision on a pure question of law. The cases cited by the Court below were mostly cases for enforcement of recurring liability such as either suits for rent, or suits for maintenance. To those classes of suits different considerations apply. The present suit is clearly barred by the rule of *res judicata*. The present ground of attack, namely, that the debts were tainted with immorality, ought to have been made a ground of attack in the previous suit if the plaintiff wanted to avoid the sale of family property. In our opinion, it is not open to the plaintiff now to avoid the sale on that ground. In our opinion, this appeal must be allowed. We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge and restore that of the Court of first instance with costs in all Courts.

J. P.

Appeal allowed.

CALCUTTA HIGH COURT.
ORIGINAL CIVIL RULE No. 11 OF 1921.
December 13, 1921.
Present:—Mr. Justice Suhrawardy and Mr. Justice Ghose.
GURUDAS KUNDU CHOWDHURY AND OTHERS—DEFENDANTS—PETITIONERS
versus
DASARATHI HALDAR AND ANOTHER—PLAINTIFFS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115—Error of judgment or law—Revision.

A High Court in revision, under section 115 of the Civil Procedure Code, cannot interfere with any error of judgment or of law committed by a Subordinate Court where another remedy is available. [p 513, col. 1.]

Rule against an order of the Court of the Sub-Judge, Howrah, in Money Appeal No. 104 of 1919.

FACTS appear from the judgment.

Babu *Gunoda Charan Sen*, for the Petitioners.—The petitioner had granted a *ticca* lease to the opposite party who built a hut on the land but they were evicted by the Municipality and the hut was removed. The present Rule arises out of a suit by the opposite party for damages against the petitioners.

The question is, whether it is a case of eviction by title paramount. The lower Appellate Court ought to have considered the question of misrepresentation and fraud on which point the Trial Court found for the petitioners. Then again the claim for damages is not maintainable for want of necessary parties,

[GHOSE, J.—Conceding that there has been a mistake of law, how do you come under section 115, Civil Procedure Code ?]

The Court acted illegally or with material irregularity in not going into the question of fraud and misrepresentation. If any one is responsible, it is the entire body of lessors and not some of them. Reads section 108 of the Transfer of Property Act. The condition that ought to have been satisfied is, that the lessor himself had a hand in the ouster or that the person claiming title paramount must have established his title in a Court of Justice. Refers to *Muktar Ahmad* v. *Rani Sundar Koer* (1).

Babu *Dhirendra Lal Kastgir*, for the Opposite Party, was not called upon to reply.

JUDGMENT.—We fail to see how we can interfere in this matter under section 115, Code of Civil Procedure.

Two points have been raised before us, first, that the learned Subordinate Judge ought to have considered the question of misrepresentation and fraud on which point the Court of first instance found for the defendant; and, secondly, that the District Board and the co-sharer landlord of the defendant ought to have been made parties to this suit.

Apparently, both these points have been satisfactorily dealt with by the learned Subordinate Judge. But if he had committed any error of judgment or of law this Court cannot interfere under section 115, Code of Civil Procedure.

The Rule is, therefore, discharged with costs. Hearing-fee one gold *mohur*.

B. M.

Rule discharged.

(1) 19 Ind. Cas. 815; 17 C. W. N. 960.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NOS. 82 OF 1919.

January 19, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

RAM DASS AND OTHERS—PLAINTIFFS—APPELLANTS.

versus

S. MOHAMMAD FAQIR *alias* MOHAMMAD RASHID AND OTHERS—DEFENDANTS—RESPONDENTS.

Costs, suit for, maintainability of—Damages for being driven to litigation, suit for.

An independent action cannot be maintained to recover the balance of costs over and above that awarded by the Court which tried the matter. [p. 514, col. 1.]

Where, under any particular proceeding, a Court is not empowered to grant costs, no costs can be granted in an independent action by any other Court [p. 514, col. 1.]

A person cannot bring a suit to recover damages for having had to resort to litigation to protect his right Such damages are too remote, and the action is nonsensical. [p. 514, col. 2.]

Letters Patent Appeal against a decree of Sir George Knox, KT., Acting Chief Justice, dated 25th of April 1919.

Mr. *Uma Shanker Bajpai*, for the Appellante.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—On the 20th of January 1908 Muhammad Zahid granted a lease to one Bhola Ram and Sarda Prasad of a share in a certain market. That lease was not to take effect until the 22nd of June 1912, because at that time other lessees were in possession of the market. On the 21st of June 1912 Muhammad Zahid executed another lease of the same share in favour of *Musammat* Lalta Bibi. That led to litigation between Bhola Ram and Sarda Prasad and Muhammad Zahid. Muhammad Zahid was in the wrong because he had contracted to give possession to Bhola Ram and Sarda Prasad on June 22nd 1912. There were proceedings before the Magistrate, initiated by Bhola Ram. There were proceedings in revision in the High Court. There was also a remand by the High Court to the lower Court and a second hearing in the High Court, and there is no doubt whatever that Bhola Ram and Sarda Prasad who were in the right in the matter from the beginning were put to very considerable expense in the course of

this litigation. Bhola Ram died somewhere about the year 1913 and on the 25th of February 1915 Mr. Kanhaiya Lal, a Vakil, evolved a plaint which he thought was good enough to be filed in the Court of the Subordinate Judge, and by that plaint he alleged a right in the plaintiffs to recover various heads of damages. The plaint is a document which has had a good deal of criticism passed upon it here during the argument in this case and, therefore, it ought to be looked at a little carefully, because it is the foundation of the plaintiffs' case, and if, on an examination of that document, no cause of action is disclosed, the proper course would have been for the Subordinate Judge to have struck the whole of the claim out, and that would have saved the Subordinate Judge and, to some extent, the District Judge from having a confused notion that this was some species of action which had some sort of relationship to an action for malicious prosecution. There is no doubt that, although we do not find the words "malicious prosecution" used in this case, all those Courts thought that this case had some affinity to a claim of that kind. We propose to show that it was not an action based on malicious prosecution and we propose to demonstrate that it was an action making claims for damages which were in law too remote. Once we appreciate the principles on which damages are said to be too remote, the whole action falls to the ground. Now, it is to be remembered that the original application to the Magistrate was by Bhola Ram and Sarda Prasad. They had a perfect right to make that application, but every body knows that when a complainant, or a plaintiff, commences an action in Court, the probability is that, even if he be successful, the amount of costs which may be awarded to him will not indemnify him against the actual necessary expenses of the suit or proceedings. It is clear law that an independent action cannot be maintained to recover the balance of costs over and above that awarded by the Court which tried the matter. It is equally clear that if, under any particular proceeding, the Court is not empowered to grant costs, no costs can be granted in an independent action by any other Court. If those two very simple propositions of law had been in the mind of the Subordinate Judge and the District Judge, the backbone of this case would have been broken at once.

There now comes a different point. It is said that the heirs of Bhola Ram can recover damages for the pain and suffering which Bhola Ram was put to in having to institute proceedings and it may be that in paragraph 9 of the plaint the descendants of Bhola Ram also claim to have damages as well. If such a claim is maintainable and is not in law too remote, then every plaintiff in a civil action, who commences a case against a defendant, and who, after successive stages of litigation, proves that he was right in commencing that action, can at its conclusion bring a claim for damages for the anxiety occasioned to him by having to institute a suit to enforce his rights. The proposition has only to be stated to show how nonsensical the whole thing is, and nonsensical is the right word to apply to this action, which is one that ought never to have been brought. It ought to have been disposed of without any ceremony at the outset.

The appeal is, therefore, dismissed with costs including fees on the higher scale.

J. P. & N. H.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 399 OF 1920.

May 30, 1921.

Present:—Mr. Daniels, J. C.

MOHAMMAD RASHID-UD DIN ASHRAF—PLAINTIFF—APPELLANT

versus

RAM SUKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Estates Act (I of 1869), Sch. I—Letters of Government, effect of—Under-proprietary rights in Oudh before Annexation—Restoration of rights—Proof, nature of.

Before a pre-mutiny root of title can be relied on in Oudh, it is necessary to show that that title has been recognised by the British Government

after the date of Lord Canning's Proclamation either by an entry in the Settlement Records or by a Settlement decree, or in some other way. [p. 5 6, col 2.]

The letters of the Government of India of 10th and 19th October 1859, which are appended as Schedule I to the Oudh Estates Act, have not the effect to restore all under-proprietary rights which existed before the annexation of Oudh. [p. 516, col. 2.]

Oudh Bihari Singh v. *Suraj Bali*, 53 Ind. Cas. 98; 22 O. C. 201; 6 O. L. J. 394 and *Jehan Kadr* v. *Afsar Bahu Begum*, 12 C. 1; 12 I. A. 124; 4 Sar. P. C. J. 630 (P. C.); Rafique and Jackson's P. C No. 91; 9 Ind. Jur. 322; 6 Ind. Dec. (N. S.) 1, referred to.

Appeal against a decree of the Subordinate Judge, Barabanki, dated 4th September 1920, upholding that of the Munsif, Fatehpur, dated 17th April 1920.

Mr. *Nizmat-Ullah*, for the Appellant.

Messrs. *A. P. Sen* and *Rameshri Prasad*, for Respondents Nos. 2 to 4.

JUDGMENT.—This appeal arises out of a suit brought by the Talukdar of Karkha, who is the appellant in this Court, against the defendants, Ram Sukh and three transferees from him, for a declaration that the defendants have no under-proprietary right in plot No. 13 (old No. 5) in the village of Paisar, but are mere grove-holders. The plaintiffs also asked for their ejectment on the ground that they had forfeited their rights by denying his title. The defendants based their title on a *bakhshishnama* (deed of gift) executed in 1264 Hijri (1846 A. D.) by the then Talukdar, Chaudhri Karamat Ali, in favour of Sukh Lal, the great grand father of the first defendant. This deed has been presumed genuine by the Court below. It is in Persian, the translation being as follows:—

The reason for writing the following lines is as follows:—

Whereas Sukh Lal Kalwar had planted a grove in one *bigha* ten *biswas* land in Mauza Rasulpur, I having received Rs. 15 current coins, have gifted the said land (to him). If, perchance, any one of the declarant and his relations lay a claim thereto it would be false and void.

Wherefore, these few words have been reduced to writing by way of a deed of gift and duly delivered (to the donee), so that the same may serve as an authority and be of use when required. Dated 21st Shawwal, 1264 A. H.

(Here follows the statement of the boundaries).

Other defences were also raised but have not been considered by the Court below, though on some of them, such as the important issue of adverse possession, findings were recorded by the Trial Court. Two questions only have been argued in this Court,—

(1) Whether the *bakhshishnama* conferred under-proprietary right.

(2) If so, whether this alone is sufficient to establish the defendants' title.

On the first question I agree with the Courts below that the language of the deed indicates an intention to confer under-proprietary rights. The words "I have conferred the land" and "if I or any of my relations make a claim to it, it will be null and void," are strongly in favour of this view. The land was not given for planting a grove as in the case of ordinary grove-holders, for the grove was already in existence when the *bakhshishnama* was executed. That a heritable right was conferred is not disputed by anybody. The land has already descended in the family of the grantee for three generations excluding the original donee.

The second issue arises in view of the fact that the first defendant was not recognised as an under-proprietor at the time of the first Regular Settlement. The entry of the Settlement *khasra* against this number shows the column for the name of the under-proprietor as blank. The defendant's grandfather, Munne, who was then alive, is not even shown as cultivator but an entry is made in the remarks column of the *khasra* to the effect that he is in possession of certain trees the detail of which is given. In the grove statement, forming part of the record of the same Settlement, a similar entry occurs to the effect that the plot contains eighteen trees plainted by Sukh Lal, and Munne with two other persons, Gaya Din and Chhedi, are entered as in possession. Munne was the son of the original grantee Sukh Lal.

The lower Appellate Court dismisses this objection with the remark that the confiscation of the *taluka* did not affect the rights of Sukh Lal. "The confiscation", says the learned Subordinate Judge, "did not involve the forfeiture of the subordinate rights." Since the decision of the Court below was pronounced, this question has

been specially referred to a Bench of this Court which has held, in *Oudh Bihari Singh* v. *Suraj Bali* (1), that Lord Canning's Proclamation swept away under-proprietary equally with proprietary rights. This plea being no longer open to him, the respondents' Counsel falls back on the plea that the effect of the letters of the Government of India of 10th and 19th October 1859, which are appended as Schedule I to the Oudh Estates Act, was to restore all such rights as they existed before the annexation. According to this view, the effect of the letters was practically to wipe away the forfeiture altogether and a pre-mutiny title can still be relied on just as if no forfeiture had occurred. Now, in the first place, this is not what the letters themselves say. The first letter tells the Chief Commissioner that the right conferred on Talukdars will be *subject to any measures which the Government may think proper to take* for the purpose of protecting inferior holders from extortion and upholding their subordinate rights. This is not a Proclamation conferring or recognising rights. It is a warning to the Talukdars that, whatsoever measures Government may think fit to take, they will be binding on them. Again, the second letter in paragraph 5 indirectly warns the Talukdars that they have no reason to complain if the Government takes effectual steps to "re-establish and maintain" the rights of subordinate holders, and it proceeds to state exactly the nature of the protection which Government intends to extend to them, namely, "to define and record their rights." This question also was discussed by the Bench in *Oudh Bihari Singh* v. *Suraj Bali* (1). The learned Judges point out that the measures taken to protect the rights of subordinate holders are two. In the first place, the Talukdars themselves were required, as a condition of their *sanads*, to protect such rights. In the second place, as was foreshadowed in paragraph 5 of the letter of October 19th, 1859, the Government took steps to define those rights, which it did by means of the rules to which legal effect was given by the Oudh Sub-Settlement Act of 1866. The very argument put forward here was raised before them, namely, that, even admitting that under-proprietary rights were confiscated, there was no need of actual restoration. The case of *Jehan Kadr* v. *Afsar Bahu Begum* (2) was referred to as showing that the rights of the former holders were "let in" by Government withdrawing the confiscation. The learned Judges point out that this decision was limited to immoveable property in the City of Lucknow, and add that the title by withdrawal of Government cannot have accrued in the case of under-proprietary rights *inasmuch as Government required under proprietors to claim their rights in the Settlement Court.* It was clearly, therefore, the view of the learned Judges that a subsequent grant or a recognition by the Settlement Officer was necessary to restore the rights of the former owners. In summing up their findings they say that the rights of under-proprietors as they existed before the Proclamation were restored by the letters of 10th and 19th October 1859 and by the Settlement Court proceedings taken under the rules validated by Act XXVI of 1866. The learned Counsel for the respondents wants me to read this passage disjuncted as meaning that the letters and the Settlement Court proceedings were two separate ways by which rights were restored. It is clear from the whole of the preceding portion of the judgment that this is not what was meant. The Settlement Court's proceedings represent the manner in which Government gave effect to the intention of restoring the rights as they existed before 1855. If the letters alone were sufficient, the reference to the rules made under Act XXVI of 1866 becomes entirely superfluous. The conclusion is clear. Before a pre-mutiny root of title can be relied on, it is necessary to show that that title has been recognised by the British Government after the date of Lord Canning's Proclamation either by an entry in the Settlement Records or by a Settlement decree or in some other way. On the question of the validity of the *bakhshishnama* of 1846 as alone sufficient to support the respondents' title I accordingly find for the appellant.

The defendant's name was recorded as under-proprietor at the Second Regular

(1) 53 Ind. Cas. 98; 22 O. C. 201; 6 O. L. J. 394.

(2) 12 C. 1; 12 I. A. 124; 4 Sar. P. C. J. 630; Rafique and Jackson's P. C. No. 91; 6 Ind. Dec. (N. S.) 1; 9 Ind. Jur. 322 (P. C.).

Settlement of 1893. It is admitted on his behalf that if he had not a good title originally this entry would not give him one. He relies very strongly on this entry, which was based on an order of the Settlement Court, in support of his plea of adverse possession. This plea was found in his favour by the Trial Court but has not been considered by the Court below. I accordingly direct the lower Appellate Court to come to a finding on this issue and the issue of limitation, on any other of the defences raised in the Trial Court which may be urged before it in support of its decision, and on the issue of the plaintiff's right to possession. The question of title which has just been decided cannot be treated as a preliminary point within the meaning of Order XLI, rule 23, as it is one of the main issues in the case. The remand will, therefore, be under Order XLI, rule 25. The findings should be submitted within two months. Ten days from the date of the findings are allowed for objections.

J. P.

Case sent back for finding.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1693 OF 1919.

December 8, 1921.

Present:—Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

ADHOR CHANDRA DASS—DEFENDANT—APPELLANT

versus

RAMESWAR MANNA—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 72—"Coercion," meaning of—Undue pressure.

The word 'coercion' referred to in section 72 of the Contract Act is used in its general and ordinary sense of undue pressure, and its meaning is not controlled by the definition of 'coercion' in section 15 of the Act. [p. 518, col. 1.]

Kanhaya Lal v. *National Bank of India Limited*, 18 Ind. Cas. 949; 40 I. A. 56; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 474; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 C. 598 (P. C.) relied on.

Appeal against a decree of the Subordinate Judge, Second Court, Hooghly, dated the 7th of May 1919, reversing that of the Munsif, Third Court, at Serampore, dated the 30th August 1917.

FACTS appear from the judgment.

Babu *Basanta Kumar Bose* (with him, Babu *Sitaram Banerji*), for the Appellant.—The defendant is the appellant. I obtained an *ex parte* rent-decree against the plaintiff. I attached his property. He paid down Rs. 50 and promised to pay the balance in a month. Subsequently, he brought the present suit for setting aside that decree as having been obtained fraudulently. The First Court dismissed the suit. On appeal it has been decreed on the ground that there was no service of summons. He has held further that the *kabuliyat* which was accepted by the First Court was not admissible in evidence because of insufficiency of stamps and non registration. In any event, I was entitled to Rs. 82 the admitted rate of rent. I claim rent at Rs. 110 p. a. the payment of Rs. 50 and the agreement to pay the balance of the decretal amount cannot be said to have been a payment under coercion. It does not come under sections 15, 16 of the Indian Contract Act.

[N. R. CHATTERJEA, J.—Look at section 72 of the Indian Contract Act and the illustration thereunder].

I submit the illustration is in direct conflict with the section of the law. The Court below was wrong in saying that there was undue influence. Then, as regards the *kabuliyat*, nowhere does the Court find that it was not executed.

Babu *Nagendra Nath Ghose*, for the Respondent.—They lost the case in the lower Appellate Court. They should have applied for a review of the original suit. The case is concluded by findings of fact. Refers to section 72 of the Indian Contract Act, *Kanhaya Lal* v. *National Bank of India Limited* (1). Halsbury's Laws of England, Volume XIII, page 169.

Babu *Basanta Kumar Bose* replied in brief.

(1) 18 Ind. Cas. 949; 40 I. A. 56; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 474; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 C. 598 (P. C.).

GOBINDA CHANDRA MULLIK *v.* CHAIRMAN OF THE HOOGHLY AND CHINSURA MUNICIPALITY.

JUDGMENT.—In this case the appellant brought a suit for rent at the rate of Rs. 110 odd against the respondent and obtained a decree. In execution of the decree, he attached certain goods of the plaintiff and the latter, in order to get back his goods, paid Rs 50 in cash and promised to pay the balance of the decree within a month. Within that time he brought the present suit for a declaration that the decree was fraudulent and not binding upon him.

The Court of Appeal below has come to the conclusion that the rent was not Rs. 110 odd, as was claimed by the appellant in the previous suit, but was Rs. 82 odd only. It is found that the promise to pay the decretal debt was clearly owing to "undue influence" (by which the learned Subordinate Judge probably means 'undue pressure') and that the present plaintiff did not make the promise as a free agent.

The case thus comes under section 72 of the Contract Act [see illustration (*b*) of that section]. As pointed out by the Judicial Committee, the word 'coercion' referred to in that section is used in its general and ordinary sense, its meaning not being controlled by the definition of 'coercion' in section 15 of the Act (See the case of *Kanhaya Lal* v. *National Bank of India Limited* (1).

Upon the findings arrived at by the lower Appellate Court we do not think we can interfere in this case. The appeal must accordingly be dismissed with costs.

It is to be observed, however, that the fact that the decree in the rent suit has been set aside by the Court below or the fact that the appeal to this Court is dismissed, does not mean the dismissal of the rent-suit.

B. N.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 176 OF 1920.

November 25, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

GOBINDA CHANDRA MULLIK AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE CHAIRMAN OF THE HOOGHLY AND CHINSURA MUNICIPALITY —DEFENDANT—RESPONDENT.

Bengal Municipal Act (III of 1884), s. 261, interpretation of—Place of business likely to be offensive or unwholesome, whether come within section.

Section 261 of the Bengal Municipal Act covers not only cases which are *per se* offensive or noxious but also a manufactory or place of business from which offensive or unwholesome smells may arise. [p. 520, col. 2.]

Withington Local Board v. *Manchester Corporation*, (1893) 2 Ch. 19 at p. 37; 62 L. J. Ch. 691; 2 R. 367; 68 L. T. 330; 41 W. R. 396; 57 J. P. 340 and *Wanstead Local Board* v. *Hill*, (1863) 13 C. B. (N. S.) 479 32 L. J. M. C. 135; 9 Jur. (N. S.) 972; 7 L. T. 744; 11 W. R. 368: 143 E. R. 190; 134 R. R. 613, referred to.

Appeal against a decree of the Subordinate Judge, Second Court, Hooghly, dated the 24th of November 1919, reversing that of the Munsif, First Court, at that place, dated the 8th of June 1918.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babus *Monindra Nath Banerjee* and *Debendra Nath Mondal*), for the Appellants.—The plaintiffs are the appellants. The appeal arises out of a suit for declaration that the action of the Municipality in levying a license fee from them and realising the same by distress warrant was *ultra vires*, and for a permanent injunction restraining the Municipality from levying such fee in future. The plaintiffs have a Rice Mill within the Municipality. The water of the mill came out of the mill to the adjoining Municipal drain. Under section 261 of the Bengal Municipal Act the Municipality imposed a fee on the plaintiffs. The Court of first instance decreed the suit. On appeal, however, that decision has been reversed. My submission is that section 261 of the Bengal Municipal Act applies when the business is *per se* noxious and, therefore, it has no application at all to the present case. The discharge of the water of the mill, when made, does not give rise to any offensive

smell. The mere fact of the passing of the water is no offence as it then does not give rise to any smell. The stench arises only when the water stagnates in the Municipal drain. It is the duty of the Municipality to see that the water from the drain is carried out to some other place of exit. The Municipality itself contributes to the creation of the nuisance. The words of the section must be strictly construed. The Legislature did not intend to extend the kinds of offensive business except those mentioned in the section itself. Refers to *Withington Local Board* v. *Manchester Corporation* (1), *Wanstead Local Board* v. *Hill* (2), *Pembroke* v. *Warren* (3).

Babu *Amarendra Nath Bose*, for Babu *Monmothanath Mukherjee* (with him, Babu *Nanda Gopal Banerjee*), for the Respondent.—The appeal is concluded by findings of fact. The learned Judge has given the best possible consideration to all the facts and circumstances of the case. He finds that there is some sort of smell when paddy is steeped in water. He further finds that, in the later stage, the smell is not so offensive as to become unbearable and, lastly, he finds that the accumulation of the water amounts to a positive nuisance. The language of the section is perfectly clear. If the contention of the other side is to prevail then some portion of the section would be quite superfluous and unnecessary. It is clear that a business which may become obnoxious would come under the purview of section 251 of the Bengal Municipal Act. I submit the case of *Withington Local Board* v. *Manchester Corporation* (1) does not apply to the present case as the English Law is different from that in the Bengal Municipal Act. The two other cases cited by the other side are similarly distinguishable.

Dr. *Dwarka Nath Mitter* replied in brief.

JUDGMENT.—The plaintiffs, who are the appellants in this appeal, brought a suit against the Hooghly and Chinsura Municipality for a declaration that the action of the Municipality in levying a license-fee from them and realising the same by distress was *ultra vires* and for a permanent injunction restraining the Municipality from levying the fee in future.

The plaintiffs have a Rice Mill within the Municipality and the latter imposed a fee under section 261 of the Bengal Municipal Act (III of 1884).

The Court of first instance decreed the suit. That decree has been set aside by the Court of Appeal below.

Two contentions have been raised before us; the first is, that there is no clear finding as to whether it was a manufactory or place of business from which offensive or unwholesome smell arises, and, secondly, that in order to bring a case within the section, the manufactory or business must be *per se* offensive or unwholesome.

With regard to the first contention, we think the findings are sufficient. The result of the findings is that, when paddy is boiled, there is some smell emitted but that is found not to be offensive. When the water in which the paddy is steeped flows from the drain, it is offensive but not so offensive as when it comes into contact with the stagnant water of the Municipal drain. The learned Subordinate Judge further finds that the flow of such a large quantity of filthy water is the direct cause of the bad smell. We think these findings are sufficient to dispose of the first contention.

As regards the second contention, we have been referred to the case of *Withington Local Board* v. *Manchester Corporation* (1). There a local urban authority proposed to erect a temporary small-pox hospital on land of their own within the district of an adjoining local authority without their consent. The adjoining local authority brought an action and moved for an injunction restraining them from erecting the hospital. The Court of Appeal held that the small-pox hospital was not a noxious or offensive business within section 112 of the Public Health Act, 1875, (38 & 39 Viet. C. 55). That section lays down that, "any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade, that is to say, the trade of blood-boiler, bone-boiler or fell monger or soap-boiler or tallow melter or tripe boiler or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty not

(1) (1893) 2 Ch. 19 at p. 37; 62 L. J. Ch. 393; 2 R. 367; 68 L. T. 330; 41 W. R. 306; 57 J. P. 340.

(2) (1863) 13 C. B. N. S. 479; 32 L. J M. C. 135; 9 Jur. (N. S.) 972; 7 L T. 744; 11 W. R. 868; 143 E. R. 191; 134 R. R. 613.

(3) (1896) 1 Ir. R. 77 at p. 119; 4 Ir. L. R. 400.

exceeding £ 50 in respect of the establishment thereof."

Having regard to the terms of the section, the case is clearly distinguishable. Lindley, L. J., after referring to the words of the section, such as "blood-boiler, bone-boiler, fell monger," etc., and the words "any other noxious or offensive trade, business or manufacture," observed "when you bear in mind that those words have been construed already so as not to include businesses which may or may not be noxious, the conclusion at which I have arrived is clear and strong, that even assuming a hospital to be in some sense a noxious business, still it is not a noxious business to which section 112 has any application; but it is a thing to be dealt with under the other group of sections, which relate specifically to hospitals and infectious diseases."

In the case of *Wanstead Local Board* v. *Hill* (2), which also has been relied upon, the question was raised whether brick-making was "other noxious business, trade or manufacture" within the meaning of the section. The Court held that to bring the case within the general words, the business or trade must be of itself of a noxious or offensive nature.

Section 261 of the Bengal Municipal Act, on the other hand, covers a case of a manufactory or place of business from which offensive or unwholesome smells may arise. There is, thus, a clear distinction between the English and the Indian Statutes.

It is further contended that the clause "manufactory or place of business from which offensive or unwholesome smells may arise" should be construed *eiusdem generis* with the clauses preceding it. *viz.*, "melting tallow, boiling offal or blood," and so on. But the previous clauses cover not only such cases but also "places used as kiln for making bricks, pottery, tiles or lime, or used as a shop for the sale of meat." It appears, therefore, that the genus comprises trades, business or manufactory which are not offensive *per se* and which would not come within the English Statute. We are of opinion that the section covers not only cases which are *per se* offensive or noxious but also a manufactory or place of business from which offensive or unwholesome smells may arise.

The appeal must accordingly fail and is dismissed with costs.

B. N. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 914 OF 1919.

January 3, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Harrison.

CHUHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

ASA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (3), proviso—Jurisdiction of Civil and Revenue Courts—Suit by lessee of occupancy tenant to recover possession from landlord.

In a suit by the lessees of an occupancy tenant to recover possession of the land from the landlord on the ground that the latter had wrongfully dispossessed the plaintiffs, the landlord pleaded that the occupancy rights of the plaintiffs' lessor had come to an end:

Held, that, having regard to the proviso to section 77 3) of the Punjab Tenancy Act, the suit was not cognisable by a Civil Court, inasmuch as it was necessary to decide in the case whether the occupancy tenant had lost his right or not [p. 521, col 2.]

Kesar Singh v. *Mangal Singh*, 19 Ind. Cas. 346; 84 P. R. 1913; 102 P. W. R. 1913; 198 P. L. R. 1913 and *Wasawa Singh* v. *Mahana Singh*, 34 Ind. Cas. 248; 1 P. W. R. 1916 Rev., referred to.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 16th January 1919, affirming that of the Munsif, First Class, Una, District Hoshiarpur, dated the 1st August 1918.

FACTS of the case appear from the following referring order:

RATTIGAN, C.J.—(*October 20th*, 1919).—"Defendants Nos. 1—16 are the proprietors of the land in suit, defendants Nos. 17-20 are occupancy tenants thereof, and plaintiffs allege that they were in possession of the land till 8th April 1916 under a lease granted by the occupancy tenants to themselves for a period of ten years. Plaintiffs further allege that they were wrongfully dispossessed of the land and ejected therefrom by the proprietors; and the present suit is to recover possession and the sum of Rs. 38, on account of damages alleged to have been caused to their cotton field. The First Court granted plaintiff a decree for possession of the land, and this decree was upheld by the District Judge on appeal.

The first ground of appeal urged before me is, that the Civil Courts had no jurisdiction to entertain the suit which was one falling under section 77 (3) (*g*) of the Punjab Tenancy Act and as such cognizable by the Revenue Courts only. The District

Judge has held, on the authority of *Kesar Singh* v. *Mangal Singh* (1), that the plaintiffs are in no sense the tenants of the proprietors and that the suit is, therefore, one cognizable by the Civil Courts. The ruling referred to is that of a Division Bench and undoubtedly supports the District Judge's view. But it is urged before me that the learned Judges who decided it overlooked the provisions of section 58 (2) of the Punjab Tenancy Act, and reference is also made to the ruling of Sir Michael Fenton, Financial Commissioner, of which a report will be found in *Wasawa Singh* v. *Mahana Singh* (2). As at present advised, I am inclined to think, though with every deference, that the ruling of the Division Bench of this Court is open to question, and I accordingly refer the point to a Division Bench for consideration. There are two subsidiary questions involved in the case, (1) whether it is open to the Civil Courts, even if they have jurisdiction, to entertain the claim, to decide the question whether the occupancy rights originally enjoyed by defendants Nos. 17-20 had terminated, and (2) whether the lease granted by the occupancy tenants for a period of ten years is invalid under the provisions of section 38 of the Act. These questions might also be decided, if necessary, by the Division Bench."

Mr. *Sundar Das*, for the Appellants.

Mr. *C. L. Gulati*, for the Respondents.

JUDGMENT.—The facts of the case, out of which the present second appeal arises, are given in the judgment in Chambers of Rattigan, C. J., of 20th October 1919, by which he referred the case to a Division Bench. The questions for our consideration are :—

(1) Whether the plaintiffs who claim to hold under a lease from the occupancy tenants of the land in question are tenants of the landlords defendants appellants; (2) whether it is open to the Civil Courts, even if they had jurisdiction to entertain the claim, to decide the question whether the occupancy rights originally enjoyed by defendants Nos. 17—20 had terminated, and (3) whether the Civil Court can decide the question whether the lease granted by the occupancy tenants for a period of ten years is invalid under the provisions of the Tenancy Act.

In *Kesar Singh* v. *Mangal Singh* (1) a Division Bench of the Chief Court held, that the lessees of land held by occupancy tenants are not themselves the tenants of the landlord; but a contrary view was held by Sir Michael Fenton, Financial Commissioner, in the case reported as *Wasawa Singh* v. *Mahana Singh* (2). We do do not find it necessary to decide at present which of these views is correct because, in our opinion, it was not open to the Civil Courts to decide whether defendants Nos. 17-20 had lost the occupancy rights which they originally had in the land, having regard to the proviso to section 77 (3) of the Punjab Tenancy Act, which lays down that, where, in a suit cognizable by or instituted in a Civil Court, it becomes necessary to decide any matter which can, under this sub-section, be heard and determined only by a Revenue Court, the Civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by Order VI, rule 10, Civil Procedure Code, and return the plaint for presentation to the Collector. The proviso also lays down that, on the plaint being presented to the Collector, the suit should be heard either by him or by an Assistant Collector of the First grade according as the value exceeds Rs. 1,000 or not. Now, a suit by a tenant to establish a claim to a right of occupancy, or by a landlord to prove that a tenant has not such a right, is exclusively triable by a Revenue Court under section 77 (3) (*a*) of the Punjab Tenancy Act.

In the present case the landlords allege that the occupancy tenants have no longer a right of occupancy in the land in question, they having lost that right in accordance with the condition appearing in the *wajib-ul-arz*. It was, therefore, necessary to decide in the present case whether the occupancy tenants had lost their right or not. Issue No. 4 was accordingly framed by the Trial Court. The Trial Court and the District Judge concurrently held that the occupancy tenants had not lost their rights ; in other words that they had a subsisting right of occupancy. This, in our opinion, was a matter which they had no jurisdiction to decide having regard to the proviso to section 77.

We, therefore, accept the appeal and direct, in accordance with the provisions of section

(1) 19 Ind. Cas. 346; 84 P. R. 1913; 102 P. W. R. 1913; 198 P. L. R. 1913.

(2) 134 Ind. Cas. 248; 31 P. W. R. 1916 Rev.

100 (3) of the Punjab Tenancy Act, that the decree of the Munsif First Class, dated 1st August 1913, be registered as that of an Assistant Collector of the First Grade in the District of Hoshiarpur. The records will, therefore, be returned to the District Judge, who will return the appeal filed in his Court to the appellants in order that they may institute it in the Court of the Collector. Costs in this Court will be costs in the case.

Z. K.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1187 OF 1920.

December 14, 1921.

Present :—Mr. Justice Suhrawardy and Mr. Justice Cuming.

Srimati SASIMUKHI CHOWDHURANI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Srimati SARASWATI SEN GUPTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Judgment vacated by subsequent order, whether can be used in evidence.

A judgment passed in a suit in which the plaintiff was found to have a certain share in a *jama* ordered the plaintiff to pay deficit Court-fee before the decree was drawn up, and directed that in default of plaintiff's payment the suit was to stand dismissed. The requisite Court-fee not having been put in, the Court made the following order : "Deficit Court-fee not paid as directed by the Court's order. The suit will accordingly stand dismissed. No decree need be drawn up" :

Held, that the judgment should not be used as evidence in a subsequent suit as the order dismissing the suit vacated the judgment in the case, which should be treated as non-existing. [p. 523, cols. 1 & 2.]

Irawa Laxmana Mugali v. *Satyappa Shiddappa Mugali*, 7 Ind. Cas. 967; 12 Bom. L. R. 766; 35 B. 38, followed.

In a suit for rent in respect of a *jama* a judgment in a previous suit between the parties relating to a different *jama*, is admissible in evidence though it may or may not operate as *res judicata*. [p. 523, col. 2.]

Appeal against a decree of the District Judge, Noakhali, dated the 17th of January 1920, affirming that of the Munsif, Additional Court, Feni, dated the 7th February 1918.

FACTS appear from the judgment.

Babu *Akshoy Kumar Banerjee* (with him Babu *Romesh Chandra Sen*), for the Appellants.—The only question for your Lordships' determination in this appeal is, whether the plaintiff is entitled to 7 annas or to 8 annas share of the rent. There were two previous suits. In the first it was decided that the plaintiff's share was 7 annas and in the second it has been decided that the plaintiff has an 8 annas share. My submission is, that the judgment in the first suit was not admissible in evidence because it was vacated by the Court's order for non payment of deficit Court-fee. See *Irawa Laxmana Mugali* v. *Satyappa Shiddappa Mugali* (1). This judgment was Exhibit C. The other judgment is Exhibit 2. This ought to have been given effect to. It really operated as *res judicata*. See *Sitanath Midda* v. *Bisudeb Midda* (2). Exhibit 2 is subsequent to Exhibit *C*. The subsequent decision superseded the earlier one. See *Moturi Seshayya* v. *Venkatadri Appa Row* (3). See also *Dambar Singh* v. *Munawar Ali Khan* (4).

Maulvi *Nurul Haq*, for the Respondents.—Exhibit 2 cannot operate as *res judicata* for two reasons. The question as to what was the share of the plaintiff in the *taluq* was not in issue in that suit. The second reason why the decision should not operate as *res judicata* is, that in that suit we were only *pro forma* defendants. The order of the Court vacating the judgment, Exhibit C, is without jurisdiction. Except by way of review, it was not open to the Court to vacate its own judgment because it was not a case merely of a clerical or arithmetical error. The question, therefore, is which of the two judgments, Exhibit 2 or Exhibit C., should have precedence. On principle, it would appear that, in the face of the earlier judgment, the subsequent judgment which was inconsistent with the earlier one should not have been passed.

Babu *Akshoy Kumar Banerjee* was not called upon to reply.

(1) 7 Ind. Cas. 967; 12 Bom. L. R. 766; 35 B. 38.
(2) 2 C. L. J. 540.
(3) 36 Ind. Cas. 289; 31 M. L. J. 219; (1916) 2 M. W. N. 219.
(4) 30 Ind. Cas. 775; 18 A. L. J. 764; 37 A. 531.

JUDGMENT.—This was a suit for rent brought by the plaintiff-appellant against his tenants on the allegation that he has 8 annas share in the *jama*. He impleaded in the suit defendants Nos. 4 and 5 his co-sharers who alleged that the plaintiff's share was only 7 annas in the *jama*. Both the Courts below have found against the plaintiff in respect of his share as well as in respect of the *jama* which he claimed to be Rs. 8 but which has been found to be Rs. 4.

The plaintiff appeals to this Court only with reference to the decision about his share in the property in suit. The Court of first instance relied chiefly on Exhibit (C) being the judgment in a suit between the parties in which the plaintiff's share was held to be 7 annas. The learned Munsif also referred to Exhibit 2 being the judgment in a suit between the parties relating to some other *jama* of the disputed tenure and held that that judgment was not admissible in evidence in this case inasmuch as the former suit related to a different *jama*. He, therefore, found that the Record of Rights which stood in favour of the defendants must be given effect to as the plaintiff had failed to adduce any evidence to rebut the presumption arising as to its correctness. On appeal, the learned District Judge has affirmed that decision. But we have not been able to follow the reasoning adopted by him. It appears that of the two judgments that were filed in this case one by the plaintiff and the other by the defendants the Courts below have attached great importance to Exhibit (C) which in their opinion concludes this case. This judgment was passed in a suit in which the plaintiff's share was found to be 7 annas by a Munsif who, towards the end of his judgment, ordered the plaintiff in that case to pay deficit Court-fee before the decree was drawn up and in default of plaintiff's payment the suit was to stand dismissed. This order was passed on the 7th of April 1914. The requisite Court fee not having been put in his successor-in-office passed the following order on the 26th May 1916: "Deficit Court-fee not paid as directed by the Court's order dated 7th April 1914. The suit will accordingly stand dismissed. No decree need be drawn up". This order virtually vacated the judgment in the case which should be treated as non-existing. Such a judgment, as has been held in the case of *Irawa Laxmana Mugali* v. *Satyappashiddappa Mugali* (1), should not be used as evidence in a subsequent suit.

With regard to Exhibit (2), the First Court observed that it referred to a different *jama* and, therefore, that Court refused to consider it. He was of opinion that the judgment in a suit relating to a different *jama* was not binding on the tenants-defendants. But we notice that the contending respondents-defendants Nos. 4 and 5 were parties to that suit, and we cannot hold that that judgment cannot be used as evidence in this case. There are, of course, circumstances to be determined to make it operate as *res judicata* between the contending parties. The lower Appellate Court has not come to any decision with regard to the admissibility of this piece of evidence. He has not accepted the reasoning of the learned Munsif in holding that judgment, Exhibit (2), is not binding upon the defendants. He does not consider the effect of that judgment as affecting the rights of the parties. It is difficult for us to say whether all the requirements have been proved in this case to make that judgment operate as *res judicata* in the present suit.

It is, therefore, necessary that the case should be remanded to the lower Appellate Court for the re-hearing of the appeal and for a decision whether judgment, Exhibit (2), operates as *res judicata* between the parties and, if so, whether there is sufficient evidence on the record to rebut the presumption which arises under section 103 B of the Bengal Tenancy Act.

We, therefore, set aside the decree of the lower Appellate Court and send the case back to that Court for a re-hearing of the appeal in the light of the observations above made.

Costs to abide the result.

Decree set aside.
Case sent back for re-hearing.

B. N.

PARSHOTAM SINGH *v.* RALLIA SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1501 OF 1917.

October 27, 1921.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Campbell.

PARSHOTAM SINGH—PLAINTIFF—APPELLANT

versus

RALLIA SINGH—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (1) (c), 2 (v)—Oral sale—Agreement to execute sale-deed—Registration—Consideration.

Defendant sold half of a house to plaintiff orally in 1908 and gave the latter possession of the portion sold. Subsequently, the defendant mortgaged the whole house. In 1913, the defendant executed an agreement in favour of the plaintiff in which he recited the oral sale and the subsequent mortgage and agreed to redeem the mortgage and execute a registered sale-deed in favour of the plaintiff in respect of the half house sold to him. Plaintiff brought a suit for specific performance of this agreement. It was objected by the defendant that the agreement was inadmissible in evidence for want of registration and that it was unenforceable for want of consideration :

Held, (1) that the agreement fell within clause (*v*) of sub-section (2) of section 17 of the Registration Act and, therefore, did not require registration ; [p. 525, col. 2.]

(2) that it was part of the oral sale of 1908 and was, therefore, supported by consideration ; [p. 525, col. 2.]

(3) that, even if that were not so, the defendant had infringed the plaintiff's right by mortgaging the portion of the house sold to the latter, and that the fact that the plaintiff refrained from seeking his legal remedy in respect of this infringement was sufficient consideration for the agreement. [p. 525, col. 2.]

Second appeal from a decree of the District Judge, Amritsar, dated the 14th April 1917, reversing that of the Senior Subordinate Judge, Amritsar, dated the 29th June 1916.

Pandit *Sheo Narain*, R. B., for the Appellant.

Lala *Moti Sagar*, R. S. for the Respondent.

JUDGMENT.—This appeal arises out of a suit for the specific performance of an agreement. The allegations on which the suit was brought may be summarised as follows :—

That in February 1908 the defendant purchased a house bearing *khana shumari* No. 1794 and verbally sold a half of it to the plaintiff, a few days after its purchase for Rs. 814 ; that, subsequently, the house was divided into two portions and both the portions were newly built, and that the plaintiff obtained possession of his half.

On the 30th October 1913 the agreement, the basis of the suit, was executed. In this agreement the fact of the oral sale of 1908 is recited and it is further stated that the executant had mortgaged the whole house for Rs. 1,000 in favour of Ambadatt, and that if he were to attempt to get a transfer made in favour of B. Parshotam Singh the mortgagee would press for his mortgage-money, and that, therefore, the executant agreed that, within the period of two years, he would pay off the mortgage-money with interest and would redeem the property from the mortgagee and would execute a registered-deed in favour of B. Parshotam Singh, the purchaser. It is further stated by him in the deed that the burden of the entire mortgage-money would be borne by his half share of the house, and in case the demand exceeded the value of his half share it would be recoverable from his other properties.

The defendant failed to execute a sale-deed in pursuance of this agreement. Thereupon, this suit was instituted by the plaintiff. The defendant resisted the suit upon various grounds, one of which only is material for the purposes of this appeal, namely, that the agreement being without consideration was not binding on the defendant, and could not be enforced as a contract against him.

The Court of first instance overruled this plea and granted a decree to the plaintiff in the terms of the relief claimed. He held the agreement to be a part of the transaction of sale and decided that there was consideration for the agreement.

On an appeal by the defendant the learned Judge of the Court below took a different view and held that no independent consideration had been established for the agreement. His view was that the oral completed sale having taken place so far back as 1908 the execution of the agreement five years later was quite a separate transaction, and ought to have been supported by a separate consideration, and that nothing was given to the defendant at

the time when the agreement was executed. The Court held that the agreement was a *nudum pactum* for want of consideration. The other questions raised in the case were left undecided by the lower Appellate Court in the face of its finding on this preliminary issue. The suit was accordingly dismissed in appeal.

This second appeal was, therefore, preferred by the plaintiff. At the hearing Mr. Moti Sagar for the respondent raised a preliminary objection to the effect that the agreement, the basis of the suit, being unregistered was inadmissible in evidence, and as the appeal could not proceed without looking at the agreement it must necessarily fail. He relied in support of his argument on clause (*c*) of sub-section (1), section 17 of the Indian Registration Act. According to that clause "Non testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest" require registration.

He argued that, inasmuch as the document acknowledged the receipt or payment of consideration on account of the oral sale of the year 1908, it ought to have been registered. The learned Vakil, however, ignored the provisions of clause (*v*) of sub-clause (2) of section 17 of the Act. It runs this :—

"Nothing in clauses (*b*) and (*c*) of sub-section (1) applies to

* * * * *

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title, or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

From the document it is clear that the executant agreed to execute another registered document which would have the effect of creating, declaring, assigning, limiting, or extinguishing a right, title or interest in the immoveable property. In the agreement it is stated that the executant had created a mortgage over the whole house, which he undertook to redeem, and thus give a clear title to the plaintiff by executing a registered document. In our opinion, the deed of agreement is clearly covered by this exception. We accordingly hold that the document sued upon was not compulsorily registrable.

On the question of consideration raised on behalf of the appellant, we concur in the view taken by the First Court and hold that the agreement formed part of the transaction of sale of the year 1908, and that it was supported by consideration. We are further of opinion that, by creating a mortgage over half the house already sold to the plaintiff, the defendant had infringed the right of the plaintiff who had a claim against him. The plaintiff in consideration of the promise to execute a registered sale-deed desisted from seeking a remedy against the defendant. This, therefore, was a sufficient consideration for the agreement executed by the defendant. The agreement was, therefore, binding on the defendant.

We accordingly set aside the decision of the lower Appellate Court on this preliminary point, and remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, with the direction that it be placed on its original number in the register of pending appeals, and be disposed of according to law. Costs will abide the result.

Z. K. *Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 699 OF 1919.

April 22, 1921.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

SATISH CHANDRA MUKHERJEE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JOYRAM ROY AND OTHERS—DEFENDANTS RESPONDENTS.

Evidence—Findings in judgment not inter partes, *admissibility of—Appellate Court, duty of, to consider whole evidence.*

Findings in a judgment cannot be used in evidence against a person who was no party to the suit in which that judgment was pronounced. [p. 527, col. 1.]

SATISH CHANDRA MUKHERJEE *v.* JOYRAM ROY.

Mahammad Zeaullah Miah v. *Sukliannessa Bibi*, 5 Ind. Cas. 352; 11 C. L. J. 603; 14 C. W. N. 446, *Kalanand Singh* v. *Jarao Kumari*, 17 Ind. Cas. 238; 17 C. L. J. 96, *Kristo Soondur Sandyal* v. *Koomar Chunder Nath Roy*, 15 W. R. 230, referred to.

An Appellate Court should not reverse the decision of the Trial Court without considering the whole evidence on which the Trial Court's decision is based. [p. 527, cols. 1 & 2.]

Appeal against a decree of the District Judge, Khulna, dated the 13th January 1919, reversing that of the Munsif, Second Court, at Satkhira, dated the 17th December 1917.

FACTS appear from the judgment.

Babu *Bankim Chandra Mukerjee*, for the Appellants.—The defendant is the appellant. The appeal arises out of a suit for rent. The annual rent is Rs. 21-3-4 and cesses Re. 1-5-4 for 1320-23. Defence is that the landlord, having interfered with peaceful enjoyment of the holding, is not entitled to rent and cannot recover cesses more than at half-anna per rupee. The first Court dismissed the suit upholding the defence contention. The lower Appellate Court reversed it. He does not come to any finding as to in whose possession the land is. The learned Judge did not reverse the finding that the plaintiff dispossessed me through the tenant. The tenant fought out cases and stopped payment of rent. I submit that is substantial interference with peaceful enjoyment of my lands. Refers to *Kristo Soondur Sandyal* v. *Koomar Chunder Nath Roy* (1). The positive finding is, that I could not realise rents through plaintiff's acts. This has not been displaced. Refers to *Kalanand Singh* v. *Jarao Kumari* (2) and *Mahammad Zeaullah Miah* v. *Sukliannessa Bibi* (3). In such cases I submit the landlord is not entitled to damages. Refers to section 68 of the Bengal Tenancy Act. The plaintiff is not entitled to more than half-anna in the rupee as cesses.

Babu *Surendra Chandra Sen*, for the Respondent.—I submit the appeal is concluded by findings of fact. Mere advise to under-tenants by the superior landlord, not to pay rents to the intermediate tenant would not constitute substantial interference. I submit the tenant is not entitled to any suspension on account of interference previous to the period in suit. The right to recover rent was with him. Refers to *Srimati Moni* v. *Kalachand Gharami* (4). Further, in cases of dispossession the question of apportionment would arise. The finding of dispossession is in my favour. The finding is, that there has been no substantial interference. Further the judgment in the previous rent suit by the defendant against his tenant is not admissible in evidence. The case in *Mahammad Zeaullah Miah* v. *Sukliannessa Bibi* (3) is clearly distinguishable.

Babu *Bankim Chandra Mookerjee*, replied briefly.

JUDGMENT.—This appeal arises out of a suit for rent. The defence was that the plaintiff dispossessed the defendant from a portion of the lands and substantially interfered with the collection of rent from his *bhag* tenants.

The Court of first instance held that there was dispossession in respect of 3 *cottas* of land and that the plaintiff had instigated the sub tenants under the defendant to withhold payment of rent and actively helped them in keeping the defendant out of the rent. In the result, the Munsif dismissed the suit.

On appeal the learned Subordinate Judge came to the conclusion that the evidence as to the dispossession of 3 *cottas* of land was of the weakest possible character and evidently the learned Subordinate Judge did not believe the case for the defendant that he was dispossessed from any portion of the land. So far as this part of the case is concerned, we cannot interfere with the finding in second appeal.

With regard to the other question, namely, whether there was interference by the plaintiff with the quiet enjoyment of the land by the defendant, the learned Subordinate Judge observes as follows: "There was no attempt to disown relationship, but only to reduce the *jama*. In one case the tenant succeeded and in the other he failed. Taking it for granted that plaintiff did give such assistance, this cannot in my view amount to a substantial interference with defendant's possession..... Big landholders may assist cultivators in litigation out of mere charity. Such action would not entitle the defendant, if he

(1) 15 W. R. 230.
(2) 17 Ind. Cas. 238; 17 C. L. J. 96.
(3) 5 Ind. Cas. 352; 11 C. L. J. 606; 14 C. W. N. 446.

(4) 9 C. W. N. 871.

happened to be a tenant of the Zemindar, to claim suspension of rent. In the present case it is not the fact that plaintiff helped the tenants but the fact that they did so out of enmity, which has led to this decision. I think it is wrong in law.'

The learned Pleader for the appellant has referred to the cases of *Mahammad Zeaullah* v. *Sukliannessa Bibi* (3) and *Kalanand Singh* v. *Jarao Kumari* (2) and relied on certain findings arrived at by the Court of first instance which have not been set aside by the lower Appellate Court. The Court of first instance referred to the findings in the judgment in a suit brought by the defendant against his tenants, in which it was held that it was at the instigation of the plaintiff that the sub-lessees suspended delivery of *bhag* paddy in 1318, and that the plaintiff helped the sub-tenants in fighting out that case. So far as these findings are concerned, we do not think that they can be used against the plaintiff who was no party to that suit. The learned Munsif, however, found upon the evidence that the plaintiff did not allow the tenants to pay rent to the defendants and helped them with advice and money in the suit for rent. He referred to the case of *Kristo Soondur Sandyal* v. *Koomar Chunder Nath Roy* (1) in which the learned Judges observed that the right of the landlord to receive rent from a farmer depends upon his securing to the latter quiet possession and giving him proper and lawful means of realising rent from the tenants; and, applying the principle to the present case, said "I should hold that the plaintiffs by dissuading tenants from paying rent to the defendants and by helping them with advice and money in making false defences in suit brought by the defendant did not secure to the defendant quiet possession and give them proper and lawful means of realising rent and interfered substantially with the defendants' enjoyment of the property". He has also found that the defendant has not yet been able to realise the decretal money from the sub-tenant as the latter moves his cattle to the house of the plaintiffs. These facts have been found by the Court of first instance upon the evidence, apart from the judgment in the previous suit, but some of them have not been considered by the learned District Judge on appeal.

We think, therefore, that the case should go back to the lower Appellate Court in order that that Court may consider the whole evidence (except the findings arrived at in the rent suit brought by the defendant), and determine whether there was substantial interference by the plaintiff with the peaceful enjoyment of the land by the defendants. If the Court comes to the conclusion that there was interference with quiet enjoyment, it will consider whether the defendant is entitled to the suspension of rent as found by the Munsif, and, if so, whether it should be for the period up to Pous 1322 or an earlier period. It will also consider whether the defendant should be awarded damages and costs even if the rent be not suspended.

With regard to the cesses, it appears that the Court of first instance found that the plaintiff was entitled to cesses only at the rate of half anna per rupee but the suit was dismissed. There was no appeal on the question of cesses but the learned District Judge decreed the suit in full, and cesses were claimed in the plaint at one anna per rupee. It does not appear why the plaintiffs should get more than half-anna per rupee which, under the law, is payable by the *raiyat* to the landlord. The Court of Appeal below will consider this question also.

Costs will abide the result.

B. M.

Case sent back.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1150 OF 1920.

December 14, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

YAKUB ALI CHOWDHURI —PETITIONER—APPELLANT

versus

Rai RAJ KUMAR DUTTA BAHADUR —OPPOSITE PARTY—RESPONDENT.

Landlord and tenant—Bengal Tenancy Act (VIII

YAKUB ALI CHOWDHURI v. RAJ KUMAR DUTTA.

of 1885), ss. 50, 105, 105A—*Presumption of correctness of entry in Record of Rights, whether question of law or of fact—Enhancement of rent—Mere payment of rent at uniform rate, does not raise any presumption of fixity of rent.*

The question whether the presumption of the correctness of the Record of Rights has been rebutted by certain *kabuliyats* is more a question of fact than of law. [p. 529, col. 1.]

Every tenure, whether permanent or otherwise, is subject to the incident of enhancibility of rent. [p 529, col. 1.]

Upendralal Gupta v *Jagesh Chandra Roy*, 33 Ind. Cas. 56; 22 C. W. N. 275 and *Jogesh Chandra Roy* v. *Makbul Ali*, 54 Ind. Cas. 850; 30 C. L. J. 140; 23 C. W. N. 945, relied on.

Where in a suit for enhancement of rent of a tenure under section 7 of the Bengal Tenancy Act the plaintiff has proved that, at the inception of the tenancy, there was no condition excluding the tenure from the operation of the ordinary liability for enhancement of rent, the Court would be justified on this evidence to conclude, without any evidence to the contrary, that the same state of things existed on the date of the publication of the Record of Rights. [p. 529, col. 2.]

The mere fact of payment of rent at a uniform rate for any number of years, apart from the presumption that can be raised under section 50 of the Bengal Tenancy Act, does not raise any presumption of fixity of rent. [p. 529, col. 2.]

Buzlul Karim v. *Satish Chandra Giri*, 10 Ind. Cas. 325; 13 C. L. J. 418 at p. 421; 15 C. W. N. 752, relied on.

Appeal against a decree of the Special Judge, Noakhali, dated the 23rd January 1920, affirming that of the Assistant Settlement Officer, Camp Noakhali, dated the 3rd October 1918.

FACTS appear from the judgment.

Babu *Asitranjan Chatterjee* (with him, Babus *Nagendra Nath Bose* and *Satyendra Chandra Mitra*), for the Appellant:—The appeal is on behalf of the tenant in a suit for enhancement of rent of a tenure. The tenure was created about 80 years ago and for this period rent was being paid at a uniform rate. In the finally published Record of Rights it is entered as a permanent tenure at a fixed rate. Its rent is, therefore, not liable to enhancement. The *kabuliyats* of 1839 and 1840 do not rebut the presumption arising under section 103 B of the Bengal Tenancy Act because in these *kabuliyats* there is nothing to show that the rent of the tenure is liable to enhancement. Refers to *Luchmi Pershad* v. *Ekdeshwar Singh* (1). There were originally two tenures and they were amalgamated into one. This amalgamation created a new tenancy. Refers to *Upendra Nath Ghose* v. *Gopi Charan Saha* (2), *Upendra Nath Ghose* v. *Dwarka Nath Biswas* (3) and *Abhoy Sankar Mozumdar* v. *Rajani Mandal* (4), *Chandra Mohan Das* v. *Shaikh Habil* (5) (Notes portion), *Golab Misser* v. *Kumar Kalanand Singh* (6) and *Ram Dayal Giri* v. *Midnapur Zemindari Co.* (7). Then, from the fact that rent has been paid at a uniform rate for a long period there is a presumption of fixity of rent. A new tenancy having been created by the amalgamation of the old ones, the old leases cannot be relied upon to rebut the presumption arising under section 103B of the Bengal Tenancy Act. Lastly, the *kabuliyats* were not produced from proper custody.

Babu *Atul Chandra Gupta* (with him Babus *Jyotish Chandra Guha* and *Radhica Ranjan Guha*), for the Respondent.—The question is, whether the tenure is one at fixed rates. My friend starts with the presumption under section 103B of the Bengal Tenancy Act but the record cannot create a right. The original leases have been produced and they show the true state of things. Refers to *Upendralal Gupta* v. *Jogesh Chandra Roy* (8). The facts of that case are on all fours with those of the present one. Evidence of acts and conduct is not admissible to vary the terms of the written contract. Also, mere payment of rent at an uniform rate for a long time does not raise any presumption of fixity of rent. See *Buslul Karim* v. *Satish Chandra Giri* (9). Then, again, mere amalgamation of the tenures did not create a new tenancy.

As regards the objection that the *kabuliyats* were not produced from proper custody, my submission is, that that objection was not taken in the Trial Court and the

(1) 4 Ind. Cas. 577; 13 C. W. N. 181.

(2) 44 Ind. Cas. 595; 22 C. W. N. 321.
(3) 44 Ind. Cas. 593; 22 C. W. N. 322.
(4) 47 Ind. Cas. 359; 22 C. W. N. 904; 29 C. L. J. 371.
(5) 19 C. W. N. CIV (104) *Notes*.
(6) 6 Ind. Cas. 217; 12 C. L. J. 107; 14 C. W. N. 884.
(7) 7 Ind. Cas. 785; 15 C. W. N. 263.
(8) 38 Ind. Cas. 56; 22 C. W. N. 275.
(9) 10 Ind. Cas. 325; 13 C. L. J. 418 at p 421 15 C. W. N. 752.

documents were, as a matter of fact, produced from proper custody.

Babu *Nagendra Nath Bose* replied.

JUDGMENT.—The plaintiff respondent brought a suit against the appellant, who is his tenant, under sections 105 and 105A of the Bengal Tenancy Act for enhancement of rent, under section 7 of that Act. Both the Courts below have allowed the enhancement prayed.

The facts are that, in 1839 and 1840, two *kabuliyats* were executed by the predecessor of the defendant in favour of the predecessor of the plaintiff in respect of two tenures which were subsequently amalgamated and became one tenure held at a *jama* of Rs. 276 and odd. These *kabuliyats* are silent as to the liability of the tenure for enhancement of rent. It appears that rent has been paid since the date of these *kabuliyats* up to the present time at the rate mentioned therein. Subsequently, in 1918, the Record of Rights in respect of these tenures were finally published in which the tenures were mentioned as permanent at fixed rate. The Courts below have held that the *kabuliyats* produced by the plaintiff sufficiently rebutted the presumption attached to the entry in the Record of Rights. This finding has been challenged in this appeal.

We are inclined to hold that the question whether the presumption of the correctness of the Record of Rights has been rebutted by these *kabuliyats* is more a question of fact than of law. But we have allowed the appellant to argue the case in order to show that the Courts below have misread the documents.

The learned Pleader for the appellant contends, in the first place, that as the *kabuliyats* do not mention that the tenures are liable to enhancement of rent they do not sufficiently rebut the presumption in favour of the correctness of the Record of Rights. It is argued, on the other hand, on the authorities of the cases of *Upendralal Gupta* v. *Jogesh Chandra Roy* (8) and *Jogesh Chandra Roy* v. *Makbul Ali* (10) that in this country every tenure, whether permanent or otherwise, is subject to the incident of enhanceibility of rent. We accept the respondent's contention and hold that the present tenures are not exempted from this ordinary incident of such tenures.

It is next contended that, at a subsequent time, these two tenureswere amalgamated into one and there might have been creation of a new tenancy on fresh terms, one of which might have been fixity of rent and as the entry in the Record of Rights must be presumed to be correct on the date of the publication, namely, the 8th February 1918, it is incumbent on the landlord to prove by evidence that nothing happened between the creation of the tenancy in 1840 and the date of the publication of the Record of Rights to vary the incident that the rent of the tenures was enhanceible. We do not think that this is the correct way of looking at the question. The plaintiff has proved that at the inception of the tenancy there was no condition excluding the tenure from the operation of the ordinary liability for enhancement of rent, and the Courts below were justified on this evidence to conclude, without any evidence to the contrary, that the same state of things existed on the date of the publication of the record. We further notice that this point was neither raised in the Courts below nor in the grounds of appeal taken in this Court.

It is also argued on behalf of the appellant that the rent having been paid for over 80 years at a unifrom rate it should have been held that the rent was fixed in perpetuity. We are not convinced that the mere fact of payment of rent at a uniform rate for any number of years, apart from the presumption that can be raised under section 50 of the Bengal Tenancy Act, raises any presumption of fixity of rent [*Bulul Karim* v. *Sartish Chandra Giri* (9).]

It further appears that these *kabuliyats* were not produced before the Settlement Officer at the time of the publication of the Record of Rights and there is no material on the record to show on what basis the entry in the *khatian* was made.

It is lastly argued that the *kabuliyats* should not have been admitted in evidence as they were not produced in Court from proper custody. We do not think that this contention ought to prevail. In the Court of first instance, when these documents were tendered by the plaintiff, they were received in evidence without any objection

(10) 54 Ind. Cas. 850; 30 C. L. J. 140; 23 C. W. N. 945.

by the defendant. The lower Appellate Court held that they came from proper custody inasmuch as the first witness of the plaintiff got them from the plaintiffs' Record-keeper and produced them in Court. These documents were in the custody of the plaintiff as they ought to have been and they were produced from his record-room by one of his officers. In these circumstances they must be taken to have been produced from proper custody.

No objection has been taken in this appeal to the rent fixed by the lower Appellate Court which finding is, therefore, affirmed.

All the points taken in the appeal having failed, this appeal is dismissed with costs.

B. N. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 956 OF 1919.

January 23, 1919.

Present :—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

KUNJ BIHARI LAL—PLAINTIFF—APPELLANT

versus

GHANSHAM DAS—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 164—Suit for profits—Jurisdiction, exclusive—Civil Procedure Code (Act V of 1908), s. 11—Res judicata.

K. purchased from *B.* on 26th April 1915 a share in a village. After the sale, *B.* sued *G.* for profits for Rabi 1322 and Kharif 1323 *F.* and got a decree. *G.* had already paid *K.* sums of money alleged to be equivalent to the above profits. *G.* sued *K.* for refund of the above, with costs, etc. The dispute was referred to arbitration and by an award the suit was decreed for Rs. 950. *K.* then sued *G.* to recover his profits for the above period and also for 1329 *F.* *G.* resisted the suit on the ground of *res judicata* and estoppel. The First Court decreed the suit, holding that the question of profits could not be and was not in issue in the civil suit, and so section 11, Civil Procedure Code, could not bar the suit, the lower Appellate Court held against *K.* *K.* appealed to the High Court :

Held, that *K*, being a recorded co-sharer, was entitled to sue for profits and that the suit was exclusively triable by the Revenue Court and that *G.* was not entitled to defeat the suit *in limine* by producing in evidence the decree of a Civil Court in which *K.* was held liable to pay a certain sum of money to *G.* as several matters involved in the present suit were not there in issue in the previous one. [p. 531, col. 2; p. 532, col. 1.]

Kishore Singh v. *Bahadur Singh*, 48 Ind. Cas. 470; 16 A. L. J. 933; 41 A. 97 and *Mollo* v. *Ramlal*, 58 Ind. Cas. 772; 18 A. L. J. 1030; 43 A. 191, referred to.

Second appeal from a decision of the District Judge, Cawnpore, dated the 28th May 1919

Dr. *Kailash Nath Katju*, for the Appellant.

Dr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—The plaintiff, Kunj Behari Lal, purchased an 8 anna share of the Zemindari rights in Mauza Seontha on the 26th April 1915 from Chaudhri Bahadur Singh and brought this suit, under section 164 of the Agra Tenancy Act, to recover his share of the profits for Rabi 1322, 1323 and 1324 *F.* from the Lambardar, Ghansham Das, the defendant. The amount claimed was Rs. 1,457-5 4, principal and interest. The only defence with which we are concerned was that the plaintiff had no right to sue for Rabi 1322 and Kharif 1323 *F.* This defence was based on the following facts. After the sale by Chaudhri Bahadur Singh to the plaintiff, the defendant paid to the plaintiff a sum of money alleged to be equivalent to his share of the profits for these two seasons. This payment was made out of Court. Thereafter, Chaudhri Bahadur Singh sued Ghansham Das, defendant, for the profits of these two seasons and got a decree. Ghansham Das brought a suit in the Civil Court against Kunj Behari Lal to recover Rs. 808-12 6, the amount he had paid to Kunj Behari Lal as his share of the profits, Rs. 113-7-11, interest, and Rs. 151 12, costs incurred in defending Chaudhri Bahadur Singh's suit, and Rs. 100 "for damages and costs incurred", in all a sum of Rs. 1,177-0-5. In paragraph 6 of the plaint in that suit Ghansham Das stated that Kunj Behari Lal had not purchased the arrears of the profits and, therefore, was not entitled to the sum of Rs. 808-12 which was paid on the 7th February 1916. He stated his cause of action arose on that date and also on the 17th May 1917, the date on which Chaudhri Bahadur Singh's

suit for profits was decreed. That suit was referred to arbitration and a decree was passed in accordance with the arbitrator's award for Rs. 950. In the present case the contention was, that "the suit is barred by section 11 of the Code of Civil Procedure and the principle of estoppel."

The Trial Court held that, under the sale-deed of the 26th April 1915, Kunj Behari Lal was entitled to all rents and profits which became due after that date, and that as Kunj Behari Lal was recorded in the *khewat* as a co-sharer in June 1915 he was *prima facie* entitled to the profits for both Rabi 1322 and Kharif 1323 *F*. The plea of *res judicata* was disposed of in the following words:

"The suit, as appears from the file, was based on the allegations that Kunj Behari Lal and Ram Narain fraudulently persuaded Ghansham Das to pay about Rs. 805 on account of profits and that he was entitled to a refund. The question of profits was not in issue directly and could not have been so in a civil suit.

"The arbitration did not rightly enter into the question of plaintiff's right for profits of any part of any year. So that, on merits, that judgment does not operate as *res judicata* as the three notable ingredients are wanting. The Civil Court decree has only affected so much as to restore the *status quo* of the parties with regard to the profits of the village."

It eventually decreed the plaintiff's suit. The defendant appealed only against so much of the decree as referred to the two seasons above mentioned. The District Judge, after setting out the pleadings in the civil suit, said:—

"One thing, however, is clear that the civil suit decided between the parties the question of the profits of Rabi 1322 and Kharif 1323*F*. No doubt the plaintiff then argued that he was not effected by Bahadur Singh's decree against the Lambardar in respect of the profits of 1322 Rabi. Any way, the civil suit was decided on the above allegations and the plaintiff cannot sue again for the profits of Rabi 1322 or Kharif 1323 *F*. It is true, as the lower Court remarks, that the Civil Court could not have heard the present case, but any Civil Court decision which is not appealed from is binding on a Revenue Court apart from section 11 of the Code of Civil Procedure. It is binding, in my opinion, even if the Civil Court had no jurisdiction the remedy from a decree so passed only being to appeal. In this case, however, the Civil Court clearly had jurisdiction, as a Revenue Court could not decree the return of profits improperly paid". He accordingly modified the First Court's decree by dismissing the claim so far as these two seasons were concerned. The plaintiff comes here in appeal and the only ground taken is, that the decree passed in terms of the award in the civil suit instituted by the defendant against the appellant does not bar the trial of the present claim for profits for Rabi 1322 and Kharif 1323 *F*. It is quite clear and, indeed, admitted that section 11 of the Code of Civil Procedure does not bar this suit. It is *prima facie* a suit falling clearly under section 164 of the Agra Tenancy Act. The plaintiff was a recorded co-sharer and was entitled to sue the Lambardar for the profits for the years in suit and the only Court which had jurisdiction to try the suit is, admittedly, the Revenue Court. Dr. Agarwala, however, although he does not adopt the reasoning of the District Judge, argued that the suit is barred by the broad rule of *res judicata* quite apart from section 11. His argument is, that this suit is not in fact, though it is in form, a suit for profits under section 164 of the Tenancy Act but that it is in reality an attempt to get round a decree of a Civil Court, properly passed, that is, a decree of the Civil Court which had exclusive jurisdiction to pass a decree. Reliance has been placed on a number of rulings of this Court which lay down the proposition that where a Revenue Court has exclusive jurisdiction to pass a particular decree a subsequent suit in a Civil Court although framed in a way that, on the face of it, gives a Civil Court jurisdiction to try it, will not lie, if the real object of the suit is to render nugatory the decree passed by the Revenue Court. It is only necessary to refer to *Kishore Singh* v. *Bahadur Singh* (1) which was followed in *Mollo* v. *Ramlal* (2) decided by a Bench of three Judges. These cases are

(1) 48 Ind. Cas. 470; 16 A. L. J. 933; 41 A. 97.
(2) 58 Ind. Cas. 772; 15 A. L. J. 1030; 43 A. 191.

said by Dr. Agarwala to be the converse of the present. He, however, cannot cite any authority for the proposition that the converse is correct law. It seems, however, unnecessary to decide this point in this case because it is impossible to say that the matter now in dispute was decided in the former suit. As the details of the claim quoted above show, several matters not now involved were then in issue. The arbitrator, in accordance with whose award that case was decided, perhaps wisely gave no reasons whatsoever for his decision. He simply awarded "Rs. 950" to the plaintiff. This, no doubt, must have included some at least of the Rs. 808 12 6 but it is impossible to say how much or why.

In our opinion, this was an ordinary suit for profits and as such was exclusively triable by the Revenue Court. It was open to the defendant to plead, and, if he could, to prove that he owed nothing or was only partially liable. But we do not think he was entitled to defeat the suit *in limine* by producing in evidence the decree of a Civil Court in which the defendant was held liable to pay a certain sum of money to the plaintiff. In our opinion the appeal must be allowed and the decree of the District Judge set aside and that of the Trial Court restored with costs throughout, including in this Court fees on the higher scale.

J. P.] *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 111-B OF 1921.

December 21, 1921.

Present :—Mr. Dhobley, A. J. C.

MUNICIPAL COMMITTEE, MALKAPUR —DEFENDANT—APPLICANT

versus

AMRIT WAMAN DALAL—PLAINTIFF —NON-APPLICANT.

Berar Municipal Law of 1886, *ss.* 51, 53—*Municipal tax—Suit for refund—Jurisdiction of Civil Court—Malkapur Municipality—Professional tax—Outside income, whether taxable—Plaint, allegations in—Jurisdiction.*

A Civil Court has jurisdiction to entertain a suit for the refund of a Municipal tax if the assessment thereof is *ultra vires* and to enter into account and direct the refund of the amount realised in excess. It has no jurisdiction to go into the question of correctness or otherwise of a calculation of assessment if the assessment is not *ultra vires*. In such a case if there be any mistake in calculation, it can be set at right only on appeal, as provided by the Municipal Law. [p. 535, col. 1.]

G. I. P. Ry. Company v. *Amraoti Municipality*, 16 Ind. Cas. 449; 8 N. L. R. 107, *Municipal Council of Cocanada* v. *Standard Life Assurance Company*, 24 M. 205; 10 M. L. J. 401, *Municipal Council of Mangalore* v. *Codial Bail Press*, 27 M. 547 and *Taluk Board, Bandar* v. *Mallikarjuna Prasada Naidu*, 61 Ind. Cas. 497; 40 M. L. J. 91; 12 L. W. 585: (1920) M. W. N. 748; 28 M. L. T. 440; 44 M. 156, referred to.

Chairman of Giridih Municipality v. *Srish Chandra Mozumdar*, 35 C. 869; 12 C. W. N. 709; 7 C. L. J. 631, followed.

The Malkapur Municipality in Berar cannot, under Notification No. 642, dated 15th October 1906, of the Local Government, assess professional income derived by the assessee outside its Municipal limits, unless such income is brought in and mixed with the income made within the Municipality. [p. 534, col. 2.]

Chairman of the Commissioners of the Joynagar Municipality v. *Sailabala Dutta*, 61 Ind. Cas. 511; 48 C. 442; 25 C. W. N. 47, referred to.

The jurisdiction of a Court depends upon the allegations in the plaint and not upon those which may ultimately be found true. The allegations may, after the trial of the suit, be held to be unfounded, in that case the suit would be dismissed, not because the Court had no jurisdiction, but because the allegations on which it was based were found to be untrue. At the same time, a Court would not have jurisdiction merely upon a bare assertion in the plaint. The plaint must make distinct allegations of fact or of law which may bear out the assertion. [p. 534, col. 1.]

Application for revision of a decree of the Judge, Small Cause Court, Malkapur, dated the 18th April 1921, in Civil Suit No. 475 of 1918.

Mr. *D. T. Mangalmurti*, for the Applicant.

Mr. *A. V. Khare*, for the Non-Applicant.

ORDER.—The plaintiff-non-applicant is a resident of Malkapur and carries on money-lending and other business at that place. He has similar business also at Buldana. The Municipal Committee, Malkapur, levies a professional tax on the inhabitants of the town at the rate of one per cent. on the income. The plaintiff alleged that in his case the Committee took his total income from both his shops at Malkapur and at Buldana as the basis and thus wrongfully realised from

him excessive amounts during the years 1914-15, 1915-16 and 1916 17. According to him, his income from his business at Malkapur alone should have been assessed and thus the levy of the tax on his income from both his shops was "unjust, illegal and unwarranted by law." His suit, therefore, was for the recovery of the excess sums realised from him.

2. The principal defence put forward in the lower Court and repeated here was, that, under section 53 of the Berar Municipal Law, 1886, the suit was not cognisable by a Civil Court. In order to decide this question it is necessary to refer to another section of the Berar Municipal Law and it is section 51. It reads as follows:—

"51 (1). An appeal against the assessment or levy of any tax under this law shall lie to the District Magistrate unless he is a member of the Committee, in which case the appeal shall lie to the Commissioner or other officer empowered by the Chief Commissioner in this behalf.

"(2). The order of the appellate authority shall be final.": Section 53 relied upon by the defendant reads thus: "53. No objection shall be taken to any valuation or assessment nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than in this law is provided."

It is thus contended for the Committee that the plaintiff's remedy lay by an appeal to the District Magistrate and that the present suit was expressly barred under the provision of section 53. A number of cases were quoted during the argument and we have a very similar case of this Court, *G. I. P. Ry. Company* v. *Amraoti Municipality* (1), which lays down that the jurisdiction of the Civil Courts is not ousted when the question is, whether a particular tax purporting to have been imposed under this law has any legal existence. When the levy or assessment of any tax by the Committee, purporting to be done under the authority of the Berar Municipal Law, is alleged to be *ultra vires*, the Civil Courts have jurisdiction to entertain the suit. The cases of *Municipal Council of Cocanada* v. *Standard Life Assurance Company* (2) and *Municipal Council of Mangalore* v. *Codial Bail Press* (3) are under the Madras District Municipalities Act, section 262 (2) of which is similar to section 53 of the Berar Municipal Law: It is to the effect that no suit can be brought in any Court to recover any sum of money collected under the authority of the Act, provided that its provisions have been in substance and effect complied with. In the first case it was held that the exaction of a tax illegally imposed and also the exaction of a tax from a person who is not legally taxable amounted to a substantial disregard of the Act and that the Civil Courts had jurisdiction to remedy the wrong in either case. In the 27th Madras case [*Municipal Council of Mangalore* v. *Codial Bail Press* (3)], the tax had been levied on the gross income, while it should have been levied on the net income, and it was held that the above mentioned section did not oust the jurisdiction of the Civil Courts to refund the tax illegally recovered. These cases mainly proceeded upon the express condition mentioned in section 262 of the Act, and, as that condition is not to be found in our law, the above decisions are not of much use to us in the present case. There are certain useful observations made in the case of *Taluk Board, Bandar* v. *Mallikarjuna Prasada Naidu* (4). Where a local authority is invested with discretionary powers, it is not for the Civil Courts to enquire into the sufficiency or otherwise of the materials on the strength of which that authority comes to a certain conclusion and decides to use its discretion in a particular way. The Courts should not interfere merely on the ground that they would have, on the same materials, come to a different conclusion and used their discretion in some other way. But if it be shown that the discretionary powers were exercised in capricious, wanton, arbitrary or unreasonable manner, the Courts have power to interfere. The same question as is involved in the present case arose in *Chairman of Giridih Municipality* v. *Srish Chandra Mozumdar* (5). That was a case under the Bengal Municipal Act, III of 1884, section 116 of which has almost an identical wording

(1) 16 Ind. Cas. 449; 8 N. L. R. 107.
(2) 24 M. 205; 10 M. L. J. 401.
(3) 27 M. 547.
(4) 61 Ind. Cas. 497; 40 M. L. J. 91; 12 L. W. 585; (1920) M. W. N. 743; 28 M. L. T. 440; 44 M. 156.
(5) 35 C. 859; 12 C. W. N. 709; 7 C. L. J. 631.

as section 53 of the Berar Municipal Law. That section provides that no objection shall be taken to any assessment or rate in any other manner than in this Act is provided. The expression "by any other authority" is not to be found in the Bengal Act but that would not, in my opinion, make any difference. The following observations made by Mookerjee, J., in the last case at pages 866-867, sum up the whole law on the subject:—

"It has been repeatedly ruled that errors in assessment, which constitute irregularities merely and do not go to the ground work of the tax and render the assessment void, can be corrected only in the manner provided by the Statute, which creates the authority and the remedy so provided must be treated as exclusive. On the other hand, where the defects in assessment are jurisdictional, rendering them void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedies, and all clear violations of law give rise to jurisdictional questions. In other words, while mere erroneous exercise of judgment is not reviewable by the Civil Court, any excess of jurisdiction makes the act liable to challenge in such Court."

3. In the present case the allegations of the plaintiff are, that the rules did not authorise the Municipal Committee to assess the professional tax on his income from the Buldana shop and that it acted without jurisdiction in taking that income into consideration while assessing the tax. These allegations, if true, would make the assessment illegal and *ultra vires* and the Civil Court had, therefore, jurisdiction to entertain the suit. The jurisdiction of Courts depends upon the allegations made in the plaint and not upon those which may ultimately be found true. The allegations may, after the trial of the suit, be held to be unfounded and in that case the suit would be dismissed, not because the Court had no jurisdiction, but because the allegations on which it was based were found to be untrue. At the same time, the Court would have no jurisdiction merely because there was an assertion in the plaint that the act objected to was *ultra vires*. The plaint must make distinct allegations of fact or of law how the act was *ultra vires*.

4. The next question is, whether the Committee could legally include the plaintiff's income from his business at Buldana in his Malkapur income for the assessment of the professional tax on him. For its decision we have to refer to the notification under which the tax was sanctioned by the Local Government. It is No. 642 of 15th October 1906, published in the Central Provinces Gazette of 20th October 1906, and the principal portion of its first clause is as follows;

"The tax shall subject to the following provisos, be assessable on every person who practises any profession or art or carries on any trade in the Malkapur Municipality, the whole or any part of whose income, derived from any source other than agriculture is not less than Rs. 100 per annum, at the rate of one per cent. on the taxable income derived from any such source".

It is contended for the Committee that the whole of the tax-payer's income derived from all sources except agriculture, whether derived within the Municipality or at any other place and whether brought into and spent within its limits or not was taxable. The case of *Chairman of the Commissioners of the Joynagar Municipality* v. *Sailabala Dutta* (6) is cited in support of the above contention. It was a case under the Bengal Municipal Act and it ruled that income brought to be spent and enjoyed within the Municipality in which the rate-payer resides becomes part of the means or circumstances within that Municipality and liable to assessment under section 85. The wording of that section is materially different and it is "persons occupying holdings within the Municipality according to their circumstances and property within the Municipality." The argument of the Committee's learned Pleader is, that as the last words, "within the Municipality," are not to be found in the rule in question, it must be presumed that the outside income whether brought into the Municipal limits or not was taxable. I must own my inability to follow the argument; moreover, in view of the express wording of the clause in our rule, there is, in my opinion, no scope for any argument. The words are "income

(6) 61 Ind. Cas. 511; 48 C. 413; 25 C. W. N. 47.

derived from any such source." Taking these words along with the preceding clause, "who practises any profession or art or carries on any trade in the Malkapur Municipality", the meaning appears to me to be clear. The income is the income derived from the profession or art practised or trade carried on within the Municipal limits If the outside income is brought in and mixed with the income made within the Municipality and spent there, the whole income will, no doubt, be taxable, but if the outside income is not at all brought in, but is kept at the place where it is earned, it cannot be taken into consideration while assessing the professional tax. It is true that such instances would be rare and, generally, all the income wherever made would be brought by the person to the place of his residence. But unless this be done the outside income would not be taxable.

5. Though the Committee stated in the lower Court that the assessment was actually made on the plaintiff's Malkapur income, the documentary evidence clearly shows that his whole income was taken into account and that his Buldana income was not excepted. The total figure on which the income-tax was levied on him by the Government was taken as the basis for the assessment of the professional tax. Thus, the Committee acted *ultra vires* and the Civil Court had jurisdiction to entertain the suit and to direct the refund of the amount realised in excess. If it had been found that the Committee had taken only the Malkapur income and kept the Buldana income out of account, the Civil Court would not have any jurisdiction to go minutely into the accounts to see what the actual income was, unless some principle in making accounts was involved. If, according to the calculation of the plaintiff, the proper tax on the Malkapur income was, say, Rs. 100, and if the Committee had on going through the accounts assessed Rs. 110, the Civil Court would have no jurisdiction to go into the question as to which calculation was correct. If there was any mistake in making accounts, it could be set right only on appeal as provided by the Municipal Law. I, therefore, agree with the lower Court that it had jurisdiction to entertain the suit and to order the refund of the amount realised as professional tax on the Buldana income. It has not been shown that that income was brought into Malkapur and mixed with the Malkapur income. On the other hand, the plaintiff's deposition would show that the Buldana income remained at Buldana.

6. We next come to the merits of the case. The plaintiff claimed refund of the excess amounts realized during the three years 1914-15, 1915-16 and 1916-17. The lower Court has held that tax actually paid for the years 1914-15 and 1916-17 was much less than what should have been paid by the plaintiff on his Malkapur income. It accordingly dismissed his claim for those years. As regards 1915-16, it held that the proper tax was Rs. 70, while the Committee had actually realised Rs. 210. It, therefore, gave the plaintiff a decree for Rs. 140 and costs in proportion. The plaintiff's claim for interest was disallowed. The Committee in this revision does not dispute the correctness of the lower Court's figure of the plaintiff's income for 1915-16 or of the tax payable by the plaintiff in that year. The Committee simply contends that the plaintiff should not have been granted a decree for a larger amount than what had been claimed by himself. The correctness of the lower Court's order for the payment of the costs of the suit is also questioned. The plaintiff has also, on the other hand, preferred a Revision No. 148 of 1921 against the dismissal of his claim for the years 1914-15 and 1916-17 and for interest. It will be convenient to dispose of the plaintiff's revision by this order.

7. For the year 1915-16, the plaintiff had claimed a refund of Rs. 133-4-0 only and thus the decree of the lower Court for Rs. 140 was wrong. This was not a suit on accounts, but the plaintiff claimed a specific sum of money. He could not, therefore, be given a decree for a larger amount.

8. A commission was issued in the lower Court for the examination of the plaintiff's books of account, and the persons to whom it was issued submitted their report and were examined as witnesses in the case. The learned Judge of the lower Court

accepted their figures of the plaintiff's income from the Malkapur shop during the years in question and based his decision on them. A complaint is made that the whole evidence was not properly considered and that the report should not have been accepted as wholly correct. I have myself gone through the evidence and the report and cannot say that the lower Court acted wrongly in accepting the report as correct. The Commissioners carefully and thoroughly examined the plaintiff's books of account and submitted their report. They were also examined at great length. There are no grounds for any interference with the decree dismissing the plaintiff's claim for these two years.

9. As regards the dismissal of the plaintiff's claim for interest, the lower Court acted properly in disallowing it. In two of the three years in question the amount paid by him as professional tax was much less than what was legally recoverable on his income. Instead of being thankful for his having to pay less, he brought a suit against the Committee alleging that he has been excessively taxed.

10. As regards the costs, the plaintiff is entitled to his costs in proportion to the claim decreed, while the defendant is entitled to its costs on the claim dismissed. The claim was for Rs. 260-7-0 and the claim now decreed is Rs. 133-4-0. The total costs of the plaintiff in the lower Court amounted to Rs. 102-8-0. According to the above proportion, the defendant shall have to pay Rs. 52 the balance Rs. 50-8-0 being borne by the plaintiff. The defendant's costs amounted to Rs. 90-8-0. The plaintiff shall have to pay Rs. 44-8-0 to the defendant, who shall bear the balance. The defendant shall have thus to pay Rs. 7-8-0 to the plaintiff as costs.

The net result is, that the plaintiff's revision fails and the defendant's revision is partially allowed and the decree of the lower Court is modified by substituting Rs. 133-4-0 for Rs. 140 decreed against the defendant. The defendant shall pay Rs. 7-8-0 to the plaintiff out of his costs in the lower Court, the remaining costs being borne as incurred. I make no order for the costs of this revision.

Defendant's application partially allowed.

G. R. D.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 50 AND 51 OF 1921.

January 18, 1922.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Jwala Prasad.

LOCHAN RAI AND OTHERS—APPELLANTS

versus

Lala SANT PRASAD—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 100, 103—Appeal, second—Finding of fact—High Court, power of, to go into evidence—Remand.

It is not for a High Court, sitting in second appeal, even if it thinks that certain evidence has been improperly rejected by the lower Court, to weigh that evidence as against the evidence on the other side and arrive at a conclusion of fact upon the matter when that determination of question of fact does not come under section 103 of the Civil Procedure Code. [p. 537, col. 1.]

In such a case the matter should be remanded to the lower Appellate Court for determining the issues of fact upon the evidence. [p. 537, col. 2.]

Per *Jwala Prasad, J.*—A finding of fact of a lower Appellate Court is conclusive in second appeal but there is nothing to prevent a High Court from going into the evidence on the record and deciding any issue whether actually raised or not in the Court below if the finding of fact is set aside on the grounds mentioned in section 100 of the Civil Procedure Code. [p. 539, col. 1.]

Section 103 of the Civil Procedure Code has widened the power of the Appellate Court to go into evidence and determine any issue not determined by the Court below. [p. 538, col. 2.]

Girdhari Lal v. *Crawford*, 9 A. 147; A. W. N. (1886) 325; 5 Ind. Dec. (N. S.) 531 (F. B.), *Deokishen* v. *Bansi*, 8 A. 172; A. W. N. (1886) 35; 4 Ind. Dec. (N. S.) 1134 (F. B.), *Bal Kishen* v. *Jasoda Kuar*, 7 A. 765; A. W. N. (1885) 225; 4 Ind. Dec. (N. S.) 908 (F. B.), *Seturatnam Aiyar* v. *Venkatachala Gounden*, 56 Ind. Cas. 117; 43 M. 567; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J 707; 47 I. A. 76; 25 C. W. N. 485 (P. C.) and *Damusa* v. *Abdul Samad*, 51 Ind Cas. 177; 47 C. 107; 17 A. L. J. 700; 5 N. L. R. 97; 37 M. L. J. 36; (1919) M. W. N. 505; 21 Bom L. R. 920; 10 L. W. 310; 24 C. W. N. 81; 46 I. A. 140 (P. C.), referred to.

Letters Patent Appeal against a judgment of Mr. Justice Ross.

Mr. *Kailaspati*, for the Appellants.

Messrs. *L. N. Singh* and *D. P. Singh*, for the Respondent.

JUDGMENT.

MILLER, C. J.—I very much regret that, in my opinion, these appeals will have to be remanded for decision by the lower Appellate Court. The only points in dispute were as to the rate of Nagdi rent and the landlord's share of the produce in the Bhowli rent. The landlord was claiming

Rs. 2 8-6 as Nagdi rent whilst the tenants were asserting that the rent was Rs. 2-1-9. The landlord was claiming Bhowli rent in certain proportions whilst the tenants were asserting different proportions.

The learned Munsif allowed the plaintiff's claim in the manner asserted by him except that, in making a calculation of the average produce of paddy, he arrived at it as 10 maunds per *bigha*, whereas in fact it ought to have been 14 maunds per *bigha*.

The tenants appealed to the Subordinate Judge. The Subordinate Judge allowed the appeal and also allowed the cross objection of the landlord who contended that a miscalculation had been made by the Munsif in arriving at the average produce of the paddy, so that both appeals were allowed.

The landlord appealed to this Court from the decision of the Subordinate Judge in so far as it allowed the tenants' appeal. The appeal came before Mr. Justice Ross. The points taken in appeal by the tenants were that the learned Subordinate Judge had, for improper reasons, rejected the evidence of the village papers as well as the report of the Assistant Settlement Officer, and had improperly relied upon the non-production of certain village papers relating to the land in question at an earlier period when it was under *Musammat* Jaipati Kuer.

The learned Judge of this Court found, and we agree with him, that the Subordinate Judge was wrong in rejecting the village papers and in rejecting the Assistant Settlement Officer's report, and to that extent we entirely agree with his decision. We also think that the learned Judge of this Court was right in pointing out that the Subordinate Judge was in error in drawing any inference from the fact that earlier village papers had not been produced when the defendants held under *Musammat* Jaipati Kuer because at that time their holdings were not the same and the rent was entirely different. The learned Judge, however, having arrived at the conclusion that certain evidence had been improperly rejected seems to have considered that if that evidence were admitted it disposed of the whole case. In my opinion it was clearly not for this Court, sitting in second appeal, even if it thought that certain evidence had been improperly rejected by the lower Court, to weigh that evidence as against the evidence on the other side and arrive at a conclusion of fact upon the matter. There may be certain cases in which the matter is so clear that the Appellate Court is driven to the conclusion that no Court acting reasonably could come to any conclusion but one, and in such cases it may be that the Appellate Court in second appeal would be entitled to decide the case without putting the parties to the trouble and expenses of having the question determined by the lower Appellate Court; but in the present case there undoubtedly was evidence on both sides as to the rate of rent both Nagdi and Bhowli. There was, on the one hand, the Record of Rights and there was some evidence given by the only witness called for the defendants which supported the Record of Rights. There was, on the other hand, the evidence which has been rejected by the Subordinate Judge, and it seems to me that the only possible course in this case is to remand the case to the lower Appellate Court to come to a conclusion of fact after considering not only the evidence which it has accepted (excluding the earlier village papers) but the evidence which Mr. Justice Ross found it had improperly rejected. Had we to determine this case for ourselves it might be an easy matter for us to arrive at a conclusion, but, as I have already said, the determination of questions of fact in second appeal not coming under section 103 of the Civil Procedure Code which is applicable in this case are not for the second Appellate Court. I, therefore, consider that the judgment of Mr. Justice Ross appealed from should be set aside and the case should be remanded to the lower Appellate Court for determining the issues of fact upon the evidence, including that which we have held was properly admissible in the case.

The decision of the Subordinate Judge, in so far as it found that the average produce of the paddy was 14 maund per *bigha* and 10 maunds per *bigha*, will remain. There is no appeal upon that question, but so far as the rest of his decision is concerned that will be set aside. The result, therefore, is that the judgment and decree of the learned Subordinate Judge are modified, as stated, and the case is remanded for decision on the facts in so far as the decree

of the Subordinate Judge has been set aside. I think, in the circumstances, the costs of this appeal will abide the result of the final determination of the case.

JWALA PRASAD, J.—I agree with the order proposed. I am not sure, however, whether in this case we could not determine the appeal without remanding the case. The question is, how are we to deal with this appeal. Are we debarred from dealing with the case on merits and disposing of it instead of remanding it?

Order XLII, rule 1, of the Code of Civil Procedure says that the rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees. Order XLI, rules 23 and 25, lay down the circumstances under which a remand can be made. Under rule 23 a remand is allowed when a suit is disposed of by the lower Court upon a preliminary point and the decree is reversed in appeal. Under that rule the Court to which the case is remanded is directed to determine certain issues left undetermined on account of the disposal of the case upon a preliminary point. Under rule 25 the remand is made when the Court trying the suit omits to frame or try any issue or to determine any question of fact which appears to the Appellate Court essential to the right decision of the suit upon the merits. In the present case none of these contingencies has arisen for a remand either under rule 23 or under rule 25. Rule 24 empowers the Appellate Court to pronounce judgment where the evidence upon the record is sufficient and finally determine the suit notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds. Generally speaking, the present case will come under rule 24, that is to say, this Court will have power to dispose of this appeal finally upon the evidence on the record. I do not find anywhere in the Code any indication that in second appeal the Appellate Court's power under rule 24 has been curtailed On the other hand, Order XLII makes this rule applicable to second appeals. No doubt, under section 100, read with section 101, no appeal shall lie to the High Court from a decree passed in appeal from any Court subordinate to it except upon the ground mentioned therein, *viz.*,

(*a*) the decision being contrary to law or to some usage having the force of law;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law;

(*c*) a substantial error or defect in the procedure provided by the Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

A second appeal to this Court did lie in this case and, as a matter of fact, we have decided that the judgment of the lower Appellate Court was illegal inasmuch as it exercised its jurisdiction irregularly in not having considered certain evidence upon the record. We are going to set aside the judgment and, therefore, the appeal to this Court was properly "laid." When once an appeal has been properly laid, then the ordinary rules under Orders XLI and XLII will apply for the disposal of that appeal. We can remand the case under rule 23 or 25 or we can determine the case finally upon the evidence under rule 24. True, no second appeal can lie upon facts, but when once an appeal is properly preferred and is entertained by this Court and the finding of fact of the lower Appellate Court is set aside and the evidence on the record is sufficient, then there is nothing to prevent the Court from going into the evidence and determining the case finally under rule 24. It has been recognised that the Appellate Court has power to remand also irrespective of rules 23 and 25 of Order XLI. I do not dispute that, and perhaps the present order of remand, though not coming under rules 23 and 25, may come under the general powers of this Court to remand the case, but I do not admit that this Court has no power to determine the case finally upon the merits and on consideration of the evidence under rule 24 of Order XLI.

I may add that section 103, which has now been added to the Code of 1908, has widened the power of the Appellate Court to go into evidence and determine any issue not determined by the Court below. This was in order to settle a conflict of decisions prior to 1907 as to whether the High Court could at all go into questions of fact and determine

an appeal on evidence: *Vide Girdhari Lal* v. *Orawford* (1), *Deokishen* v. *Bansi* (2) and *Bal Kishen* v. *Jasoda Kuar* (3). In the case of *Seturatnam Aiyar* v. *Venkatachala Gounden* (4) their Lordships of the Privy Council held that the High Court in second appeal had jurisdiction to deal with the case and to decide the issues upon the materials before the Court when the District Judge returned his finding without dealing with those materials in a satisfactory manner. In the case of *Damusa* v. *Abdul Samad* (5) their Lordships of the Privy Council held that the Judicial Commissioner had in second appeal on terms of section 100 of the Code (1908) power to decide what was the real question in the case notwithstanding that an issue had not been framed on it.

While I agree that a finding of fact of a lower Appellate Court is conclusive in second appeal, there is nothing to prevent the High Court from going into the evidence on the record and deciding any issue whether actually raised or not in the Court below, if the finding of fact is set aside on the grounds mentioned in section 100 of the Code. In the present case the evidence on the record is sufficient and almost all of them appear to have been dealt with by the Munsif. The remand is only for the purpose of the lower Appellate Court to record its finding upon the evidence on the record. This could be done by us here without much loss of time. The remand could, therefore, have been obviated.

However, as my Lord the Chief Justice is of opinion that the case should be remanded, I subscribe to it.

Case remanded.

J. P.

(1) 9 A. 147; A. W. N. (1886) 325; 5 Ind. Dec. (N. S.) 531 (F. B.).
(2) 8 A. 172; A. W. N. (1886) 35; 4 Ind. Dec. (N. S.) 1134 (F. B.).
(3) 7 A. 765; A. W. N. (1885) 225; 4 Ind. Dec. (N. S.) 908 (F. B.).
(4) 56 Ind. Cas. 117; 43 M. 567; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 47 I. A. 76; 25 C. W. N. 485 (P. C.).
(5) 51 Ind. Cas 177; 47 C. 107; 17 A. L. J. 700; 15 N. L. R. 97; 37 M. L. J. 36; (1919) M. W. N. 505; 21 Bom. L. R. 920; 10 L. W. 310; 24 C. W. N. 41; 46 I. A. 140 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 587 OF 1920.

January 20, 1922.

Present :—Mr. Justice Stuart

Musammat NAFISUNNISA AND OTHERS —DEFENDANTS—APPELLANTS

versus

Mirza MUMTAZ HUSAIN—PLAINTIFF —RESPONDENT.

Muhammadan Law—Marriage—Shia—Requisites of valid marriage—Marriage performed secretly—Restitution of conjugal rights.

Plaintiff, a Shia Muhammadan, and defendant No. 1, a Shia girl, who was above 20 years of age, contracted a secret marriage of their own choice and of their own free will and at the time the ceremony took place the plaintiff had an intention of having a public ceremony performed later with the consent of his wife's family and did not intend to consummate the marriage until that ceremony was performed. His wife's relatives opposed his access to his wife and endeavoured to marry her to another man. Thereupon, he sued for restitution of conjugal rights. It was alleged on behalf of the defendants that no marriage ceremony had taken place:

Held, that as, under the Shia Law, the presence of witnesses was not necessary in any matter regarding marriage and as a marriage contracted by the spouses themselves or their guardian in private was valid, the parties were legally married, and that a marriage which was a valid marriage could not be invalidated by the desire of the parties to have a more elaborate ceremony performed later. [p. 541, col. 2.]

Held, further, that the ceremony being complete the plaintiff was entitled to claim restitution of conjugal rights although he had agreed that he would not consummate the marriage till public ceremony was performed. [p. 541, col. 1.]

Moonshee Buzloor Ruheem v. *Shumsoonnissa Begum*, 11 M. I. A. 551; 8 W. R. P. C 3; 2 Suth. P. C. J. 59; 3 Sar. P. C. J. 259; 20 E. R 208, referred to.

Where in a Shia marriage the essentials are present (the declaration and the acceptance expressed in such a manner as to demonstrate intention without any sort of ambiguity) the presence or the absence of religious ceremonials is immaterial and in no way affects the validity of the union. [p. 541, col. 2.]

Under the Shia Law, as in the Hanafi Law, if a woman is adult and sane, she is competent to enter into a matrimonial engagement without advice or consent from any body. [p. 542, col. 1.]

Second appeal from a decision of the Additional District Judge, Gorakhpur, dated the 31st March 1920.

Mr. *Iqbal Ahmad*, for the Appellants.

Mr. *Agha Haider* and Dr. *S. M. Sulaiman*, for the Respondent.

NAFISUNNISA v. MUMTAZ HUSAIN.

JUDGMENT.—The suit, out of which this appeal arises, is described by the Trial Judge as the most miserable case he has ever had to try. It is certainly not a pleasant one. The plaintiff, Mirza Mumtaz Husain, is the first cousin of the first defendant Nafisunnisa. Nafisunnisa is the daughter of Nawab Mirza, deceased. Her mother, Kaniz Banu Khanam, and her brother Mirza Khadim Husain and her uncle Mirza Kalab Hasan are the three remaining defendants. The plaintiff's case was, that he had known the first defendant all her life; that a strong affection had grown up between them and that he had endeavoured to marry her after obtaining her relatives' consent; that, failing to secure this he married her secretly on the 26th of January 1917 but has never been allowed access to her owing to the opposition of her relatives; that her relatives have since endeavoured to marry her to another man. He, therefore, instituted this suit for restoration of conjugal rights. The young lady joined her relatives in signing a written statement in which the plaintiff was described as a man of bad character who had been dismissed from the Railway service. The written statement admitted that they were cousins and the fact that the plaintiff was intimately acquainted with defendant No. 1. It asserted that no marriage ceremony had ever taken place but that the plaintiff had by duress caused defendant No. 1 to sign a document in which she had admitted the performance of the ceremony although, as a matter of fact, no ceremony had taken place. The suit was contested with bitterness. The facts, as found by the learned Munsif and the Additional District Judge, are as follows:—On the date alleged the plaintiff and defendant No. 1 undoubtedly recited to each other formulæ requisite for a valid marriage. The parties being Shias the formulæ are Shia formulæ. The acknowledgment made by defendant No. 1 of the fact of marriage was a genuine acknowledgment and was not obtained from her by duress. Defendant No. 1, as is shown by her letters, was tenderly attached to the plaintiff before the ceremony took place. Her affection for the plaintiff has continued, but owing to pressure put upon her by her mother and brother, she has in the Courts been compelled to profess an aversion which she does not feel. The finding is that these two young people married one another of their own choice and of their own free will and that the bride's relatives have restrained her against her will from going to her husband. The relatives have come here in second appeal. I will take the grounds of appeal in order. The first ground is that, on the plaintiff's own showing, the alleged *nikah* was to remain in operation till it was followed by another and regular *nikah*, and no subsequent *nikah* having taken place, the suit was not maintainable. It is true that the plaintiff under cross-examination admitted that, at the time when the ceremony took place between him and the defendant, he had in his mind an intention of having a public ceremony performed later with the consent of his wife's family and that he had not intended to consummate the marriage until that ceremony was performed. This circumstance, however, can in no way invalidate the ceremony. It is found that both the parties were adults and in full possession of their faculties. The bride at the time of the marriage was over 20 years of age. "Under the Shia Law 'the presence of witnesses is not necessary in any matter regarding marriage; and if a marriage were contracted by the spouses themselves or their guardians in private, it would be valid; even if there were an injunction to secrecy, that would not invalidate it.'" (Ameer Ali on Muhammadan Law, Volume II, 4th Edition, page 333). There can be no doubt that the marriage was in the correct form. There is nothing in the Muhammadan Law which countenances the doctrine that a marriage which is a valid marriage can be invalidated by the desire of the parties to have a more elaborate ceremony performed later. Either the ceremony was a good ceremony, in which case the marriage is a good marriage, or the ceremony is not a good ceremony, in which case there is no marriage. There is no provision in Shia Law for a ceremony which would create a marriage if afterwards ratified by a subsequent ceremony. Here all the conditions necessary for a valid marriage between Shias were complied with. So the parties are legally married.

The second ground is:—"Because the exercise of conjugal rights being dependant upon the performance of a second *nikah*, the suit should have been dismissed." "If there

had been a stipulation after the marriage had taken place to the effect that it would not be consummated until the lapse of a specified period, such a stipulation is valid." (Ameer Ali on Muhammadan Law, Volume II, 4th Edition, page 365). But there was no condition in the ceremony. No condition was made. The bride did not accept the marriage conditionally. Much has been made of the remark under cross-examination made by the plaintiff, but this remark is no more than an indication of his general view as to what he then hoped. He had hoped, according to him, when the ceremony was completed, that his wife's relations would eventually approve their union, and he proposed not to live with his wife until he had obtained that approval. But it is, of course, open to him, having failed to obtain that approval, to secure his wife's presence. On the findings of the Courts below, in spite of her contest in the Trial Court, she wishes to go to him.

The 3rd ground is: 'Because the plaintiff and the defendant No. 1 not having consented, in unequivocal terms, to a permanent and absolute union, to commence from the time of the contract, for the purpose of intercourse, no valid marriage was constituted between them." I have already dealt with this point.

The 4th ground is:—"Because the essential religious ceremonies not having taken place at the time of the alleged marriage, their marriage was absolutely void." This ground cannot be supported. "The law appoints no specific ceremony for the contractual performance of a marriage; and no religious rites are necessary for contracting a valid marriage." (Ameer Ali on Muhammadan Law, Volume II, 4th Edition, page 333). It is true, as stated at page 334, that "Local forms of religious ceremonies have become associated with the performance of the matrimonial contracts." At page 334 it is stated:—"The validity or invalidity of a marriage, however, does not depend in any way on the performance or non performance of the forms and ceremonies that have been engrafted on Moslem manners and customs by contract with outside races." In India it has become more or less the custom to introduce certain prayers into the ceremony. At page 336 the learned author continues: "As stated before, in practice there is little or no difference between the ceremonials observed by the Shias and the Sunnis on these occasions. Theoretically, however, there is a difference which ought not to be lost sight of in dealing with the question of *form*. Whilst the Sunnis simply recommend the use of the *Khutba* before the contract is finally executed, and of the *Surat ul-Fatiha* (the opening chapter of the Koran) at the conclusion of the marriage, the Shias consider the use of these to be, to some extent, obligatory. Among them, the ceremony commences as well as concludes with a prayer, and after the *sigeh* has been pronounced, the person who officiates as minister or priest, reads the *Khutba* and the *Surat ul Fatiha* to sanctify and bless the union." It is clear from what has been stated above that where the essentials are present (the declaration and the acceptance expressed in such a manner as to demonstrate intention without any sort of ambiguity) the presence or the absence of religious ceremonials is immaterial and in no way affects the validity of the union.

The 5th ground is:—"Because the burden of proving that defendant No. 1 after free and independent advice and fully realising the effect on her interests entered into the contract of marriage was upon the plaintiff-respondent and he has failed to discharge the burden." It was here argued that the Court should approach this question as if it were a question of the execution of a sale or contract by a *purda nashin* lady; that it should be established by sufficient evidence that she had had independent advice; that the matter had been clearly explained to her and that she was entering the matrimonial state forewarned and forearmed. The argument appears to me to have no bearing upon a case such as this. We are dealing here with the question of Muhammadan marriage among Shias, the laws and rules of which are to be found in their own religion. The habit of keeping women secluded has been known to Shias for a very considerable period. There is nothing in the Shia Law to justify the imposition in the matter of marriage of conditions which have been imposed upon persons dealing with *purda nashin* women in business matters. The Shia Law, (in this respect it is no different from the

Hanafi Law), lays down that if a woman is adult and sane, she is competent to enter into a matrimonial engagement without advice or consent from anybody.

The last ground is a general ground to the effect that the Court should, in its discretion, have refused to grant relief. A Court has not very great discretion in the matter as was laid down many years ago, in the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1) but in this particular case on the facts there is every reason why the relief should be granted for it has been found that the young lady is eager and desirous to go to her husband and is being restrained by her relatives. For these reasons, I dismiss this appeal with costs which will include fees on the higher scale.

J. P. *Appeal dismissed.*

(1) 11 M. I. A. 551; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C J. 259; 20 E. R. 208.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 181-B OF 1919.

October 18, 1920.

Present :—Mr. Macnair, A. J. C.

NARAYAN—DEFENDANT—APPLICANT

versus

AMRITA—PLAINTIFF—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3—"Legal representatives", meaning of—Application by some—Abatement, whether of entire suit.

The words "legal representiatives" in Order XXII, rule 3, of the Civil Procedure Code of 1908 cannot be construed to mean all the legal representatives. They must include any legal representative to whom the right to sue survives. The question to be decided in each case is, whether the omission of one of the representatives is fatal to the suit or appeal. [p. 543, col. 1.]

Where, therefore, some only of all the legal representatives to whom the right to sue survives apply to have their names substituted for that of a deceased appellant, the appeal does not abate as a whole but abates to the extent of the claim of such of the legal representatives as have not jointly or severally applied for their substitution of their names. [p 542, col. 2; p. 543, col. 1.]

Musala Reddi v. *Ramayya*, 23 M. 125; 9 M. L. J. 313; 8 Ind. Dec. (N. S.) 483, followed.

Ghamandi Lal v. *Amir Begam*, 16 A. 211; A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136 and *Haidar Husain*, v. *Abdul Ahad*, 30 A. 117; 5 A. L. J. 62; A. W. N. (1908) 41; 3 M. L. T. 207, not followed.

Application for revision of an order of the Additional District Judge, West Berar, Akola, dated the 17th July 1919, in Civil Suit No. 281 of 1917.

ORDER.—The plaintiff obtained a decree in the First Court against one Nagoji. Nagoji appealed; but during the pendency of the appeal he died and left five sons. Narayan, the third son, applied for substitution of his name in place of that of his deceased father. He did not disclose the existence of his four brothers. His application was granted. The respondent, however, urged that the appeal had abated as Narayan was not the legal representative of the deceased. Narayan urged that he was the manager of the family. The lower Appellate Court has found that he was not the manager and, though this finding is attacked in revision, I see no reason whatever to interfere with it.

Another ground is, however, urged before me. The lower Appellate Court has held that Narayan desired to carry on the appeal for his sole benefit. It is urged that he is entitled to do so. The lower Appellate Court relies on *Ghamandi Lal* v. *Amir Begam* (1) and *Haidar Husain* v. *Abdul Ahad* (2). In *Ghamandi Lal* v. *Amir Begam* (1) it was held that the words "the legal representative" in section 265 of Act XIV of 1882 (corresponding to Order XXII, rule 3, of the Code of Civil Procedure, 1908) must be read in the plural: the application to the Court, therefore, must ask that all the legal representatives of the deceased appellant should be made parties to the suit. This ruling was followed in *Haidar Husain* v. *Abdul Ahad* (2).

The ruling in *Ghamandi Lal* v. *Amir Begam* (1) is distinguished in *Musala Reddi* v. *Ramayya* (3). It was there held that where some of the legal representatives made an application and owing to a *bona fide* belief that it was unnecessary for them to have the other legal repre-

(1) 16 A. 211; A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136.

(2) 30 A. 117; 5 A. L. J. 62; A. W. N. (1908) 41; 3 M. L. T. 207.

(3) 23 M. 125; 9 M. L J. 313; 8 Ind. Dec. (N. S.) 483.

sentatives brought on the record as respondents failed to do so the appeal did not abate. I agree with the Judges who decided the Madras case that the strict literal construction of sections 365 and 366 in accordance with the view of the Allahabad High Court would have unfortunate results. If *A* imagined that he was the sole legal representative of an appellant it would be unfortunate if he was precluded from obtaining relief in so far as he was affected merely because another person *B* was also a legal representative.

But if the words "legal representative" are held to mean all legal representatives I cannot see how the Civil Procedure Code provides for a distinction on the ground of the *bona fide* belief of some of the legal representatives. It appears to me, therefore, that the words "legal representative" cannot be construed to mean all legal representatives. They must include any legal representative to whom the right to sue survives.

This interpretation appears to me to be the natural interpretation. The words in Order XXII, rule 4, are similar to the words in Order XXII, rule 3. I do not think it has ever been disputed that a plaintiff can get relief against a legal representative of a deceased defendant even if another legal representative whom he has failed to implead exists. The result of failure to implead the second legal representative is at most that he cannot get relief against him.

The question to be decided in each case is, whether the omission of one of the representatives is fatal to the suit or appeal. In the present case it is admitted that Narayan was a co sharer of the field in dispute. He, therefore, had a right to prosecute the appeal so far as his own share is concerned. The appeal, therefore, must be heard on the merits. The first Appellate Court must consider whether it should exercise its discretion given to it by Order XLI, rule 4, of the Civil Procedure Code. If the exercise of this discretion is refused, the decree of the First Court must stand so far as the shares of Narayan's brothers are concerned. I reverse the decree of the lower Appellate Court and remand the case for trial with advertence to the above remarks. Costs in this case will be costs in the first appeal.

G. R. D.

Application allowed;
Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 127 OF 1920.

January 23, 1922.

Present :—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

BECHAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KISHUN LAL—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Pre-emption—Liability of pre-emptor to pay for incumbrance created by vendee as part of sale consideration - Consideration—Compromise of suit—Person no party to compromise not bound.

One *K* sold a house to *J.* for Rs. 1,800 on 4th October 1914. The vendee paid Rs. 900 in cash and for the balance executed a mortgage of the same property in favour of *K.* on 5th October. *B.* and others sued to pre-empt the property making both the vendor and the vendee parties to the suit but compromised the suit with the vendee alone for possession of the property on payment of Rs. 1,575 to the vendee, stipulating that they did not admit the validity of the mortgage but if it was enforced they would pay. *K.* sued to enforce the mortgage:

Held, that the mortgage was a part of the sale consideration, and that as the pre-emptor knew of the existence of the mortgage he was liable for the amount.

Ramta Prasad v. Sohan Bhagat, 3 Ind Cas. 782; 32 A. 45; 6 A. L. J. 966, distinguished.

BECHAN SINGH v. KISHUN LAL.

A person who is no party to a compromise in a suit cannot be adversely affected by anything that the other parties chose to do behind his back.

Second appeal against a decree of the District Judge, Benares, dated the 19th of September 1919.

Dr. *S. M. Sulaiman*, Messrs. *Peary Lal Banerjee* and *Harnandan Prasad*, for the Appellants.

Dr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows. On the 4th of October 1914 the plaintiff sold a house to *Musammat* Jillo, defendant No. 1, for Rs. 1,800. It was stated in the sale-deed that out of the consideration money Rs. 900 was paid in cash and that a mortgage of the house had been given for the balance. It was quite clear that the consideration for the sale was the mortgage *plus* the balance in cash. On the 5th of October 1914 *Musammat* Jillo executed the mortgage. Defendants Nos. 2 and 3, Bechan Singh and Bishnath Singh, appellants here, brought a suit to pre-empt the sale and they made both the plaintiff and *Musammat* Jillo parties to it. That suit was compromised between *Musammat* Jillo and the appellants. The mortgagee plaintiff was exempted from the suit. According to that compromise it was agreed that *Musammat* Jillo should receive in cash Rs. 1,375 and it was stated that, although the appellants did not admit the validity of the mortgage which had been executed by *Musammat* Jillo in favour of the plaintiff, nevertheless if *Musammat* Jillo was held liable on that mortgage they undertook to pay whatever her liabilities might be. This suit was brought by the plaintiff on his mortgage and he made *Musammat* Jillo the first defendant and Bechan Singh and Bishnath Singh defendants Nos. 2 and 3. The main defence was, that the mortgage was not genuine and that, in any case, it was not binding upon the property. The first Court decreed the claim in part against *Musammat* Jillo by giving a simple money decree against her and dismissed it as against the present appellants. The judgment of the Trial Court proceeded chiefly on the case of *Kamta Prasad* v. *Sohan Bhagat* (1). On appeal by the plaintiff the learned Judge held that the case of *Kamta Prasad* v. *Sohan Bhagat* (1) was not applicable to the facts here and in that opinion we agree. In that case the mortgage was executed for a different debt altogether although both the sale and the mortgage were of the same date. Here we hold that although the mortgage was actually executed a day after the sale, nevertheless the mortgage was a part of the consideration for the sale and must be regarded as part of the same transaction. In this view the case of *Kamta Prasad* v. *Sohan Bhagat* (1) has no application. It must be remembered that the pre-emptors in this case knew of the existence of the mortgage because it was mentioned in the sale-deed under which they pre-empted. It was open to them as prudent men to see that the mortgage was paid off before the money which they paid into Court reached the hands of *Musammat* Jillo. We cannot see how the plaintiff, who was no party to the compromise, can be adversely affected by anything they chose to do behind his back. In our opinion the view taken by the Court below is right. We, therefore, dismiss this appeal with costs including in this Court fees on the higher scale.

J. P.

Appeal dismissed.

(1) 3 Ind Cas 782; 32 A 45; 6 A. L. J. 963.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 793 OF 1921.

August 14, 1921.

Present:—Mr. Justice Martineau.

ALI HUSSAIN KHAN—PETITIONER

versus

HARCHARAN DAS—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 197, 439—Order under s. 197—Executive order—Revision—High Court, power of.

The granting of sanction under section 197 of the Criminal Procedure Code is an executive act, and does not become a judicial one because the sanction is granted by a Court, or because the sanctioning Court treats it as such. A High Court has no power to interfere with such an order in revision.

Nando Lal Basak v. *Mitter*, 26 C. 852; 3 C. W. N. 539; 13 Ind Dec. N. S. 1146, referred to

Grey v. *North Western Railway Administration*, 13 P. R. 1891 Cr., cited.

Revision from an order of the District Judge, Hissar, dated the 16th April 1921.

Messrs. *Garden Noad*, *Khadim Ali Shah* and *Iftikhar Ali*, for the Petitioner.

Mr. *Jagan Nath*, for the Respondent.

JUDGMENT.—The respondent, who is a Vakil practising at Hissar, applied to the District Judge of Hissar for sanction, under section 197, Criminal Procedure Code, to prosecute the petitioner, Sardar Ali Hussain Khan, Senior Subordinate Judge, for offences under sections 500, 504 and 506, Indian Penal Code, in connection with an incident which occurred while the petitioner was hearing a case in his Court on the 4th November 1920. The District Judge ordered a notice to issue to the petitioner to show cause why sanction should not be granted, and the present application has been made for the revision of that order under sections 435 and 439, Criminal Procedure Code.

One of the objections urged on behalf of the respondent is, that the order is an executive and not a judicial order, and that, therefore, the present application is not maintainable. In my opinion, this objection is correct. The granting of sanction under section 197 is clearly not a judicial but an executive act, where the authority granting the sanction is the Government, and it is difficult to see how it can assume a different character if the sanction is granted by a Court. Courts exercise executive as well as judicial functions, for instance, in imposing fines upon ministerial officers under section 36 of the Courts Act.

There is a wide distinction between the provisions of section 197 and those of section 195 in regard to the granting of sanction. Section 195 not only prohibits a Court from taking cognizance of certain offences, except with the previous sanction or on the complaint of certain authorities, but lays down the nature of the sanction required specifying what it must contain and what it need not contain. In section 197, on the other hand, no particular form of sanction is prescribed, and the section merely provides that no Court shall take cognizance of a certain class of offences unless the sanction of one of certain specified authorities has been obtained. Further, there is no provision in section 197, as there is in section 195, by which a sanction given or refused may be revoked or granted by a superior authority, and it is also noticeable that, whereas it is provided in section 439 that the High Court may exercise any of the powers conferred on a Court of Appeal by section 195, it contains no reference to section 197. It was, in fact, held in *Nando Lal Basak* v. *Mitter* (1) that, under the revisional powers conferred by the Criminal Procedure Code, the High Court has no authority to interfere with an order made by a subordinate Court granting or refusing sanction under section 197.

It is contended on behalf of the petitioner that, as the matter has been treated by the District Judge as a judicial one, it can be treated here also in the same way, and *Grey* v. *North Western Railway Administration* (2) has been cited in this connection; but I cannot agree with this contention. An executive proceeding does not become a judicial proceeding merely because the Court regards it as such.

I hold, therefore, that this application cannot be entertained and I dismiss it.

Z. K.

Application dismissed.

(1) 26 C. 852; 3 C. W. N. 539; 13 Ind. Dec. (N. S.) 1146.

(2) 13 P. R. 1891 Cr.

PATNA HIGH COURT.
CRIMINAL REVISION No. 1 OF 1922.
January 24, 1922.
Present:—Mr. Justice. Jwala Prasad.

BALKESHWAR SINGH—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 355 (2), 342—Warrant case—Summary trial—Examination of accused, necessity of—Written statement, whether sufficient—Penal Code (Act XLV of 1860), s. 238—Conviction on different charge—Prejudice—Knowledge.

When a warrant case is tried summarily the procedure to be followed is that prescribed for the trial of warrant cases—and, therefore, the memorandum of the substance of the evidence of each witness must as provided by section 355 (2) be signed by the Magistrate. [p 547, col. 2.]

A written statement filed by an accused person cannot take the place of his examination under section 342, Criminal Procedure Code. [p. 547, col. 1.]

Raghu Bhumij v. *Emperor*, 58 Ind. Cas. 49; 1 P. L. T. 241; 5 P. L. J. 420; 21 Cr. L. J. 705, referred to.

Non-compliance with the requirements of section 342 or 355, vitiates the trial. [p 547, col. 2]

An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and, unless he has this knowledge he must be seriously prejudiced in his defence. Where he is convicted on a charge different from that on which he is tried the nature of the case made at the trial, the evidence given and the line of defence made are matters to be taken into consideration to decide whether he has been prejudiced or not in the trial. [p. 548, cols. 1 & 2.]

Mahomed Hossein v. *Emperor*, 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247 and *Karali Prasad Guru* v. *Emperor*, 35 Ind. Cas. 984; 44 C. 358; 20 C. W. N. 1075; 17 Cr. L. J. 424, followed.

Criminal revision against an order of the Deputy Magistrate, Daltanganj, dated the 28th November 1921.

Mr. *Devaki Prasad Sinha*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This Rule issued by a Division Bench of this Court is directed against an order of the Deputy Magistrate of Daltonganj, dated the 28th November 1921, in a case convicting the accused of an offence under section 457, Indian Penal Code and imposing upon him a sentence of three months' rigorous imprisonment.

The learned Vakil appearing on behalf of the accused impugns the aforesaid conviction and the sentence upon the ground that the trial held by the Magistrate was vitiated by certain illegalities and irregularity: the first ground urged is, that the Magistrate omitted to examine the accused under section 342, Criminal Procedure Code, after the close of the prosecution evidence and before the accused was called upon to enter into his defence.

The learned Vakil has referred to the certified copy of the record of the case prepared in the form "kept under section 263 of the Code of Criminal Procedure," and contends that from the copy it does not appear that there was any plea of the accused recorded, far less that he was examined under section 342 of the Code.

The original record does show that the accused's plea was recorded in the column headed "The plea of the accused and his examination (if any)." The heading and the entry made by the Magistrate in this column appear to have been omitted on the certified copy granted to the accused filed along with the application to this Court. The certified copy contains the columns both before and after the aforesaid column relating to the plea of the accused and his examination. The copy was applied for on the 14th December and was granted on the 21st December. It is not possible to find out the reason how this omission of this important column in the copy granted to the accused occurred. This, however, is a matter for the Magistrate to enquire and investigate. I must take the record as it is and hold that the plea of the accused and his examination was recorded in the appropriate column. The entry in that column runs as follows:

"The accused says I have not committed any offence and the case is false. I cannot say why the complainant has brought this false case. I would file the written statement".....Later, a written statement was filed for the accused.

There is nothing enclosed with this record to indicate when the accused was examined, namely, whether before or after the close of the prosecution case. This entry is not dated. After the close of the prosecution evidence the Magistrate's signature appears at the end of the last witness for the prosecution and is dated the 16th November 1921. Thereafter, the entry of the Magistrate on that date is "Evidence for the prosecution closed. The

accused is not ready with his evidence and wants his witnesses to be summoned ...Summon the above-named witnesses for the 28th November 1921. The accused on bail as before. All prosecution witnesses discharged."

It appears that a written statement on behalf of the accused was filed on that very day, as is mentioned in the column referred to above relating to the plea of the accused and his examination.

It has been settled by authorities that a written statement filed by an accused person cannot take the place of his examination under section 342, *vide* the case of *Raghu Bhumij* v. *Emperor* (1) and the decisions referred to therein, therefore, the written statement filed by the accused in the present case could not absolve the responsibility of the Magistrate to examine the accused under section 342 of the Code. The note made in the column referred to above only shows that, first, the accused was examined and his plea was recorded, and, afterwards, the written statement was filed by him. It does not appear that he was examined after the close of the prosecution case. The learned Deputy Commissioner, in his letter No. 179, dated the 12th January, addressed to the Assistant Registrar of this Court, refers, in paragraph 2, to the explanation given by the Trying Magistrate to the effect that there is a column in the summary trial form, headed "The plea of the accused and his examination (if any)" in which the full statement of the accused, after examining the principal prosecution witnesses, was recorded, adopting the procedure of the warrant case. Thus, the Trying Magistrate contends that this ground does not seem to prevail.

But the statement of the accused in the aforesaid column was recorded after examining the principal prosecution witnesses; the Magistrate does not say after all the prosecution witnesses. The law requires that the examination of the accused should take place after the close of the prosecution evidence and before the accused is called upon to enter into his defense, *vide Raghu Bhumij* v. *Emperor* (1), *Suraj Pandey* v. *Emperor* (2). The offence for which the accused was being tried was that triable in a warrant case and, therefore, the procedure for warrant cases would apply to the trial of the case though a summary one under section 262, Criminal Procedure Code. It was pointed out in case of *Mahomed Hossein* v. *Emperor* (3) that the examination of the accused under section 342 is mandatory. Therefore, in the absence of anything on the record to show that the requirements of section 342 were complied with, and in view of the explanation of the Trying Magistrate referred to above, I hold that the trial is vitiated on account of the illegality referred to above. The record prepared in the case is further defective, inasmuch as the memorandum of the substance of the evidence of each witness has not been signed by the Magistrate as is required by section 264 of the Criminal Procedure Code. That section prescribes the mode in which the record of the evidence of witnesses should be prepared in summary trials in cases of the offences mentioned in sub-section (1) of section 260, clauses (*b*) to (*m*) when tried by a Magistrate of First and Second Class. The offence in the present case was one under section 457, Indian Penal Code, which is one of the sections mentioned in section 261 (1) of the Criminal Procedure Code. Clause (1) of section 355 says that the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. This, the Magistrate has done in the present case. He has prepared a memorandum of the evidence of each witness but he has not signed the said memorandum as is required by clause (2), of the section, which says: "Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record."

It has been held that non compliance of the requirements of section 355 constitutes an illegality which must vitiate the trial. But for the aforesaid illegalities arising out of the non compliance of sections 352

(1) 58 Ind. Cas. 49; 1 P. L. T. 241; 5 P. L. J. 430; 21 Cr. L. J. 705.

(2) 58 Ind. Cas. 521; 1 P. L. T. 641; (1920) Pat. 281; 21 Cr. L. J. 793.

(3) 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247.

and 355 the record prepared by the Magistrate appears to be very careful and complete. He has recorded in sufficient detail the evidence of all the prosecution and defence witnesses and it is, therefore, to be regretted that the aforesaid errors should have been committed so as to vitiate the careful trial held by him.

The learned Vakil on behalf of the accused then submits that the conviction of the accused under section 457, Indian Penal Code is bad, inasmuch as the Magistrate has found that the prosecution failed to establish the intention with which the house trespass was committed by the accused, namely, for the purpose of committing theft, and, consequently, it was not open to the Magistrate to convict the accused of an altogether different intent, namely, to commit adultery.

The case of the complainant was, that the accused had entered the house with a view to commit theft, and he sought to prove it by showing that the granary was broken and some grains were lying near him. He further sought to support his case by the prosecution witnesses. In the cross-examination on behalf of the accused, it was suggested that the complainant was displeased with the accused for a suspicion of having illicit connection with the wife of the former, and that he had threatened the accused to implicate him in a false case. The prosecution denied the suggestion. In the circumstances of the case, the Magistrate came to the conclusion that the intention of theft with which the accused was charged was concealed by the prosecution and that the real intention of the accused was to carry on an intrigue with the wife of the complainant. The reasons given by the Magistrate for coming to the conclusion appear to be sound; but the question is, whether the accused could be convicted of a different intention than the one of which he was charged. Section 238, Criminal Procedure Code, empowers the Magistrate to convict the accused of a different charge from what he was originally accused of, provided the accused was not in any way prejudiced by the conviction on the new charge. In the case of *Karali Prasad Guru* v. *Emperor* (4) it was held that the accused was not prejudiced, inasmuch as the accused himself definitely set up the plea of having entered the house on account of previous intrigue and upon the invitation of the widow who was occupying the house in question. Mookerjee, J., fully recognised the proposition laid down in the case of *Behari Mahton* v. *Queen-Empress* (5) that "an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and, unless he has this knowledge, he must be seriously prejudiced in his defence," and, following the dictum of Couch, C. J., in *Reg.* v. *Govindas Haridas* (6), that the nature of the case made at the trial against the prisoner, the evidence that was given and the line of defence set up by him, are all matters to be taken into consideration His Lordship held in that case that in the circumstances of the case and considering more particularly the defence set up by the accused and the evidence produced by him, the accused was not at all prejudiced.

In the present case the prosecution concealed the intention and when opportunity was given to it by suggestions made in the cross examination it still refused to accept the suggestions. The accused did not admit that he had entered the house. He pleaded *alibi* and he denied the occurrence altogether. He simply suggested that the case was falsely lodged against him on account of the suspicion by the complainant that the accused was carrying on an intrigue with his wife. Therefore, upon the case of the prosecution, and on the line adopted by the defence, the accused could not be said to have any knowledge of the charge of which he has now been convicted, namely, of having entered the house with the intent of committing adultery. This was the view taken in an exactly similar case in *Mahomed Hossein* v. *Emperor* (3). The observations made in that case are so appropriate that I am tempted to quote *in extenso:* "Then, again, the charge was with intent to commit theft, as alleged by the prosecution in their evidence, and in their evidence they did not aver that there was any other reason for the house-breaking. It was the defence which tried to

(4) 35 Ind. Cas. 984; 44 C. 358; 20 C. W. N. 1075; 17 Cr. L. J. 424.

(5) 11 C. 106; 5 Ind. Dec. (N. S.) 829.
(6) 6 B. H. C. R. 76 Cr.

elicit from the prosecution witnesses that there was some familiarity between the accused and a woman in the complainant's house. It is, therefore, on the defence that the conviction rests and not on the prosecution. There can be no doubt that, when the learned Magistrate found that the charge of theft or the charge of house-breaking with a view to commit theft, broke down, and it appeared that there was another object, it was his bounden duty to have given the accused notice of that by drawing up a charge clearly stating what it was that he was accused of doing. The trial appears to us to have been vitiated by these errors, and the conviction and sentence are, therefore, set aside."

The question then arises as to whether a re-trial should be ordered. Herein also I would adopt the views of their Lordships in the case referred to above: "We do not order a re-trial because the accused has already been 21 days in jail, and we consider that is sufficient to meet the ends of justice in this case." In the present case the accused has been in jail for two months and he was sentenced only for three months.

The petitioner will be released and set at liberty.

M. L. *Conviction set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 367 OF 1920.
CRIMINAL REVISION PETITION No. 297 OF 1920.

December 20, 1920.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Coutts-Trotter.

MUHAMMAD IBRAHIM SAHIB—PETITIONER

versus

SHAIK DAWOOD—RESPONDENT No. 1.

Penal Code (Act XLV of 1860), s. 323, prosecution under—Death of person hurt, whether causes abatement of prosecution—Probate and Administration Act (V of 1881), s. 89, effect of, on criminal proceedings—Criminal Procedure Code (Act V of 1898), ss. 195 to 199, prosecutions under—Abatement.

A criminal prosecution under section 323, Indian Penal Code, does not abate by reason of the death of the person hurt. [p. 550, col. 1.]

Section 89 of the Probate and Administration Act has no reference to criminal prosecutions but is confined to civil actions only. [p. 550, col. 2.]

Rama Nand v. *Emperor*, 40 Ind. Cas. 1003; 26 P. R. 1917, Cr.; 18 Cr. L. J. 633; 31 P. W. R. 1917, Cr. and *Labhu* v. *Emperor*, 52 Ind. Cas. 797; 25 P. R. 1919 Cr.; 20 Cr. L. J. 717, dissented from.

Ganesh Narayan Sathe, In re, 13 B. 600; 7 Ind. Dec. (N. S.) 397, *Emperor* v. *Sultan Singh*, 4 Ind. Cas. 24; 31 A. 606; 6 A. L. J. 882; 10 Cr. L. J. 473 and *Gangamma Dorayya, In re*, 2 Weir 418, relied on.

The right to institute criminal proceedings subject to certain limitations contained in sections 195 to 199 of the Criminal Procedure Code, is common to any person cognizant of the commission of the offence and does not exist merely in favour of the person injuriously affected by the offence. [p. 550, col. 2.]

Quære—Whether even in cases falling under sections 195 to 199, Criminal Procedure Code, the death of the complainant after the institution of the proceedings causes any abatement.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise an order of the Stationary Second Class Magistrate, Negapatam, in Calendar Case No. 387 of 1919.

FACTS appear from the judgment.

Mr. *S. K. Jayarama Iyer*, for the Petitioner.—The Magistrate erred in closing the case without pronouncing a judgment of conviction or acquittal. Section 89 of the Probate and Administration Act does not apply to criminal proceedings. The death of the complainant will not cause the proceedings to abate. Criminal proceedings, generally, can be started by any person generally cognizant of the facts. There is no question of the offence being compoundable or otherwise. See *Ganesh Narayan Sathe, In re* (1), *Emperor* v. *Sultan Singh* (2) and *Gangamma Dorayya, In re* (3). The decisions relied on by the lower Court, *Rama Nand* v. *Emperor* (4) and *Labhu* v. *Emperor* (5), are not sound law.

Mr. *V. Narasimha Aiyangar*, for the Respondent, first accused, relied on the rulings of the Punjab Chief Court reported as *Rama Nand* v. *Emperor* (4) and *Labhu* v. *Emperor* (5).

The Public Prosecutor, for the Crown.

JUDGMENT.

AYLING, J.—In this case the Police preferred a charge-sheet against two persons, Shaik Dawood and Muhammad Abu Baker, for offences under section 304A or 323 of

(1) 13 B. 600; 7 Ind. Dec. (N. S.) 397.
(2) 4 Ind. Cas. 24; 31 A. 606; 6 A. L. J. 882; 10 Cr. L. J. 473.
(3) 2 Weir 418.
(4) 40 Ind. Cas. 1003; 26 P. R. 1917 Cr.; 18 Cr. L. J. 633; 31 P. W. R. 1917 Cr.
(5) 52 Ind. Cas. 797; 25 P. R. 1919 Cr.; 20 Cr. L. J. 717.

the Indian Penal Code by beating one Sultan Marakayar and causing his death. The Magistrate, after hearing the prosecution evidence, held that death was not the result of the beating and framed a charge under section 323 of the Indian Penal Code only. Accused entered on their defence and adduced evidence. After the close of the defence evidence the defence Pleader drew the Magistrate's attention to a ruling of the Punjab Chief Court reported as *Labhu* v. *Emperor* (5), and argued that, owing to the death of the person injured, the charge against the accused must be held to have abated. The Magistrate accepted this contention and closed the case without recording any judgment of conviction or acquittal.

The present revision petition is filed by one Muhammad Ibrahim Sahib, son in-law of the deceased Sultan Marakayar. He was examined as fourth prosecution witness in the case; and it was he who reported the occurrence to the Village Munsif and to the Police (*vide* Exhibits C and D) on 18th February 1919, the day after the occurrence. Sultan Marakayar died on 20th February 1919. The Police charged the case on 21st March 1919.

It was found impossible to serve the second accused, Muhammad Abu Baker, and with the consent of the petitioner, the petition in so far as affected him was dismissed on 29th October 1920. It remains to consider what orders should be passed as regards the case against the first accused, Shaik Dawood.

With all respect to the learned Judges of the Punjab Chief Court who have held otherwise in *Rama Nand* v. *Emperor* (4) and *Labhu* v. *Emperor* (5), I must dissent from the view that a criminal prosecution under section 323 of the Indian Penal Code abates by reason of the death of the person hurt. It appears to be based on what seems to me a mistaken reading of section 89 of the Probate and Administration Act (V of 1881) which runs thus:—"All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory."

The provision has no reference to criminal prosecutions but to civil actions only. The right to institute criminal proceedings, subject to certain limitations contained in sections 195 to 199 of the Criminal Procedure Code, with which we are not concerned in this case, is common to any person cognizant of the commission of the offence, and does not exist merely in favour of the person injuriously affected by the offence. The word "prosecute" which occurs in the section implies no connection with criminal proceedings, but is used in the same sense as in sections 1 & and 16 of the Limitation Act. The use of the term "cause of action"—a phrase unknown to the Criminal Law,—is clearly indicative of the scope of the section. Section 89 of the Probate and Administration Act being inapplicable, it makes not the slightest difference whether the offence is compoundable or not.

This is in accordance with the views expressed in *Ganesh Narayan Sathe, In re* (1), *Emperor* v. *Sultan Singh* (2), and by this Court in *Gangamma Dorayya, In re* (3).

I have already referred to the provisions of sections 195 to 199 of the Criminal Procedure Code as provisions with which we are not now concerned, but I would not be understood as suggesting that the death of the complainant after the institution of the proceedings caused any abatement even in such cases. It was held by this Court in *Gowdar Kotra, In re* [*High Court Proceedings, 13th July* 1869] (6), that in a case of criminal prosecution for adultery the death of the husband after he had instituted the prosecution did not cause the prosecution to abate.

I would, therefore, direct the Magistrate to restore the case to his file and to dispose of it according to law, as against first accused Shaik Dawood.

COUTTS TROTTER, J.—I entirely agree, and I only add a few words of my own because there are two reported decisions of the Punjab Chief Court which countenance the view that section 89 of the Probate and Administration Act (V of 1881) applies to criminal as well as to civil proceedings. My Lord has pointed out several considerations that appear to me completely to dispose of

(6) 4 M. H. C. R. App. (LV) 55; 2 Weir 235.

such a contention; but there is a further one which reduces it to a positive absurdity. By the section all rights to prosecute or defend any suit or other proceeding, * * * * survive to and *against* his executors or administrators" —with certain defined exceptions. So that, if the Punjab view is correct, an executor or administrator can be put in the dock to answer for the criminal acts of his testators

This, of course, cannot have been pointed out to learned Judges, but it ought to have occurred to the reporters who put those decisions in the volumes of reports, and who had ample leisure to consider what was involved in them. With six High Courts, overburdened with work, putting forth a heavy outturn of judgments which they have no time to consider at length except in cases of special importance, some responsibility of discrimination ought to rest on the reporters as to what they select for publication*. The present indiscriminate system of reporting everything throws an unnecessary burden on both Bench and Bar and these cases seem to me to afford a signal instance of the mischief.

M. C P.

Petition allowed.

*NOTE.—We would fain have discussed, rather elaborately, the broad issue as to the responsibilities of Reporters raised by Mr. Justice Coutts Trotter, but, as the pages of "Indian Cases" do not appear to be a proper place for such a discussion we consider it sufficient to reproduce here a few sentences from a local Newspaper, "the Civil & Military Gazette," dated the 28th August 1921, inspired, as it would appear, by the very same remarks of the Honourable Judge :—"It is well-known that a judgment of a High Court, whether in a case of special importance or otherwise, and whether published or not, serves as a precedent which the lower Courts are bound to follow, and this predicates that *all* judgments give expression to the deliberate opinions of the Judges.....Mr. Justice Coutts-Trotter himself says that the Punjab Judges probably went wrong because Counsel did not point out to them a certain argument. Yet he expects the reporter to arrive at this without any such aid. Is it not asking a little too much of a reporter to sit in judgment upon the judgments of the learned Judges and to have to consider whether the case has been correctly decided or not.?..... ...The Reporter's selection of cases for publication must surely be confined to consideration of whether the judgment is of interest or lays down something new or such like."—[Ed.]

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 106 OF 1921.

September 1, 1921.

Present:—Mr. Daniels, J. C.

BHAGWAT PRASAD AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 169, 110—*Substantive offence not proved—Discharge—Proceedings under s.* 110—*Evidence of commission of substantive offence, admissibility of.*

A High Court always looks with suspicion on cases where proceedings under section 110, Criminal Procedure Code, are started against a person after the Police have failed to procure evidence against him on a charge of a substantive offence Section 110, Criminal Procedure Code, is not intended for furnishing the Police with means of detaining persons against whom a definite charge has been made but broken down. [p. 552, col. 2.]

Accused was arrested on suspicion of being concerned in a dacoity, but discharged under section 169, Criminal Procedure Code, for want of sufficient evidence. He was re-arrested under section 55 of that Code, and proceedings were started against him under section 110 of the same Code wherein the Police put in evidence of his participation in the decoity :

Held, that the evidence was inadmissible, and that the conviction based on it must be set aside inasmuch as if the evidence was sufficient to prove the participation of the accused in the dacoity, he should have been brought to trial for that offence, and if it was not, the Court had no right to allow it to be brought in to prejudice its mind against the accused in his trial for bad livelihood. [p. 552, col. 2.]

Application against an order of the District Magistrate, Partabgarh, dated the 23rd July 1921, confirming an order of the Magistrate of the First Class, Partabgarh, dated the 12th July 1921.

Mr. *H. K. Ghose*, for the Applisants.

The Government Pleader, for the Crown.

JUDGMENT.—In this case five persons, Bhagwat Prasad, Sitladin, Bhagwandin, Bhagotidin and Maharajdin, apply for revision of an order binding them over under section 110, Criminal Prosedure Code. They were bound over by a Deputy Magistrate, whose order has been upheld by the District Magistrate, on appeal. They were tried jointly with one Onkar whose associates they are said to be. This Onkar is undoubtedly a bad character and he did not appeal

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rom his conviction. The present applicants were arrested on suspicion of being concerned in a dacoity committed against one Chokh Lal in March last. They were discharged by the Police under section 169, Criminal Procedure Code, as there was no evidence sufficient to prove their participation in the dacoity. They were immediately re arrested under section 55, Criminal Procedure Code, and the present proceedings started against them. This Court, and, indeed, every High Court, always looks with grave suspicion on cases in which proceedings are started against an accused because the Police have failed to procure evidence against them on a charge of substantive offence. The *bad-mashi* sections were not intended for furnishing the Police with the means of detaining persons against whom a definite charge has been made but has broken down. In this case the evidence of the Sub-Inspector (P. W. No. 1) establishes that these people were not known to the Police as bad characters up to the time of the dacoity on Chokh Lal. They had never been under surveillance nor had history sheets been opened in respect of them. Indeed, one of them, Bhagwandin, was employed as Chowkidar, and was only dismissed in consequence of his being implicated in the dacoity. These facts should have made the Courts below very cautious in accepting evidence that the accused bore the general reputation of thieves and bad characters prior to their arrest. In this case the Courts have actually accepted evidence of their alleged participation in the dacoity as forming an important element in the case against them under section 110. Nine of the prosecution witnesses, P. W. Nos. 2 to 9 and P. W. No. 24, were called for no other purpose than to prove that the accused were concerned in the dacoity. It is needless to say that this evidence should have been wholly excluded. If it was sufficient to prove that the accused took part in the dacoity they should have been brought to trial for that offence. If it was insufficient, as it evidently was, the Courts had no right to allow it to be brought in to prejudice their minds on a trial for bad livelihood. This evidence has certainly influenced the minds of both the Deputy Magistrate, and the District Magistrate and its admission would in itself be a sufficient ground for setting aside the conviction of the accused. * * * * * I accordingly allow the application and set aside the orders of the Courts below. The accused, if in jail, will be released and the bonds and sureties, if executed, will be cancelled.

N. B.

Application allowed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 568 OF 1921.

January 16, 1922.

Present :—Mr. Justice Jwala Prasad.

MOHAMMAD ISHAQ AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 355, —Summary trial—Deposition of witnesses, reading of.

In a case triable summarily, the deposition of the witnesses need not be read over to them. [p. 553, col. 1.]

Criminal revision against an order of the Sessions Judge, Bhagalpore.

Mr. *S. P. Bose*, for the Petitioners.

Mr. *Manohar Lal*, for the Opposite Party.

JUDGMENT.—The four petitioners have been convicted under section 323, Indian Penal Code, and sentenced to pay a fine of Rs. 40 each. The learned Vakil on behalf of the petitioners urges that the conviction is bad, firstly, because the accused should not have been tried summarily; secondly, because the depositions of the witnesses were not read over to them, and, thirdly, because the evidence of the *alibi* on behalf of the petitioner No. 3 Sadullah was not considered.

The petition of complaint clearly discloses an offence under section 323, Indian Penal Code, although sections 147 and 447, were mentioned. The Magistrate, therefore, summoned the petitioners under section 323, Indian Penal Code, only.

The offence came under section 323 only which is triable summarily, *vide* section

260, sub-clause 1 (*c*) of the Code of Criminal Procedure.

On the 22nd of August, the date fixed for the examination of the witnesses, a petition was filed on behalf of the accused admitting that the case was triable summarily and praying that, in view of the fact that the dispute related to the land, the accused should be tried in a regular way. The Magistrate refused this petition on the ground that the case was purely of *merit*. Though there was a dispute concerning land, yet the occurrence took place when a Panchayat was called in order to settle the dispute and at the time nothing was pending in connection with the land. There was nothing in the character of the dispute between the parties which rendered it desirable that the case should not have been tried summarily and, therefore, subsection (2) of section 260 did not apply. The trial was, therefore, not illegal or irregular.

As to the second ground, a reference be made to section 355 of the Code of Criminal Procedure which does not require that the evidence of witnesses should be read over to them in a case triable summarily. Section 260, which requires the evidence to be read over to the witnesses, applies only to sections 356 and 357 and does not apply to section 355. This contention also is, therefore, unsubstantial.

As to the third ground, true, the petitioner No. 3 examined two witnesses for defence. The first witness expressly stated that he had no personal knowledge as to where the accused Sadullah was on the date of occurrence (7th of July 1921). Similarly, witness No. 2 stated that he could not give the date of service of Court process on Musaddi Mandal. This evidence was not at all an evidence of *alibi*. It does not appear from the judgment of the Sessions Judge that any reference to the *alibi* evidence was made before that Court in argument. This contention is also overruled.

The result is, that the application is dismissed.

Application dismissed.

M. L.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL MISCELLANEOUS CASE No. 20 OF 1921.

September 29, 1921.

Present:—Mr. Saunders, J. C.

JAGANATH KAHAR—APPLICANT

versus

EMPEROR—

Court Fees Act (VII of 1870), s. 19, cl. xvii—Application for bail by Advocate—Fiscal Statutes—Interpretation.

An application for bail signed only by the Advocate of a prisoner is an application made by the prisoner himself and, under section 19, clause xvii Court Fees Act, does not require to be stamped.

Kali Prasad Banerji v. *Gisborne and Co.*, 10 C. 6; 13 C. L. R. 156; 5 Ind. Dec. (N. S.) 42, relied upon.

The Court Fees Act deals purely with fiscal matters and like all other Statutes imposing pecuniary burdens or encroaching upon or qualifying the rights of the subject, must be interpreted in favour of the subject.

Mr. *L. K. Miller*, for the Applicant.

Mr. *R. G. Aiyangar*, for the Crown.

JUDGMENT.—The applicant in this case was arrested by the Police upon a charge of theft and while in custody he applied by his Advocate to the Magistrate for bail. The petition for bail was signed by the applicant's Advocate and was unstamped. The Magistrate then recorded the following order:—

"This application must be stamped as it is not covered by section 19, clause xvii, of the Stamp Act as it is presented by the Advocate on behalf of the person in duress."

The reference should, of course, have been to the Court Fees Act of 1870. The applicant by his Advocate comes to this Court in revision on the ground that the Magistrate was not justified in rejecting his application as requiring a stamp. It is urged that an application made by the Advocate of a prisoner in durees or under restraint is an application made by the prisoner himself. I am of opinion that this view is correct. It is suggested that if it had been the intention of the framers of the Court Fees Act to exempt applications made by the Advocate for a prisoner, this would have appeared in the Act by the addition of the words "by or on behalf of the prisoner" in clause xvii, section 19, or by

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some similar addition of words. But the Court Fees Act is an Act dealing with purely fiscal matters, and the rule of construction adopted by the Courts in England that Statutes imposing pecuniary burdens or encroaching upon or qualifying the rights of the subject must, in cases of doubt, be interpreted in favour of the subject, is one which may, I think, be properly applied in this country. There is no doubt, moreover, that in this Court it has been the practice to accept applications by Advocates on behalf of persons in custody within the meaning of section 19 clause xvii, without a Court-fee and I think it should be accepted as the established practise. A similar question arose in the case of *Kali Prosad Banerji* v. *Gisborne and Co* (1) where a judgment debtor in custody appealed against the order of the District Judge without affixing a Court-fee stamp to his memorandum of appeal. The memorandum was rejected by the Deputy Registrar, among other reasons, because he held that clause xvii of section 19 of the Court Fees Act applied only to petitions by a prisoner personally and not to petitions presented on his behalf by his Vakils. This view was, however, overruled by the Chief Justice. I am of opinion that the applications in this case should have been accepted as an application by the prisoner, although it was only signed by his Advocate and that it did not require to be stamped under the provisions of the Court Fees Act.

N. H.

Application accepted.

(1) 10 C. 61; 13 C. L. R. 156; 5 Ind. Dec. (N. S.) 42.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 573 OF 1921.

September 29, 1921.

Present :—Mr. Justice Lindsay

RAM PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Jurisdiction—Magistrate—Order against bad character to leave any place—Executive order.

A Magistrate has no authority to order a man to leave any place under threat of being prosecuted as a bad character.

Magistrates have no business to issue executive orders for which they can produce no statutory authority.

Muhammad Bakar Ali v. *Hanwant Singh*, A. W. N. (1897) 59, referred to.

Criminal Revision from an order of the District Magistrate, Muzaffarnagar, dated the 2nd September 1921.

Mr. *S. C. Mukerjee*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application by one Ram Prasad against whom an order has been made by the District Magistrate of Muzaffarnagar on the 2nd of September 1921. A certified copy of this order is before me and, so far as it relates to Ram Prasad, runs as follows :—"Read report of S. O. Khatoli: Ram Prasad is shown to be an undesirable man. He will leave Khatoli at once or be prosecuted as a bad character."

According to the instructions supplied to the learned Government Pleader the District Magistrate seems to take up the attitude that Ram Prasad cannot question this order and that, in any case, his application is premature inasmuch as no proceedings have been taken yet against him as being a bad character.

The order of the Magistrate directing Ram Prasad to leave the town of Khatoli under threats of being prosecuted as a bad character is wholly indefensible, and one which he had no jurisdiction to make. If he believes that Ram Prasad is a person who is liable to be dealt with as a bad character he can take against him such proceedings as are warranted by the provisions of the Criminal Procedure Code. He has, so far as I am aware, no authority to order a man to leave any place under threats of being prosecuted as a bad character. The attention of the learned District Magistrate may profitably be drawn to the case which is reported in the Allahabad, Weekly Notes, 1897, at p. 59 [*Muhammad Bakar Ali* v. *Hanwant Singh* (1)]. In the judgment which was delivered by a Bench of this Court the learned Magistrate will find some observations which are pertinent to the matter in hand and which deal with the claim of Magistrates to issue executive orders for which they can produce no statutory authority.

I set aside the order of the learned District Magistrate accordingly as being illegal and *ultra vires*.

J. P. *Order set aside.*

(1) A. W. N. (1897) 59.

PATNA HIGH COURT.

CRIMINAL REVISION No. 377 OF 1921.

September 28, 1921.

Present;—Mr. Justice Bucknill.

ABDUS SAYEED KHAN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 107—*Dispute as to possession of land—Proceedings under s. 107—Court, jurisdiction of—Proper procedure.*

Where there is a dispute about land and where there is some *bona fide* claim on the part of both parties the appropriate and proper section to be operated is section 145 of the Code of Criminal Procedure. [p. 556, col. 1.]

But when a Magistrate has reason to think that an individual is likely to commit a breach of the peace, he has jurisdiction, even though the apprehended breach of the peace may relate to a dispute about land, to put into operation the provisions of section 107, Criminal Procedure Code. [p. 556, col. 1.]

Emperor v. *Abbas*, 12 Ind. Cas. 833; 39 C. 150; 14 C. L. J. 429; 16 C. W. N. 83; 12 Cr. L. J. 569, followed.

Himmat Mian v. *Emperor*, 46 Ind. Cas. 296; 19 Cr. L. J. 712, referred to.

Criminal revision against an order of the District Magistrate, Darbhanga, refusing to quash the proceedings against the petitioner under section 107 of the Code of Criminal Procedure.

Mr. *L. K. Jha*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in criminal revisional jurisdiction and it arises in a connection with an order made by a Magistrate of the First Class at Darbhanga, purporting to act under section 107 of the Criminal Procedure Code. The circumstances under which the law was thus put into operation are very simple and arose out of a quarrel between the complainant and the present applicant as to who had the right to collect rents from the tenants of a certain *mouza*. There is no question but that the right to collect rent may be regarded as a matter which might fall within the purview of section 145, Criminal Procedure Code. It is argued here for the complainant that the Magistrate had no jurisdiction, in the circumstances of this case, to deal with the matter under section 107 of the Code of Criminal Procedure and that, therefore, his order should be set aside. It is contended that section 145, Criminal Procedure Code, was the section which the Magistrate was bound to utilise. Now, I am far from saying that section 145, Criminal Procedure Code, would not have been useful for application to this particular case and I am inclined to think, looking at all the circumstances, that it would have been probably more appropriate to have applied the provisions of section 145, Criminal Procedure Code rather than to have dealt with the matter under section 107. There does seem to have been some definite sort of dispute between parties as to who had the right to collect the rents, and I do not know that I can definitely say that the applicant here had no sort of right or pretension to his claim. It is important to observe that the Magistrate did undoubtedly come to a conclusion as to who had this right, for he bases the view that the complainant was in the right upon the evidence which was adduced by him to that effect. At the same time, he comes to the conclusion that the applicant should be bound over personally to keep the peace for a period of one year and enter into a bond of Rs 200, on the ground that there was likelihood of a breach of the peace owing to the probability that the applicant would commit acts of force and had, indeed, attempted forcibly to collect rents from the villagers. The question, therefore, whether the Magistrate had jurisdiction to deal with this question under section 107, Criminal Procedure Code, does not strictly, therefore, depend upon any mere determination of who had the lawful claim to the right to collect the rents, but hinges on the fact found by the Magistrate that the actions of the applicant were such as were likely to disturb the public peace. It has been very ably argued for the applicant that, where there is a dispute about land, section 145, Criminal Procedure Code, binds down the Magistrate to deal with such a matter under its provisions. I have already, however, pointed out that in this case it does not seem to me that materiality of the question of possession of the right to collect the rents is very evident or that the Magistrate's decision need depend entirely upon such a foundation. The position of the law is not, I think, in my opinion, altogether very satisfactory. So far, at any rate, as it has been placed before me, it would seem from the case of *Emperor* v. *Abbas* (1) that the

(1) 12 Ind. Cas. 833; 39 C. 150; 14 C. L. J. 429; 16 C. W. N. 83; 12 Cr. L. J. 569.

Full Bench of that Court has quite clearly laid down that the fact that there is a dispute concerning land likely to cause a breach of peace does not deprive a Magistrate of jurisdiction under section 107, Criminal Procedure Code, where the Magistrate is informed that any person is likely to commit a breach of the peace or disturb public tranquillity or to do any wrongful act that might probably occasion a breach of the peace or disturb the public tranquillity. What I understand, this is very clear language to me, is that when a Magistrate has reason to think that an individual is likely to commit a breach of the peace he has jurisdiction, even though the case for the apprehended breach of the peace may relate to a dispute about land, to put into operation the provisions of section 107, Criminal Procedure Code. Now, it is quite true that in this Court Mr. Justice Jwala Prasad in the case of *Himmat Mian* v. *Emperor* (2) has held that when there is a clear dispute regarding the possession of land, the proper section to proceed under is section 145, Criminal Procedure Code, which not only is more effective in order to prevent the breach of the peace, but also is one which causes the least prejudice to the contending parties. I have no reason to quarrel with that expression of opinion. I think that, where there is a dispute about land and where there is some *bona fide* claim on the part of both parties, the appropirate and proper section to be operated is section 145, Criminal Procedure Code. But I do not feel justified in stating that a Magistrate who has reason to believe that there is a likelihood, owing to the action of an individual, of the occurrence of the breach of the peace, has no jurisdiction even when the cause of the likelihood of the breach of the peace has its origin in a dispute about land, to put into operations the provision of section 107, Criminal Procedure Code. That is what the Magistrate has, I think, here done and I cannot see any good authority for saying that what he has done has been done without jurisdiction even though it may be that it would have been preferable that the provisions of section 145, Criminal Procedure Code, should have been brought into play.

(2) 46 Ind. Cas. 296; 19 Cr. L. J. 712.

For these reasons, I see no ground for interference in this matter.

J. P.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 557 OF 1921.

September 24, 1921.

Present:—Mr. Justice Lindsay.

BISSAY—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Summonses and warrants, execution of—Court, duty of—Conviction without hearing defence witnesses, illegality of—Revision.

It is the business of a Court to see that its summonses and warrants are duly executed, and if an accused insists on a Court issuing process for the attendance of his witnesses he has done all that the law requires of him. It is not his duty to take suitable steps to have his witnesses brought into Court but it is for the Court to do it.

Where, therefore, an accused is convicted without hearing his witnesses, as they fail to appear, as summonses and warrants are not executed on them, the conviction is illegal and cannot be sustained.

Criminal revision from an order of the Sessions Judge, Cawnpore, dated the 30th May 1921.

Messrs. *S. P. Sinha* and *Beni Bahadur*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This application for revision must be accepted. It has been admitted on the ground put forward in the petition that the Magistrate who tried the case had wrongfully disposed of it without hearing the defence evidence of the applicant.

A perusal of the order sheet shows that the witnesses cited by the accused failed to appear in Court. Summonses and warrants were issued with the object of bringing these witnesses into Court, but neither were executed. The Magistrate seems to have got tired at last and proceeded to give judgment, remarking that it was the business of the accused to take suit-

able steps to have his witnesses brought into Court.

It was the business of the Court to see that its summonses and warrants were duly executed, and if the accused insisted on the Court issuing process for the attendance of these witnesses he had done all that the law required of him. It was for the Court to do the rest. I, therefore, allow this application, set aside the conviction and sentence and send the case back to the Magistrate for disposal in accordance with law after hearing such witnesses as the accused may desire to call in his defence.

J. P.

Application allowed.

PATNA HIGH COURT.
CRIMINAL REVISION NO 494 OF 1921.
November 10, 1921.
Present:—Mr. Justice Ross.
RAM NARAIN SINGH AND OTHERS—
2ND PARTY—PETITIONERS
versus
DHONRAI GOPE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 360, applicability of—Evidence of witnesses not read over, effectof—Irregularity—Trial, if vitiated—Accused, meaning of—Defect of parties, effect of—De facto *possession, meaning of.*

Section 360 of the Criminal Procedure Code applies to trials under Chapter XII and the word "accused" in that section does include persons against whom an order under section 145, Criminal Procedure Code, has been drawn. [p. 557, col. 2.]

Therefore, in the case of proceedings under Chapter XII the evidence must be read over to the witnesses. [p. 557, col. 2.]

The non-reading over of depositions to the witnesses in a proceeding under section 145, Criminal Procedure Code, does not, however, invalidate the trial itself [p. 557, col. 1.]

A tenant who is in possession of a portion of the land in dispute is not a necessary party to a proceeding under section 145, Criminal Procedure Code. [p. 558, col. 1.]

Krishna Kamini v. *Abdul Jubbar*, 30 C. 155; 6 C. W. N. 737 (F B.), followed.

De facto possession, with which alone section 145 proceedings are concerned, means effective occupation or control. [p. 558, col. 1.]

Criminal revision against an order of the Sub Divisional Officer, Bhagalpore.

Messrs. *Jayaswal*, *C. C. Das* and *N. N. Sen*, for the Petitioners.

Messrs. *Manuk*, *K. N. Chowdhuri*, *S. K. Banerji* and *S. S. Bose*, for the Opposite Party.

JUDGMENT.—The petitioners are the second party to a proceeding under section 145, Criminal Procedure Code, in which possession has been declared to be in the 1st party. The first ground which is urged for revision of the order is, that none of the depositions of the witnesses were read over to them as required by section 360, Criminal Procedure Code, and, therefore, the presumption of correctness does not attach to the record under section 80 of the Evidence Act because the evidence was not taken according to law, and, therefore, whether admissible or not, it is of no value and there is nothing to support the finding.

In reply, it is contended that section 360 does not apply to trials under Chapter XII because there is no accused in such a proceeding. I cannot agree to this argument. If the word "accused" in that section does not include persons against whom an order under section 145 (1) has been drawn then there is a plain inconsistency in the section itself and the Court must construe it as best as it can. If so interpreted, the section must, at least, mean that in the case of proceedings under Chapter XII the evidence must be read over to the witnesses.

It is further argued that, even if there is a defect in the manner of recording the evidence, that does not invalidate the trial itself. The decisions are not consistent; but the weight of opinion is that, where there is this defect in the record of the deposition, the witness cannot be convicted of perjury in a subsequent trial. But it is altogether a different proposition, and one for which there is no authority, that because the depositions were not read over to the witnesses there was, therefore, no evidence before the Magistrate on which he could come to a finding on the question of possession in the trial in which these depositions were made. I can see no ground in principle for such a contention and this objection must be overruled,

The second ground is, that one Fadulli Mandar was also a tenant of a portion of the land in dispute and as he was no party to these proceedings, the proceedings are bad for defect of parties. This question is concluded by the decision in *Krishna Kamini* v *Abdul Jubbar* (1) and the contention must fail.

The third ground is, that the order under section 145 (1) was drawn up on the 5th January 1921, the Police reported that the petitioners had taken possession of the land on the 9th October 1920 and, therefore, the Magistrate had no jurisdiction to declare the opposite party in possession but could only declare the petitioners in possession. If, in fact, the petitioners dispossessed the opposite party more than two months before the 5th January 1921 then, clearly, the Court had no jurisdiction to declare the possession of the opposite party. But the Magistrate finds that there was no actual possession by the petitioners. He refers to the Police report and to the evidence on this point in detail and comes to the conclusion that such a stealthy act of ploughing and sowing when the opposite party was absent in Court in the most haphazard manner, cannot be held to be an act of possession. *De facto* possession, with which alone these proceedings are concerned, means effective occupation or control. The Magistrate evidently thought that the exclusive power of control by the petitioners could not be said to be manifest in these acts. On the facts I cannot say that the Magistrate was not entitled to find that there had been no change of actual possession, therefore, there is no question of jurisdiction.

The application is dismissed.

. P.

Application dismissed.

(1) 30 C. 155; 6 C. W. N. 737 (F. B.).

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS No. 216 OF 1921.

September 28, 1921.

Present:—Mr. Justice Lindsay.

MUHAMMAD DARAZ KHAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 528—Transfer of case—Discussion of case at Club before Sessions Judge likely to try case, whether ground for transfer.

Discussion of a criminal case at a Club by a Civil Surgeon or any of the other officers who are likely to be concerned in the disposal of it before a Sessions Judge who is to try the case, is a sufficient ground for transfer of the case from the Court of that Sessions Judge.

Criminal miscellaneous application under section 526 of the Code of Criminal Procedure.

Mr. *S. C. Mukerji*, for the Applicant.

Mr. *Lalit Mahon Banerji*, Government Advocate, for the Crown.

JUDGMENT.—This is an application made on behalf of one Muhammad Daraz whose case has been committed to the Court of Session at Farrukhabad. I have perused the affidavit and the reply which has been received from the learned Sessions Judge. One of the grounds on which the transfer has been sought is that the Civil Surgeon of Fatehgarh has been discussing this case at the local Club with the officers of the station including the learned Sessions Judge. The learned Sessions Judge in his explanation admits that he had heard one or two discussions of the case at the Club. That fact by itself is, in my opinion, sufficient to justify an order for transfer. Discussion of a case like this at the Club by the Civil Surgeon or any of the other officers who are likely to be concerned in the disposal of it is an extremely improper proceeding. The learned Sessions Judge suggests that it would be inconvenient on the score of cost to transfer the case to some other district. The answer to this is that this cannot be helped. He suggests that a special officer should be deputed to hear the case. This is beyond my power. I have no authority to depute a Special Judge to hear this case. The

case will, therefore, be transferred for disposal to the file of the Sessions Judge of Cawnpore.

Case transferred.

J. P.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 310 OF 1920.

April 1, 1921.

Present :- Mr. Prideaux, A. J. C.

CHUNNILAL—APPLICANT

versus

THE MUNICIPAL COMMITTEE, ARVI

—NON APPLICANT

C. P. Municipal Act (XVI of 1903) ss. 122, 67 (2), 289, applicability of—Encroachment made by previous owner—Present owner, whether guilty—Remedy.

Section 122, Central Provinces Municipal Act, cannot be interpreted as making punishable an omission to remove an existing encroachment not made by the accused person

The word "obstructs" in section 122 of the Act applies to the person who built or caused to be built the encroachment and not to the accused who originally had nothing to do with the erection of the encroachment.

Sub-section (2) of section 67 read with section 139 of the Central Provinces Municipal Act provides a remedy for an encroachment not made by the present owner or occupant of the erection which is an encroachment.

Application for revision of an order of the District Magistrate, Wardha, dated the 17th September 1920, dismissing Appeal No. 32 of 1920 arising out of Criminal Case No. 32 of 1920, decided on 9th August 1920 by the Tahsildar and Magistrate, Second Class, Arvi.

Mr. *W. H. Dhabe*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The applicant owns a shop within the Municipal limits of Arvi town. In front of his shop there is a *chabutra*, or raised platform, which the Municipal Committee says is an encroachment on Municipal land. The applicant was served with a notice to remove this *chabutra*. He failed to do so and he has been prosecuted under section 122 of the Central Provinces Municipal Act and convicted under that section by the Second Class Magistrate, Arvi. An appeal to the District Magistrate has been summarily rejected. It was contended for the applicant that, as he did not make the encroachment himself but inherited the *chabutra* together with his house from his father, he is not liable under the section above quoted. Other defences were also raised but it is unnecessary to consider these at present. The evidence on record makes it fairly clear that the encroachment, if it is one, has existed for a long number of years and I am prepared to accept the statement of the applicant, corroborated as it is by his evidence, that he did not himself build or have any hand in the building of this *chabutra* but that it was inherited by him from his father. It seems to me that the word "encroaches" in section 122 *prima facie* means commits an act of encroachment and that no one can be held liable for an act or admission unless such act or admission is declared to be an offence. The offence made criminally punishable under section 122 is the act of making an encroachment, and I do not think that the section can be interpreted as making punishable an omission to remove an existing encroachment not made by the accused person. I see no force in the learned District Magistrate's contention that the accused is liable to be punished under section 122 if he has allowed the *chabutra* to stand on Municipal ground. The word "obstructs" would apply to the person who built or caused to be built the encroachment and not to the accused who originally had nothing to do with the erection of the *chabutra*. It is not as if the Municipality had no remedy in a case of this nature. Sub-section (2) of section 67 read with section 139 provides a remedy. I am of opinion that the accused cannot be convicted of an offence under section 122 in respect of this *chabutra*, because the said encroachment is not proved to have been made by him. The conviction is illegal and I set aside conviction and sentence. The fine, if paid, must be refunded.

Petition granted.

G. R. D.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE NO. 443 OF 1921.

January 23, 1922.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt., and Mr. Justice Rafique.

In the matter of M TASADDUQ AHMAD KHAN SHERWANI, ADVOCATE.

Legal practitioner—Advocate—Conviction for offence—Removal from Rolls, proceedings for—Propriety of conviction, whether can be gone into—Penal Code (Act XLV of 1860), s. 153A—Moral turpitude.

In a proceeding against an Advocate to show cause why he should not be suspended or struck off the Rolls on the ground of his having been convicted of a criminal offence, he cannot go behind the conviction and show that the conviction was, in the circumstances, improper.

Rajendra Nath Mukerji, In the matter of, 22 A. 49: 3 C. W. N. 736: 1 Bom. L. R. 708: 26 I. A. 242: 7 Sar. P. C. J. 556: 9 Ind. Dec. (N. S.) 1064 (P. C.), referred to.

An offence under section 153A, Indian Penal Code, of promoting or attempting to promote feelings of enmity or hatred between different classes of His Majesty's subjects always involves element of moral turpitude and may involve an offence of the deepest moral turpitude, and an Advocate convicted of this offence is liable to removal from the Rolls of Advocates.

The Government Advocate, for the Crown.

JUDGMENT.—Tasadduq Ahmad Khan Sherwani has appeared before us to-day to show cause why he, being an Advocate of this Court, should not be suspended or struck off the Rolls. On the 1st of July 1921, he made a speech at Chara. That matter was investigated by the Magistrate, who, on the 18th of July 1921, convicted Mr. Sherwani under section 153A of the Indian Penal Code and sentenced him to imprisonment. The evidence, as presented to the Magistrate, satisfied him that an offence had been committed. Mr. Sherwani, who has been called to the Bar in England and is an Advocate of this Court, did not, when before the Magistrate, make any defence. He put in a written statement, but he did not criticise the witnesses or analyse the speech on which the prosecution was mainly based. He commenced to-day to do both. We pointed out to him that the case in the Magistrate's Court could not be re-opened in these proceedings, and we referred to the decision of the Privy Council *Rajendra Nath Mukerji In the matter of* (1). In that case there had been an inclination in this very Court to permit the Vakil's Counsel to go behind the conviction in order that it might be shown that he had committed no offence in law. When this matter was argued in the Privy Council they said definitely that there could be no argument to show that the conviction was, in the circumstances, improper. Mr. Sherwani, therefore, comes before us to-day as a man convicted of an offence in which he promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects. He has told us that in his view an offence under that section involves no element of moral turpitude. We disagree very strongly with this view. We think that moral turpitude is always involved in the commission of an act which comes within that section, and may indeed involve an offence of the deepest moral turpitude.

We have to consider now, what is the proper order which should be passed. During the argument it was indicated to Mr. Sherwani that there might come a day when he would regret not being a member of the profession. We feel that we ought to be cautious not to pass such an order as would for all time deprive Mr. Sherwani of his right to practise as an Advocate. But that is a very different thing from saying that he ought, at this moment, to remain an Advocate of the Court. In our view, he ought not to be allowed to continue on the Rolls. In view of the conviction which has been passed against him, we order that the name of Tasadduq Ahmad Khan Sherwani be struck off the Rolls of this Court. If, however, it should happen that, hereafter, Mr. Sherwani should desire to re-join the profession and should make an application to the Court, we hope the Bench who will have to decide that matter will give it favourable consideration if they are of opinion that the circumstances then put forward by Mr. Sherwani and his demeanour and attitude in the matter make it just and reasonable for them to do so.

J. P. *Order accordingly.*

(1) 22 A. 49; 3 C. W. N. 736; 1 Bom. L. R. 708; 26 I. A. 242; 7 Sar. P. C. J. 556; 9 Ind. Dec. (N. S.) 1064 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 247 OF 1920.

April 6, 1921.

Present :—Mr. Hallifax, A. J. C.,
Mr. Prideaux, A. J. C. and
Mr. Kotval, A. J. C.

SAPKU—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 30—Confession of co-accused, admissibility of—Conviction, whether can be based on it alone.

A confession of an accused not being declared relevant by the Evidence Act as against a co-accused cannot be treated as substantive evidence and a judgment cannot be based upon it so far as the co-accused is concerned. A Court may under section 30 of the Evidence Act take it into consideration with or supplementarily to relevant facts which may form the basis of a judgment. [p. 569, cols. 1 & 2]

Emperor v. *Noni Gopal Gupta* [*Lalit Mohan Chakravarti*], 10 Ind. Cas 582; 38 C. 559; 15 C. W. N. 593; 12 Cr. L. J. 256 (S. B.), relied on.

A confession of a co-accused must be regarded with suspicion. [p. 570, col. 1.]

Bala v. *Emperor*, Criminal Appeal No. 215 of 1915, (unreported), relied on.

FACTS :—Two accused Shrawan and Sapku Patil filed separate Appeals Nos. 246 of 1920 and 247 of 1920, respectively, against their conviction for murder by the Sessions Judge. Both the Judges (Messrs. Hallifax and Prideaux, A. J. Cs.) who heard these appeals agreed in dismissing the appeal of Shrawan but held different opinions about the guilt of Sapku, but they recorded only one judgment each in Criminal Appeal No. 245 of 1920, *Shrawan* v. *Emperor* saying that the judgment would also deal with the appeal of Sapku Patil, Criminal Appeal No. 247 of 1920. Owing to this difference of opinion about the guilt of Sapku Patil, Criminal Appeal No. 247 of 1920 was referred to Mr. Kotval, A. J. C., for opinion. Full facts appear from the following dissentient judgments of Hallifax and Prideaux A. J. Cs. dated the 10th of February 1921 :—

HALLIFAX, A. J. C.—This judgment will deal also with the appeal of the co-accused Sapku Patil (Criminal Appeal No. 247 of 1920). Against Shrawan the case is perfectly clear. It cannot be, nor has it been suggested, that the evidence of the unfortunate child's mother, *Musammat* Raju (P.W. No. 12), cannot be accepted as entirely true. That with the other evidence proves the following facts beyond all doubt. It was a most unusual thing for Shrawan to return to the house at all on that day. Nevertheless, he did return in the afternoon for no apparent reason and tried to detach the boy from his mother. He again returned towards the evening and made a false statement of the reason. He then hung about the house doing nothing and followed the boy when he left his mother to go round to the front of the house. He was seen there with the child in his arms within, at the most, half an hour of the time when he was drowned in the pit in the next 'bari,' and he was the last person to be seen with him. But in place of any explanation as to where or when he parted from him he can only offer a false denial of having been even in the village during that afternoon. The child was too young to go as far as the pit by himself and must have been taken there. The direct way through an opening in the fence did not exist till after his death, as his father, Raghu (P. W. No. 13), explains, and even this was obstructed by thorns about a foot in height, which a child of four could not get over. Even if he had gone there by himself, it is very improbable that he could have got drowned without his cries being heard. Indeed, it is quite probable that the Mukaddam, Sona Patil, did hear, and perhaps even see, the drowning, but with characteristic cowardice or more probably because he was mixed up in the plot himself, as the false report he sent to the Police indicates, he refuses to say anything about it. Sapku Patil, who had a very strong motive for desiring the boy's death, had for some time been trying, directly or indirectly, to induce Shrawan to drown him and Shrawan had shown signs of yielding. All this by itself would perhaps give rise to no more than a very strong suspicion, not quite amounting to proof, that Shrawan had murdered the child.

2. But we have, in addition, his own detailed confession, and, so far as it concerns himself, there is every reason to believe that it is perfectly true. Shrawan was arrested on the 15th of September at noon. The Sub-Inspector, who was making the investigation, started with him for Bhandara the same evening for the purpose of getting the confession which he had already made recorded by a Magistrate, arriving there about midday on the 16th. Shrawan was taken that evening to the Magistrate's residence, as the Courts were shut on that day, but the Magistrate very properly refused to record any confession in those circumstances. On the following day he was produced in Court. The Magistrate then told the accused he would have two hours for reflection after which anything he desired to say would be taken down, and took care to ensure that no policeman was within his sight or hearing. At the end of two hours the Magistrate questioned him fully and carefully and he declared that, neither the Police nor anybody else had ill-treated him or held out any threat or promise to him to induce him to make a confession or had told him what he was to say. Even then he was given another hour for reflection, after which he was told to say anything he wished to say and then related the whole story almost without any further questions. He certainly takes the greater share of the blame on himself, admitting that the child was decoyed away and killed by him, though he says that it was at the instigation of Sapku Patel, and that Sapku was present at the murder, and not Mangria, as he had said before. The commitment enquiry began on 29th September 1920 and at the end of it the accused was examined by the Magistrate. It was then, for the first time, that he said his confession was untrue. He declared the Sub-Inspector had tutored him and had threatened him with further torture if he failed to make a confession before the Magistrate and to say in it just what he had been told to say, and this he repeated in the Sessions Court. The emptiness of the allegation is apparent from the fact that though Shrawan was defended in both Courts by an able Pleader, no suggestion of anything of the kind was made in the cross-examination of the Sub-Inspector or in any other way, except in the statements of the accused. How little the Magistrate knew, when he began to examine him, that Shrawan had any intention of resiling from his confession is apparent from the first question he put, which proceeds on the assumption that he still stuck to it. And even after that no questions were put to the Sub-Inspector or to any other witness in the Sessions Court in regard to any threat or inducement held out to Shrawan or any torture inflicted on him or anything done or said to him in reference to the making of his confession. It seems beyond doubt that the confession is perfectly true so far as Shrawan himself is concerned, and we are bound to act upon it and to find him guilty. The attachment of the unfortunate child to Shrawan made the murder easier as well as more diabolical and for such a cold blooded and despicable crime, committed, doubtless, solely for a promised pecuniary reward, the only possible sentence is that of death

3. As regards Sapku Patil, I may say at once that the finding that he was present at the commission of the murder cannot, possibly, be upheld. It rests solely on the statement of the co-accused Shrawan and, though I am of opinion that a conviction on such a basis is not illegal, as I shall explain later, still I do not believe this statement of Shrawan's. That he first told the Police that Mangria was there and not Sapku, is on record, in spite of the strenuous and partially successful efforts of Sapku's learned Pleader to exclude evidence so entirely favourable to his client. Even if Sapku was entirely responsible for the abominable crime, he would probably arrange to be elsewhere during its commission, though it is significant that if he was really in some other village he could very easily have established the fact by convincing evidence but has failed to produce a single witness. An untrue statement of Sapku's presence is also one that Shrawan would very naturally tack on to an otherwise perfectly true account of the matter. If Sapku was really the prime mover in the matter, it would appear to Shrawan that he was likely to escape all punishment unless he could be shown to have been present at the commission of the offence. I do not go so far as to say that I disbelieve Shrawan's statement that Sapku was present when the boy was

murdered. It may be true, but I am not prepared to accept it as true by itself. It still remains to be seen, however, whether Sapku is proved to have abetted the murder by instigation or conspiracy and so to be liable under section 109 of the Indian Penal Code to the punishment prescribed by section 302 of that Code.

4. The statement made by Shrawan that he murdered the child at the instigation of Sapku Patil and in conspiracy with him is supported by convincing proof that Sapku had a very strong motive for desiring the boy's death and that nobody else in the world had, and by the evidence of conspiracy given by Ishria Mahar (P. W. No. 5) and the boy's natural parents *Musammat* Raju (P. W. No. 12) and Raghu Kunbi (P. W. No. 13). The boy's age precludes the possibility of anybody desiring his death but a person who wanted his property. It has been suggested that the widows of his adoptive father had this motive, but the contest was not between them and the murdered boy, Kashiram, but between the boy and Sapku's son whom he was setting up in opposition to Kashiram. Whichever boy succeeded, the position of the widows would be the same. We have, indeed, in this case not only proof of the existence of a strong motive in Sapku exclusively, a fact which is relevant under section 8 of the Evidence Act, but we have further proof, relevant under section 11 of the Act, of circumstances which render the instigation of the murder by Sapku highly probable. That a person of his class and position in life would, in these circumstances, probably procure a murder which would be so advantageous to him as that of the boy Kashiram is abundantly clear from the facts that mention of its probability was made and the boy's parents were warned beforehand, as they state themselves, and also that he was accused of it immediately the boy's body was discovered, even before it was at all really certain that the death was not accidental. In the deposition of Ishria Mahar (P. W. No. 5) there is certainly much falsehood as to detail. It is clear from an examination of the whole case that Ishria was himself one of the principal persons in the conspiracy and one of the two persons who were mainly instrumental in seducing Shrawan but to save his own skin, as soon as Shrawan was arrested, he went at once to the Police and made a sort of confession, minimising his own share and declaring that he had warned the boy's parents of the plot. This is the story he repeated in Court. Now, after careful examination I believe Ishria's statement that Sapku Patil asked him in the presence of certain others to kill the boy Kashiram to be true. The fact that he lies in saying that he refused and that he warned the boy's parents tends to lessen that belief but does not destroy it. I refuse entirely to recognise the artificial distinction so often raised between what a prudent man would believe "out of Court," and what a Judge or Magistrate is allowed to believe in a judicial proceeding. There is no such distinction. As to the oft quoted maxim "*falsus in uno, falsus in omnibus*" if that were not itself entirely false the result would be that the whole of the depositions of the vast majority of witnesses would have to be left entirely out of consideration.

5. It is obvious, however, that there is not sufficient basis for the conviction of Sapku Patil for instigation and conspiracy in proof of the existence in him alone of a strong motive and of circumstances making such a course highly probable, the evidence of Ishria that he asked him to commit the murder and the evidence of the boy's parents that they saw him in consultation with the persons mentioned by Ishria and the accused Shrawan as the conspirators. These matters are, to my mind, sufficient corroboration of the statement made by Shrawan of the complicity of Sapku Patil, that is to say, they led me to believe that statement to be true. But without that statement they amount practically to nothing in the way of direct implication of Sapku. Therefore, unless we can start with the statement of Shrawan as a basis, treating it as substantive evidence to be corroborated by the other matters mentioned, it must be held that there is no evidence against Sapku. In *Empress* v. *Karim Bax* (1) Stevens, J. C., held that this could not be done. The principles laid down in that case are these. The

(1) 9 C. P. L. R. 37 Cr.

testimony of an accomplice is substantive evidence, and a conviction may legally proceed on it without corroboration. The statement of a co-accused is on a different footing. "It is not in itself substantive evidence and we may not start with it as a basis, proceeding to enquire how far it is corroborated. It can only be used in a subsidiary manner in connection with the substantive evidence adduced in the case." The opposite view was taken, though this ruling was not mentioned, by a Bench of this Court in 1911 in the unreported case of *Emperor* v. *Malhari* (Criminal Appeal No. 38 B of 1911) where Batten, A. J. C., and Stanyon, A. J. C., quoting with approval the Allahabad case of *Emperor* v. *Kehri* (2), held that a statement made by a co-accused and admitted under section 30 of the Evidence Act, "is a piece of evidence as relevant as any other kind of evidence," and that "a conviction based on the uncorroborated statement of a co accused would not be illegal."

6. It seems necessary to examine the views expressed by the High Courts on this point. In support of the proposition that, as against an accused person, the confession of a co-accused is not evidence but something different which can only be taken into consideration, so that a conviction based on such a statement alone, with or without corroboration, is illegal, it seems usual to quote the judgment of the Calcutta Full Bench in *Empress* v. *Ashootosh Chuckerbutty* (3) though the support it receives from that ruling is not great. It is certainly supported by the ruling of Benson and Sankaran Nair, JJ., in *Giddigadu* v. *Emperor* (4) and by a judgment of Sir Lawrence Jenkins, C. J., Brett and Chatterjee, JJ., concurring, in *Emperor* v. *Noni Gopal Gupta* [*Lalit Mohan Chakravarti*] (5). In the first case mentioned all the learned Judges were agreed that the confession of a co-accused was evidence and Sir Richard Garth, C. J., added that it ought to be dealt with by the Court just like any other evidence and if sufficiently corroborated could form the basis of a conviction. Mr. Justice Jackson, after finding that such a statement is "evidence" as much as the deposition of a witness, goes on to say: "There remains the question of the effect to be given to such confessions, and this point also appears to me not doubtful. The confession clearly cannot stand higher as to probative force than the testimony of an accomplice, who is declared to be a competent witness against an accused person (section 133) and the law does not say of the confession as it says of such testimony, that 'a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice'. That being so, I consider that we are free to lay down the rule, which would undoubtedly prevail in England if it were possible that such matter could be admitted, and to hold that a conviction based upon such confession alone would be illegal, and not only so, but that such confession will not legally suffice, when corroborated by other facts of which evidence is offered, unless those facts are such that, if believed to exist, they would of themselves suffice to support a conviction". In this quotation I have ventured to correct a somewhat obvious misprint in the report, in which the first two letters of the word "illegal" are omitted and prefixed to the word "legally" which comes immediately below it in the concluding passage of the extract. Markby, J., concurred in this view with hesitation and McDonell, J., without remark. Ainslie, J., apparently agreed with the learned Chief Justice in thinking that a conviction on the uncorroborated statement of a co accused admitted under section 30 of the Evidence Act would not be illegal but was in practice impossible.

7. With all respect, I feel bound to say that I am unable to follow the argument in the passage quoted from the judgment of Mr. Justice Ainslie, and I concur entirely in the following passage from the judgment of Heaton, J., in *Gangapa Kardepa* v. *Emperor* (6). Referring to *Empress* v. *Ashootosh Chuckerbutty* (3) the learned Judge said:—

(2) 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360.

(3) 4 C. 483; 3 C. L. R. 270; 1 Shome L. R. Crl. R. 79; 2 Ind. Dec. (N. S.) 807 (F. B.).

(4) . Ind. Cas. 867; 33 M. 46; 8 M. L. T. 116; 9 Cr. L. J. 404.

(5) 10 Ind. Cas. 582; 38 C. 559; 15 C. W. N. 593; 13 Cr. L. J. 286 (S. B.).

(6) 21 Ind. Cas. 673; 38 B. 156; 15 Bom. L. R. 975 2 Bom Cr. C. 143; 14 Cr. L. J. 625.

"In this case the Judges did regard the confession of a co-accused as evidence for reasons which to me are convincing. Therefore, it is that I feel bound to decline to follow the ruling in *Queen-Empress* v. *Khandia* (7) and feel that I must treat the confessions of the co-accused as evidence for the purpose of all the accused. The second point is that, even so, regarding the confessions they are evidence of so peculiar a character that to found a conviction on that class of evidence alone is illegal, and for this proposition there is the authority of the Calcutta case already referred to. But to this proposition also I must respectfully demur. There is, I believe, no law whatever prescribing the credibility of evidence. Matters relating to the admission of evidence are matters of law, but the credibility of evidence is a matter left to the knowledge, experience and logic of the Court that has to decide on the evidence. I think that much of the confusion which has arisen more particularly in the case of accomplice evidence, has arisen out of the fact, that questions of credence and questions of law have not been rigorously kept apart but have been confused together. Moreover, I think that if a Court lays down a rule touching the credibility of evidence it does that which it has no authority to do and which it ought to be against the conscience of the Court to do. How can a Court, however eminent, lawfully say that a Jury in some future case shall not be convinced by some particular class of evidence?" In regard to the dictum of Ainslie, J., that even the corroboration must be of evidence of facts "such that if believed to exist they would of themselves suffice to support a conviction." I would quote the judgment of this Court in *Emperor* v. *Malhari* (Criminal Appeal No. 38 B of 1911) the case above-mentioned. Stanyon, A. J. C., said: "A good deal has been written and said about the scope of sectin 30 of the Indian Evidence Act, 1872; and some of the earlier published decisions on the point would make the confession of one accused something less than evidence against his accomplice jointly tried with him for the same offence, so that no conviction of the latter could be sustained thereon if the other evidence would be insufficient to prove his guilt. We are unable to take this view. We do not think it was the intention of the Legislature that section 30 should provide a mere superfluity, to be used only in cases already established by other evidence."

8. The judgment in *Giddigadu* v. *Emperor* (4) is very short. The learned Judges, Benson and Sankaran Nair, JJ., first lay down no more than that a conviction would be most unsafe in practice if there was no evidence other than the confession, and add at the end of their judgment that, "conviction on such a confession alone has long been held to be a case of no evidence and bad in law", citing two Madras cases of 1873 and 1876, to which I am unable to refer, and the Calcutta Full Bench case already discussed. In 1911, in *Emperor* v. *Noni Gopal Gupta* [*Lalit Mohan Chakravarti*] (5), Sir Lawrence Jenkins, C. J., Brett and Chatterjee, JJ., concurring, said: "While admissions, a word which embraces confessions, are by section 21 relevant, and may be proved as against the person making them, all that section 30 provides is, that the Court may take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Thus, to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of section 5." The principle enunciated is based on the conclusion that such a confession is not evidence, which is directly opposed to the unanimous decision of the Full Bench of the same Court in the case already discussed, which was not mentioned by the learned Chief Justice.

9. In a later case in the same Court, *Emperor* v. *Babar Ali* (8), Fletcher, J., proceeded entirely on the assumption that a conviction could rest on the confession of a co-accused if it were sufficiently corroborated. After considering the effect of the confessions in that case as against those who made them, the learned Judge said: "As against the remaining four accused, the confessions can be taken into consideration, but the Court requires corroboration before it will act upon the confessions of co-accused. The

(7) 15 B. 66; 8 Ind. Dec. (N. S.) 45.

(8) 28 Ind. Cas. 657; 42 C. 789; 21 C. L. J. 492; 19 C. W. N. 594; 16 Cr. L. J. 831.

corroboration in the evidence in this case, although it raises a case of suspicion, falls far short of what is required to support a conviction. It consists principally of statements of witnesses as to seeing the accused, or some of them, together on the night of the occurrence, and as against one of the accused as to the identification of certain ornaments found with one of the accused which had sometime or other been pledged with the deceased woman. These statements, though giving rise to suspicion, are consistent with the innocence of these four accused". Finally, we have the dissentient judgment of Mr. Justice Shah in *Gangapa Kardepa* v. *Emperor* (6). The learned Judge was of opinion that a conviction based only upon matter which can be taken into consideration under section 30 of the Evidence Act and is not corroborated by other evidence is bad in law, but apparently accepted the view that such matter could be treated as substantative evidence, and a conviction could rest upon it if there were sufficient other evidence to justify a belief in its truth.

10. Against the proposition that the confession of a co-accused can be used as a piece of substantive evidence and that we may start with it as a basis, proceeding to enquire how far it is corroborated, we have, therefore, the *dictum* of Stevens, J. C., in *Emperor* v. *Karim Bax* (1), that of Ainslie, J., in the *Empress* v. *Ashootosh Chuckerbutty* (3), which on examination works out very nearly to laying down a "rule touching the credibility of evidence" of which Heaton, J., speaks in the passage quoted above, the judgment of the Madras High Court in *Giddigadu* v. *Emperor* (4) which rests entirely on authority to which I cannot refer, and the *dictum* of Jenkins, C. J., in *Emperor* v. *Noni Gopal Gupta* [*Lalit Mohan Chakravarti*] (5) which apparently was not followed by Fletcher, J., in *Emperor* v. *Babar Ali* (8).

11. On the other hand, we have reasoned and to my mind convincing judgments by Knox, J., and Richards, J., in *Emperor* v. *Kehri* (2), by a Bench of this Court in *Emperor* v. *Malhari* (Criminal Appeal No. 38-B of 1911) and by Heaton, J., Macleod, C.J., concurring, and, on this point, Shah, J., not dissenting, in *Gangapa Kardepa* v. *Emperor* (6). To these I might add the reasoning in the judgment of the learned Sessions Judge (Mr. F. K. Boyd) which is published as an annexure to *Gangapa Kardepa* v. *Emperor* (6). There is also the judgment of Garth, C. J., in the *Empress* v. *Ashootosh Chuckerbutty* (3), and indeed the unanimous decision of the Full Bench in that case that such a statement is substantive evidence. I have not mentioned the Allahabad case of *Queen-Empress* v. *Nirmal Das* (9) nor the Bombay case of *Queen-Empress* v. *Khandia* (7) as they may both be taken as overruled by the later decisions quoted. In any case, the reasons stated in the later rulings appear to me much more convincing. I concur entirely in the views expressed by the Allahabad High Court in *Emperor* v. *Kehri* (2) and by Mr. Justice Heaton in *Gangapa Kardepa* v. *Emperor* (6), and hold that in this case the confession made by Shrawan can be treated as substantive evidence against Sapku Patil, and if it is found to be credible, because it is sufficiently corroborated by other evidence or matters proper for consideration, Sapku Patil can be convicted on it. I have already stated that I believe his statement that Sapku Patel instigated him and conspired with him to murder the boy, because that statement is sufficiently corroborated by the evidence of Ishria (P. W. No. 5), *Musammat* Raju (P. W. No. 12) and Raghu (P. W. No. 13) and that of the witnesses who relate the circumstances of the disputes and litigation over the adoption and the property. Convincing proof of that somebody instigated Shrawan to commit this murder, that it is highly probable that Sapku Patil did so, and that it is practically impossible that anybody else did so, seems to me sufficient proof that Sapku Patil did so. Under section 109 of the Indian Penal Code, Sapku is liable to the punishment provided by section 302 for murder, and to my mind there appears to be no question about the sentence that ought to be passed upon him. His crime is more despicable and diabolical than that of his hired assassin Shrawan. For all these reasons, I consider that in the case of Sapku the conviction ought to be altered to one of abetment of murder punishable under

(9) 22 A. 445; A. W. N. (1900) 169; 9 Ind. Dec. (N. S.) 1334.

sections 109 and 202 of the Indian Penal Code read together and that the sentence should be maintained.

PRIDEAUX, A. J. C.—I have had the advantage of reading the judgment which my learned brother proposes to deliver. I agree that the finding that Sapku Patil was present at the murder cannot be upheld for I do not believe Shrawan's statement that Sapku was then present. I further agree that a strong motive existed for Sapku desiring the death of the boy Kashiram. However, I am of opinion that the statement of Shrawan cannot be treated as substantive evidence as against Sapku. Section 30 of the Evidence Act says that a confession by a co-accused may be taken into consideration against another being jointly tried. But such confession does not fall within the definition of evidence given in section 3 of the same Act. As pointed out by Jackson, J., in *Queen* v. *Chunder Bhuattacharjee* (10), "the section does not provide, as has been repeatedly pointed out by this Court, that such confession is evidence, still less does it say that it shall be the foundation of a case against the person implicated. The Legislature very guardedly says that it may be 'taken into consideration' and I think the obvious intention of the Legislature in so saying was that, when, as against any such person, there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing on the truth or sufficiency of such evidence."

The same Judge held to this opinion in *Empress* v. *Ashootosh Chuckerbutty* (3). The authorities on this point have been mentioned by my learned brother. I incline to the view expressed by Jenkins, C. J., in *Emperor* v. *Noni Gopal Gupta* [*Lalit Mohan Chakravarti*] (5), namely, that the confession of an accused person is not evidence against a co-accused in the sense that a conviction on that alone could be supported. It can only be taken into consideration under section 30, that is to say, it can lend assurance to other evidence. Other cases which support this view are *Queen-Empress* v. *Nirmal Das* (9), *Queen-Empress* v. *Khandia* (7). Even if treated as evidence, the case-law is in favour of the proposition that such evidence is of too weak a character to form the basis of a conviction. Such a confession may be evidence in the sense that it may be taken into consideration in determining the guilt or innocence of a co-accused, but the section has to be strictly construed, and a confession of this nature is merely to be an element in the consideration of the case and does not do away with the necessity for other evidence. I do not think that such a confession alone will sustain a conviction.

Confessions may be divided into two classes, those that spring from genuine remorse, and those, whether true or false, which are made under some inducement, given not necessarily by the Police but by others who have interested themselves in the investigation of the case. It is obvious that those coming within the first kind are the most valuable. In the present case it seems to me that, as regards the co-accused, Shrawan's statement is entitled to little weight. He began by saying to the Police that Mangria and Ishria had been trying to induce him to get the boy killed, and that Mangria actually killed Kashiram in the presence of himself and Sapku Kunbi. On this statement Mangria was arrested. Next day, Shrawan was arrested, and then, for the first time, implicated Sapku, accused. Later on, he made the confession in which he stated that he pressed the boy's throat and then drowned him in the pit in the presence of and under the instigation of Sapku, accused. This statement he now retracts.

He has thus told two stories and a part of the last, namely, that Sapku, accused, was present at the drowning of the boy I disbelieve. Under these circumstances, I am unable to accept the retracted confession as sufficient against Sapku unless there is other evidence on the record showing his guilt. I turn now to see what evidence there is.

Ishria's statement I do not believe. On the 14th September Shrawan made a statement to the Police saying that Ishria had tried to induce him to kill the boy. The

(10) 24 W. R, 42 Cr.

next day Ishria appeared before the investigating officer of his own accord and made a statement saying that Sapku Patil had been trying to induce him to kill Kashiram. In his statement as a witness he speaks to being sent for by Sapku, where, in the presence of Sapku, Chutia and Mangria, Sapku, accused, asked him to drown Kashiram. The witness refused and told Janglia, the father of the accused, Shrawan, to warn Raju, the mother of the boy, that Sapku was planning his murder, and he further warned Janglia to tell his son Shrawan not to join in the plot. Janglia denies that Ishria warned him, though the boy's mother says that Janglia had warned her. He may have done so but that the warning originally came from Ishria, there is nothing to show except his own statement. Before the Police reached the village the suspicion that Sapku had instigated the murder had got about and shortly after this witness had been himself implicated we find him coming forward as a witness against Sapku, obviously in an attempt to clear himself. Evidence of this nature is not convincing. The incident spoken to by Ghurshya (P. W. No. 6) does not directly implicate Sapku. The mother of the boy stated that after the boy's death she accused Sapku Patil, Mangria and Chutia and Ishria Mahar of having combined to kill her son. She did so because they seemed intimate and used to sit together and she had overheard the saying that Kashiram would not enjoy the fruits of his victory long. It is very improbable that if these men were conspiring the boy's death, they would allow themselves to be overheard by the mother. I disbelieve this part of the woman's statement.

Raghu, the father of the boy, examined as P. W. No. 14, speaks to his wife telling him of Janglia's warning and to his own suspicion that Shrawan committed the murder at the instigation of Sapku, Ishria and Mangria. He saw Sapku in the village that morning. That by itself is not suspicious for the man lives in a neighbouring village.

This is all the evidence. There is strong suspicion against Sapku, and it is not likely that Shrawan would have killed the boy unless instigated to do so by promise of a reward. But suspicion is not proof and I am clearly of opinion that the evidence on record together with Shrawan's retracted confession is insufficient to warrant the conviction of Sapku, and that it would be unsafe to convict him on the evidence on record. I would, therefore, allow the appeal of this appellant, set aside his conviction and sentence and acquit him.

Shrawan's conviction is, I think, correct. There is evidence to show that the boy used not to go to Hagria's *badi* where the pit he was found in is situated, though it has been found there is a foot-path and an opening in the dividing fence between the *badis* of Raghu and Hagria. The Sub-Inspector's statement shows that the opening is guarded by thorns about a foot high, which would have to be stepped over, and a boy of four is unlikely to have crossed there. The pit could, of course, be reached by going round but, again, the boy is not likely to have gone that distance. The boy's body bore no external marks of violence and the medical evidence shows that death was probably due to drowning. As the boy was 2 feet 6 inches in height it is unlikely that he would have been drowned by falling into the hole, where the utmost depth of water is said by P. Ws. Nos. 2 and 14 to be $1\frac{3}{4}$ feet. An accidental fall into the pit would probably have led to the boy's screams being heard. P. W. No. 7, Bakshi, speaks to meeting Shrawan that evening near Ladku Patil's *badi* which is beyond the pit at about sunset and *Musammat* Raju, the mother, says that Shrawan who had been given leave on account of the *marbod* festival returned to the house that afternoon and was there when the boy got up and went out. He then took the boy into his lap. The boy was missed after this, and it seems from the mother's statement that Shrawan was the person last seen with the boy. Shrawan was servant to Raghu, the boy's father, and had been given leave for the day. Yet he appears twice at the house that afternoon, a suspicious circumstance going to show his visits were made with some ulterior motive. Shrawan has adduced no evidence to show how he was forced to make a false confession. The Sub Inspector admits that he told the man to speak the truth but this fact would not invalidate the confession. As regards the person making it a retracted confession may even without any corroborative evidence form the basis of a conviction, *Emperor* v. *Kehri* (2) and in the

present case there is evidence to show that this appellant was last seen with the boy, and the circumstances connected with the boy's death point to his having been murdered.

I would confirm conviction and sentence in Shrawan's case and dismiss his appeal.

The case was then referred to a Third Judge by the following

ORDER.

HALLIFAX AND PRIDEAUX, A. J. Cs.—(*February* 10, 1921.)—As we are divided in opinion in respect of this appeal the case will be laid before such third Judge as the Judicial Commissioner may appoint in this behalf for his opinion under section 429 of the Criminal Procedure Code. Our opinions are stated in the separate judgments recorded in the appeal of the co-accused Shrawan Mahar (Criminal Appeal No. 246 of 1920) dismissed to-day.

On the case being laid before the Judicial Commissioner the following order was passed:

DRAKE-BROCKMAN, J. C.—(*February* 14, 1921.)—Let the case of Sapku be laid before Mr. Kotval, A. J. C., for opinion.

OPINION.

KOTVAL, A. J. C.—The materials on record appearing against Sapku are: the confession of Shrawan, the co accused, and the depositions of P. W. No 5, P. W. No. 12 and P. W. No. 13. Hallifax, A. J. C., holds that Shrawan's confession can be treated as substantive evidence and that we may start with it as a basis. Prideaux, A. J. C., is of the contrary opinion.

The first proviso to section 165, Evidence Act, lays down that the judgment must be based upon facts declared by the Act to be relevant and duly proved. Chapter II, part, I of the Act deals with the subject of the relevancy of facts. Section 30 finds place in this Chapter. It is to be noted that in all cases under this Chapter when a fact is declared relevant the Act uses the expression "is relevant" to declare the relevancy. In section 30 the Act does not say that the confession referred to therein is relevant but only says that the Court may take it into consideration. The confession, therefore, not being declared relevant by the Act as against the co-accused judgment cannot be based upon it so far as he is concerned. When, therefore, section 30 declares only that the Court may take it into consideration, I think it is a fair inference that what it means is that the Court may take it into consideration with or supplementarily to relevant facts which may form the basis of a judgment. If this view is correct, then the interpretation of section 30 by Jenkins, C. J., in *Emperor* v. *Noni Gapal Gupta* [*Lalit Mohan Chakravarti*] (5) is the right one.

Both Hallifax and Prideaux, A. J. Cs., have disbelieved the statement of Shrawan that Sapku was present when the boy was murdered, and I agree with them. Hallifax, A. J. C., in paragraph 3 of his judgment writes:—

"It still remains to be seen, however, whether Sapku is proved to have abetted the murder by instigation or conspiracy and so to be liable under section 109 of the Indian Penal Code to the punishment prescribed by section 302 of that Code;"

and in paragraph 5:—

"It is obvious, however, that there is not sufficient basis for the conviction of Sapku Patil, for instigation and conspiracy, in proof of the existence in him alone of a strong motive and of circumstances making such a course highly probable, the evidence of Ishria that he asked him to commit the murder and the evidence of the boy's parents that they saw him in consultation with the persons mentioned by Ishria and the accused Shrawan as the conspirators. These matters are to my mind sufficient corroboration of the statement made by Shrawan of the complicity of Sapku Patil, that is to say, they lead me to believe that statement to be true. But without that statement they amount practically to nothing in the way of direct implication of Sapku. Therefore, unless we can start with the statement of Shrawan as a basis, treating it as substantive evidence to be corroborated by the other matters mentioned, it must be held that there is no evidence against Sapku."

It is obvious, therefore, that he would have acquitted Sapku but for his opinion that it is permissible to start with the statement of Shrawan as a basis treating it as substantive evidence to be corroborated by the other matters mentioned.

Assuming that the view taken by me is not correct and treating the statement of Shrawan as substantive evidence, I am not inclined to put any reliance on it so far as

it implicates Sapku or on the evidence of P. W. No. 5, P. W. No. 12 and P. W. No. 13 for the reasons given by Prideaux, A. J. C. As a matter of judicial prudence, a statement like Shrawan's must be regarded with suspicion: *Bala* v. *Emperor* (Criminal Revision No. 215 of 1915). The evidence of P. W. No. 5 could have been corroborated by Sapku, Chutia and Margrie, but they are not examined. Moreover, it does not corroborate the statement of Shrawan that he—Shrawan—was instigated by Sapku. If believed, it proves conduct on the part of Sapku showing that Sapku had gone to hire another person besides Shrawan to commit the murder.

The one solid fact against Sapku is the existence of a motive on his part. This raises a strong suspicion against him but cannot suffice for a conviction.

In my opinion, the accused Sapku should be acquitted.

JUDGMENT.

HALLIFAX AND PRIDEAUX, A. J. Cs.—(*April* 6, 1921.)—Following the opinion stated by Kotval, A. J. C., on the reference made under section 429 of the Criminal Procedure Code, we order that the conviction and sentence of the accused Sapku be set aside and that he be acquitted and set at liberty.

J. P. *Conviction set aside.*

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 9 OF 1921.
August 10, 1921.
Present:—Mr. Justice Teunon and Mr. Justice Suhrawardy.
DULLOO SINGH AND OTHERS—ACCUSED—PETITIONERS
versus
THE DEPUTY INSPECTOR GENERAL OF POLICE, C. I. D., BENGAL—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), ss. 193, 204, 471—Sanction to prosecute—Decree, whether bar to prosecution—Examination of witnesses on commission.

The existence of a decree not set aside is no bar to a prosecution under sections 193, 204, 471 and cognate sections of the Penal Code. [p. 271, col 1.]

Emperor v. *Molla Fuzla Karim*, 33 C. 193; 3 Cr. L. J. 365, relied on.

For the purposes of an enquiry made by a Civil Court under the provisions of section 195 of the Criminal Procedure Code, the examination of witnesses on commission is permissible. [p 271, col. 1.]

Rule against an order of the Judge, Small Cause Court, Sealdah.

FACTS appear from the judgment.

Sir *Asutosh Chaudhuri*, Kt. (with him Babu *Kanaidhan Dutt*), for the Petitioners.—Where the decree of a competent Court is subsisting and is not set aside, how can there be sanction to prosecute? Unless and until the decree is set aside, how can you say that the decree was obtained by fraud? That the sanction is not in proper form is clear and indisputable. Moreover, the examination of witnesses on commission in the course of enquiry which led to the grant of sanction is not sanctioned by law.

Mr. *Orr*, for the Opposite Party, refers to *Hume* v. *Poresh Chunder Ghose* (1), *Emperor* v. *Molla Fuzla Karim* (2) and *Ram Prosad Malla* v. *Raghubar Malla* (3).

Sir *Asutosh Chaudhury* in reply.—*Emperor* v. *Molla Fuzla Karim* (2) has no application to the facts of the case as no evidence was taken in that case. *Ram Prosad Malla* v. *Raghubar Malla* (3) cannot apply as it was an *ex parte* decree. Refers to *Kasi Chunder Mozumdar, In the matter of the Petition of* (4), *Sangili Vira Pandia* v. *Queen* (5).

JUDGMENT.—This Rule is directed against an order by which the Judge of the Small Cause Court of Sealdah has granted to a responsible officer of Government sanction for the prosecution of the five petitioners on charges under sections 204, 193, 471, and cognate sections, of the Indian Penal Code.

The suit out of which the application arose was one brought by the first petitioner against one Lakhia Chamarin and her minor son, Biswa Nath, as the heirs and representative of Gajan Chamar and his wife, Ukia, to recover a sum of money said to be due on a hand note. In this suit Dukharan, the father of Biswanath represented his minor son, and the suit

(1) 22 Ind. Cas. 321; 41 C. 446 at p. 456; 15 Cr. L. J. 49 (S. B.).
(2) 33 C. 193; 3 Cr. L. J. 365.
(3) 4 Ind. Cas. 6; 37 C. 13 at p. 21; 13 C. W. N. 1038; 10 Cr. L. J. 454.
(4) 6 C. 440; 7 C. L. R. 330; 8 Ind. Dec. (N. S.) 286.
(5) 6 M. 29; 2 Weir 173; 2 Ind. Dec. (N. S.) 299.

eventually terminated in a compromise by which the plaintiff gave up all claims against the defendants on the execution by Dukharan of a promissory-note for the sum of Rs. 200 in favour of the plaintiff. On the order-sheet the final order reads "decreed on compromise," but this is obviously a mistake, as, in view of the statements made in the petition, there could be no decree against the defendants and the suit was in fact dismissed.

The grounds on which the Rule was issued are three, namely, (1) that the suit having been compromised the application for sanction is not maintainable, (2) that the sanction is not in proper form and (3) that the examination of witnesses on commission in the course of enquiry which resulted in the grant of sanction is not warranted by law.

In our opinion none of these objections can be sustained.

On the first point it is sufficient to refer to the case reported in *Emperor* v. *Mollo Fuzla Karim* (2), wherein it has been held that the existence of a decree not set aside is no bar to a prosecution.

The order granting the sanction embodies by reference the application made and in the several paragraghs of the said application all the essential particulars are to be found. Thus, as to form, there has been a substantial compliance with the requirements of the law.

The woman, Lakhia, and certain other witnesses reside in the State of Benares and were examined on commission. For the purposes of an enquiry made by a Civil Court under the provisions of section 195 of the Criminal Procedure Code, their examination on commission was, in our judgment, permissible and sufficient.

We accordingly discharge this Rule.

B. N. *Rule discharged.*

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 45 OF 1921.

January 3, 1922.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

MAHESH SHAH—

versus

DARBARI HUSSAIN—

Local Self-Government Act (III B. C. of 1885), ss. 78, 139, 140—Encroachment on road—District Board, power of, to frame Bye-Laws—Bye-laws, whether ultra vires.

A District Board is empowered under sections 139 and 140 of the Local Self-Government Act to make a Bye-Law for carrying out the purposes of the Act and has impliedly, if not expressly, power to provide, by its Bye-laws, for the punishment of encroachment over its roads in order to carry out the provisions of section 78 of the Act, *i. e.*, to provide for the repairs and maintenance of its roads, etc. and such a By-Law framed by the District Board is not *ultra vires*. [p. 572, col. 2.]

Ramanath Ghose v. *Emperor*, 11 C. W. N. clxxv (175), dissented from.

Criminal reference by the Sessions Judge, Shahabad.

JUDGMENT.—This is a reference by the Sessions Judge of Shahabad under section 439 of the Code of Criminal Procedure, recommending that the conviction of, and the sentence passed by, the Magistrate upon the accused under the Bye-law framed by the District Board of Shahabad under section 139 of the Local Self-Government Act (Act III of 1885 B. C.) be set aside, on the ground that the Bye-law in question is *ultra vires*.

The Bye-law in question runs as follows:—

"Whoever encroaches on any road by cultivating crops, or by ploughing it up for cultivation or by the construction of any building or structure thereon, except by the permission of the Chairman of the District Board, shall be liable to a fine not exceeding Rs. 50 and to a further fine not exceeding Rs. 2 for every day on which the offence is continued."

Section 139 of the Act says: "Every District Board or Local Board, empowered in this behalf by the Lieutenant-Governor, may, subject to the control of the Lieutenant-Governor, make Bye-laws for carrying out all or any of the purposes of this Act."

Section 140 empowers the Board to provide for the punishment of the breach of the

Bye laws with fine which may extend to Rs 50, and in the case of continuing breach with a further fine which may extend to Rs. 5 for every day during which the breach is continued.

Thus, a District Board is empowered to make a Bye-law for carrying out the purposes of the Act.

Section 78 of the Act enjoins upon the District Board the duty.....to provide for the repair and maintenance of roads, etc., which have been taken charge of by the Board under the Act, or towards which it may have agreed to contribute.

The learned Sessions Judge holds that the words "repair and maintenance" in the section cannot possibly include encroachment on the roads and, therefore, the District Board has no right to make a Bye-law for the purpose of punishing persons making encroachments upon the roads. He has relied upon the case of *Ramanath Ghose* v. *Emperor* (1) which fully supports his views and is on all fours with the present case.

Now, the words "provide for" in the section mean, to procure means in advance or to take measures in view of an expected or possible need, and the word "maintenance" of road means, the keeping it up. Maintenance of way has a technical meaning of maintaining in repairs all fixed property of a road, such as, tracks, bridges, etc., which are the necessary appurtenances. The above meanings of the words have been taken from Webster's and the Imperial Dictionaries.

Thus, under the section, a duty is cast upon a District Board to keep the road in repair and to maintain it by keeping in repairs the bridges, tracks, etc., on the road by providing funds and taking necessary measures with respect thereto.

On the one hand, it is possible to contend that no duty is cast upon the District Board to provide by its Bye-law for the punishment of persons encroaching upon their roads. On the other hand, it is difficult to see how a road can be maintained in its proper condition without preventing encroachments thereon and, impliedly, the District Board would be deemed to be authorised to make Bye-laws making encroachments penal, in addition to the provisions made for dealing with encroachments on roads by the penal laws of the country, such as, the Indian Penal Code and the Code of Criminal Procedure (section 133). The point is not free from difficulty and, in view of the decision of Stephen, J., in the case cited above, I was, at one time, inclined to refer this case for the consideration of a larger Bench so as to decide the point once for all, inasmuch as it is of great public importance. On further consideration I have come to the conclusion that the case should not be referred to a larger Bench but should be decided by us.

No decision of any Court, excepting that of Stephen, J., referred to above, has been shown to us. I have fully considered that decision in the light of the provisions of the Local Self-Government Act, and hold that the District Board has impliedly, if not expressly, power to provide for, by its Bye-laws, the punishment of encroachments over its roads, in order to carry out the provisions of section 78 of the Act, namely, to provide for the repairs and maintenance of its roads, etc. Section 139 empowers the District Board to make Bye-laws and section 140 empowers it to impose punishment for the breach of Bye-laws.

I, therefore, differ from the view taken by the learned Sessions Judge of Shahabad as well as by the Calcutta High Court, and hold that the Bye law is not *ultra vires*, and the conviction of, and the sentence passed upon, the petitioner was not without jurisdiction.

I decline to accept the reference.

ADAMI, J.—I agree.

J. P. *Reference not accepted.*

(1) 11 C. W. N. clxxv (175).

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 870 OF 1921.

December 17, 1921.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

GHAZI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300, Excep. (1), 302—Murder—Woman of loose character—Refusal to admit husband to sexual intercourse—Grave and sudden provocation—Punishment.

MADODAR RAM v. EMPEROR.

Accused killed his wife, whom he knew to be a woman of depraved character, because she refused to have sexual intercourse with him on the night of the occurrence and also abused him. The woman had often before refused such intercourse:

Held, that the accused could not be said to have acted under grave and sudden provocation, and was guilty of murder.

Under the circumstances of this case, a sentence of transportation for life was considered sufficient.

Government Pleader v. *Nattekallappa*, 1 Weir 308, referred to.

Appeal from an order of the Sessions Judge, Dera Ghazi Khan, dated the 4th October 1921.

Mr. *M. L. Puri* for Mr. *Des Raj Sawhny*, for the Appellant.

JUDGMENT.—In this case one Ghazi, a *Baloch* of the Dera Ghazi Khan District, has been convicted of the murder of his wife, *Musammat* Bano, and has been sentenced, under section 302, Indian Penal Code, to the penalty of death There is ample evidence upon the record that *Musammat* Bano was a woman of a loose character, and that she had contracted an illicit intimacy with one *Malak* Ghulam Rasul. Consequently, there were constant quarrels between the husband and the wife, and it appears that the latter would not allow the former to have sexual intercourse with her.

On the morning of the 7th of May 1921 the woman was found murdered on the platform of her husband, and the latter was smoking a *huqqa* by her side. The prisoner's first cousin, Chakar, P. W. No. 5, was the first to come up to him and found him sitting near the corpse of his wife with his *chola* and *manjhla* stained with blood. Upon an enquiry made by the witness the prisoner admitted that he had killed his wife. This confession was repeated by him before a large number of persons and also before a Magistrate who recorded his statement on the 13th May. Before the Committing Magistrate he again admitted his guilt and adhered to that statement when he was examined by the Sessions Judge.

There can, therefore, be no doubt that the appellant, Ghazi, killed his wife on the night of the 6-7th May 1921, and that the offence was committed with the blood-stained hatchet which he himself produced from his house. The learned Counsel for the appellant, however, seeks to minimize the gravity of the offence by invoking the plea of grave and sudden provocation. He contends that not only was *Musammat* Bano a woman of a depraved character, but that she also refused to have sexual intercourse with her husband on the night in question. He further invites our attention to the confession recorded by the Magistrate on the 13th May in which the accused stated that his wife had used abusive language on that night. Considering that the woman's misconduct was already known to the husband and that she had often refused to have sexual intercourse with him, we are not prepared to hold that the provocation which he received on that night was grave as well as sudden. We accordingly hold that the appellant has been rightly convicted of the offence of murder.

As regards the sentence, the learned Counsel relies upon a judgment reported as *Government Pleader* v. *Nattekallappa* (1) where the wife's refusal to have connection with her husband was regarded as a mitigating circumstance justifying the reduction of the sentence of death to one of transportation for life. In the case before us we have not only the wife's refusal to have sexual intercourse with the prisoner, but also the fact that she was a woman of an immoral character and that she probably abused her husband on the night in question. In view of these circumstances, we do not think that this is a case in which the extreme penalty of the law should be exacted. While upholding the conviction, we accept the appeal so far as to reduce the sentence to one of transportation for life.

Appeal accepted.

(1) 1 Weir 308.

PATNA HIGH COURT.
DEATH REFERENCE No. 13 OF 1921.
CRIMINAL APPEAL No. 133 OF 1921.
September 28, 1921.
Present:—Mr. Justice Das and Justice Sir John Bucknill, Kt.
MADODAR RAM —ACCUSED—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code Act (V of 1898), s. 298—Jury

EMPEROR *v.* LACHHMAN.

trial—Murder—Confession, inadmissible in evidence, read before Jury, effect of—Re-trial.

Where during the course of a trial by a Court of Session upon a charge of murder a confession by the accused was read to the Jury, but it subsequently transpired that the confession had not been recorded according to law and had to be ruled out as inadmissible:

Held, that that statement might reasonably be regarded as having affected in some measure the minds of the Jurymen in convicting the accused however the Judge might have endeavoured to remove that impression from their minds, and that, under the circumstances, the accused was entitled to a new trial.

Reference made by the Sessions Judge, Patna, dated the 31st August 1921.

Mr. *Baikunth Nath Mitter*, for the Appellant.

Mr. *Manohar Lall*, Assistant Government Advocate, for the Crown.

JUDGMENT.

BUCKNILL, J.—In this appeal and reference, appellant, who has been sentenced to death for murder, has, through his Counsel, drawn the attention of this Court to a certain circumstance (which took place in the course of the trial) which is a matter of very grave concern. It would appear from what is stated by the learned Sessions Judge in his summing up to the Jury, that to use his own words,

"the confession which was opened by the Public Prosecutor and was read to the Jury in the course of the trial was not recorded according to law and had to be ruled out as inadmissible."

The fact that such procedure took place in a case of such gravity as is this is a matter of very great regret. Whatever may have actually taken place it seems quite clear that the Jury was informed that the accused had made a confession. I have no doubt whatever that a statement may very reasonably be regarded as having been bound to affect in some measure the minds of the Jurymen, however carefully the learned Judge may have (and quite rightly) endeavoured to remove that impression from their minds. In those circumstances, and without expressing the least view as to the facts of this case, I think that the accused is entitled to a new trial. I should like to add that, pending this new trial, I think it would be highly advisable that the accused should be kept under medical observation so that his state of mind may be watched in order to see whether his mentality is normal. The circumstances under which, as is alleged at the trial, the murder took place, were so violent and barbaric, that it seems possible that the mind of a person who could have committed such a crime was unhinged.

The case will go back for a new trial.

DAS, J.—I agree.

J. P.

Case sent back.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 24 OF 1921.

July 26, 1921.

Present:—Mr. Daniels, J. C.

EMPEROR—COMPLAINANT

versus

LACHHMAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 110—Sureties, rejection of—Magistrate, power of.

A Magistrate cannot reject sureties offered by the accused on a Police report without recording any evidence on the point. It is quite open to a Magistrate to ask the Police to report on the character of the sureties offered but before finally rejecting them it is his duty to have some materials on which he can act judicially.

Jai Govind v. *Emperor*, 17 Ind. Cas. 72; 15 O. C. 263 at p. 268; 13 Cr. L. J. 760, relied on.

Reference by the Officiating Sessions Judge, Rae-Bareli.

The Government Pleader, for the Crown.

JUDGMENT.—This is a reference by the Sessions Judge of Rae Bareli on the ground that the Magistrate has wrongly rejected the sureties offered by the accused on a Police report without recording any evidence on the point. The reference is in accordance with the law laid down in *Jai Govind* v. *Emperor* (1) and two earlier cases of this Court. It is quite open to a Magistrate to ask the Police to report on the character of the sureties offered, but before finally rejecting them it is his duty to have some materials on which he can act judicially. I accordingly accept the reference, and direct the Magistrate to proceed to enquire into the fitness of the sureties offered.

J. P.

Reference accepted.

(1) 17 Ind. Cas. 72; 15 O. C. 263 at p. 268; 13 Cr. L. J. 760.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 943 OF 1920.

December 2, 1920.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

HARKHOO AND ANOTHER—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 159—Witness, duty of—Refreshing memory.

A witness before a Court of Justice is under an obligation to tell the truth and the whole truth, to the very best of his power. If upon any question he suffers from a *bona fide* lapse of memory, and that failure of memory can be remedied by reference to any memorandum or other writing prepared by the witness at the time, and the Court invites the witness to refresh his memory with reference to the writing the witness is under an obvious obligation to do so. It is part of the duty under which he lies to lay the whole truth before the Court to the best of his ability.

Criminal appeal from an order of the Sessions Judge, Gorakhpur.

Mr. *Narmadeshwar Prasad Upadhya*, for the Appellant.

Mr. *W. Wallach*, Government Advocate for the Crown.

JUDGMENT.—In this case Harku and Sheoraj, two young men, Kahars by caste, and distantly related, have been convicted; the first on a charge under section 302, and the second on a charge under section 302 109 of the Indian Penal Code, in connection with the murder of a boy named Brij Kishor. The record is before us for confirmation of the capital sentence passed by the Sessions Court. Both the convicts have submitted petitions of appeal through the Superintendent of the Jail in which they are confined, and the case on their behalf has been fully argued before us by Counsel. The record is a somewhat voluminous one, but the whole of the evidence is carefully summarised in the judgment of the learned Sessions Judge, and we do not propose to recapitulate more of it than is necessary in order to make clear the reasons for the decision we have come to.

The question of motive bulks somewhat largely in the evidence, but may be briefly disposed of so far as these appellants are concerned. There is no doubt that the right of succession to a considerable property turned on the question whether or not this boy Brij Kishor was the posthumous son of one Sismol Prasad, who died in the month of August 1912, and his second wife *Musammat* Ram Jota.

* * * * *

The argument addressed to us on behalf of the appellants has consisted largely of a general attack on the prosecution evidence in all its details. We have been asked, in effect, to disbelieve practically every statement made by any of the prosecution witness and to ascribe the statements of Harku and Sheoraj, recorded by the Magistrate on June 4th, as due to threats and ill usage. In connection with these statements our attention has been specially drawn to certain evidence which shows that when they were handed over to the Police both Harku and Sheoraj bore on their persons slight but definite marks of ill usage. Babban Singh when pressed on this point, admitted that they had been beaten on their way to the Police Station but said that this was done because they sat down on the ground and obstinately refused to move. It is probable enough that the precise truth has not been told on this point and that both the accused underwent a certain amount of rough usage at the hands of Babban Singh and the indignant neighbours of *Musammat* Ram Jota. There is nothing particularly surprising in this, and there is no reason whatever to associate the consequences of this ill usage with the statements made by the two accused before the Magistrate on June 4th. The accused themselves have never done so. They have either denied making those statements altogether, or have ascribed them to threats and ill usage on the part of the investigating Sub-Inspector. One other matter of detail we think it advisable to notice in this connection. The learned Sessions Judge complains that, when Sub-Inspector Ata ullah Khan was in the witness box, he was unable to remember the precise nature of the injuries on the persons of the two accused when they were brought before him and, on being asked to refresh his memory by consulting any memorandum on the point which he might have made at the time in his own diary of the investigation, refused to do so. A difficulty of this sort between the

Court and an investigating Police Officer seems to crop up from time to time, chiefly in records which come to us from the Gorakhpur Judgeship. As a matter of fact, the diary of the Police investigation is in the hands of the Judge at Sessions trial and entirely at his disposal, so long as he deals with it within the limits laid down by the law. In practice, one would not have thought that any Sessions Judge would have experienced any particular difficulty in getting over a failure of memory of this nature on the part of a Police witness if only by reading aloud to him the relevant extract from the diary and asking him what he had to say about it. As, however, the Sessions Judge in this case has appealed to us to pronounce an opinion on the supposed question of law involved, we feel no hesitation in saying that a witness before a Court of Justice is under an obligation to tell the truth and the whole truth, to the very best of his power. If upon any question he suffers from a *bona fide* lapse of memory, and that failure of memory can be remedied by reference to any memorandum or other writing prepared by the witness at the time, and the Court invites the witness to refresh his memory with reference to the writing, the witness is, in our opinion, under an obvious obligation to do so. It is part of the duty under which he lies to lay the whole truth before the Court to the best of his ability. We trust we may not have any further occasion to notice this point.

Note.—The rest of the judgment is not material for the purposes of this report.—[*Ed.*]

J. P. *Appeal dismissed.*

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 51 OF 1921.

October 21, 1921.

Present :—Mr. Justice Das.

RAMDHEYAN RAM—PETITIONER

versus

Musammat RAM DULARIA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 488, order under—Decree of Civil Court, subsequent—Previous order of Criminal Court, enforcement of.

A subsequent decree of a Civil Court supersedes any order for maintenance that may have been previously passed by a Criminal Court under section 488 of the Criminal Procedure Code, but such a decree is no answer to an application for enforcement of an order previously obtained by the wife under section 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for custody had been duly complied with and that without any sufficient reason she has left his custody.

Devi Ditta v. *Ganga Devi*, 4 P. R. 1906 Cr.; 4 Cr. L. J. 73; 115 P. L. R. 1907, followed.

Reference made by the Sessions Judge, Shahabad.

Mr. *S. N. Sahay*, for the Opposite Party.

JUDGMENT.—I am unable to agree with the views taken by the learned Sessions Judge of Shahabad. It is quite true that the subsequent decree of the Civil Court supersedes any order for maintenance that may have been previously passed by a Criminal Court under section 488 of the Code of Criminal Procedure; but, as has been held, such a decree is no answer to an application for enforcement of an order previously obtained by the wife under section 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for custody had been duly complied with and that, without any sufficient reason, she has left his custody [See *Devi Ditta* v. *Ganga Devi* (1)]. It is quite true that one of the questions which was raised by the lady, namely, that her consent to the decree was obtained by fraud could not be investigated by the Criminal Court; but still her other allegations were there, namely, that her husband refused to maintain her and was in fact ill-treating her. Those were matters which could be investigated by the Criminal Court, and they were in fact investigated by the Criminal Court. The learned District Magistrate has recorded a finding that the husband refused to maintain her. In my opinion, upon that finding, it was open to the wife to apply for enforcement of the previous order passed in her favour under section 488 of the Code of Criminal Procedure I am unable, therefore, to accept the reference.

Reference not accepted.

(1) 4 P. R. 1906 Cr.; 4 Cr. L. J. 73; 115 P. L. R. 1907.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1990 OF 1918.

November 21, 1921.

Present:—Mr. Justice Scott Smith and Mr. Justice Abdul Qadir.

RAJA RAM-PUNAM CHAND, CLOTH MERCHANTS, OF DELHI —PLAINTIFFS—APPELLANTS

versus

JUGAL KISHORE-RAM RICHHPAL, *Artias*, OF DELHI—DEFENDANTS —RESPONDENTS.

Arbitration—Notice to parties—Award.

An award which is given in the absence of any party to the arbitration, and without any notice to him as to the time or place where the arbitrators would sit to decide the dispute, is illegal.

Second appeal from a decree of the District Judge, Delhi, dated the 23rd May 1918, reversing that of the Subordinate Judge, Second Class, Delhi, dated the 3rd January 1918.

Lala *Moti Sagar*, R. S., and Lala *Piyre Lal*, for the Appellants.

Lala *Sardha Ram*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit based on an agreement made by the defendants, a Delhi firm known as Jugal Kishore Ram Richhpal, to sell 20 cases of dyed satin to the plaintiff firm called Raja Ram Punam Chand. The case of the plaintiffs is, that the defendants supplied only four out of the 20 cases bargained for and that they pleaded their inability to supply the remainder as the goods had been sunk at sea. The plaintiffs asked them to show their shipping documents to satisfy them that the default was really due to an act of God and not to the negligence of the defendants, but the latter were unable to produce any such documents, apparently, for the reason that the documents, if any, were with another firm, Tek Chand-Pahlad Rai, with whom they had, in their turn, placed an order for the supply of the goods in question. It is stated that the last named firm, in answer to the demands of the defendant firm, had put forward the plea that the goods had been sunk at sea. The contract between the parties to this suit was on the indent form of the Delhi-Hindustan Mercantile Association and, relying on clause 15 of that form, the plaintiffs wrote to the defendants, on the 1st September 1916, to deliver the goods or the matter would be referred to arbitration as provided by clause 15 of their contract. On the 6th September 1916 one Mr. Ratnam was nominated by the plaintiffs as their arbitrator and, later on, Pandit Balkishen was nominated as an arbitrator by the defendant firm. On the 25th the arbitrators gave an award against the defendants for Rs. 2,933-3-6, and the plaintiff firm brought this suit for Rs. 3,247 7 6 to secure the sum allowed by the award together with interest and some expenses subsequently incurred. The defendants objected to the validity of the award on the ground that no notice was given to them by the arbitrators, and that the award was made without making proper inquiries. The Court of first instance decreed the plaintiffs' claim, holding that "the defendant knew that the case was being heard on the 25th September 1916 and that it was so heard and he kept away." The defendants appealed to the District Judge, who accepted their appeal and has held that "no notice was given" and as 'the defendants had no opportunity to produce evidence there has been no proper enquiry and the arbitrators are guilty of legal misconduct." The plaintiffs have now preferred this second appeal against the above decision and decree and we have heard Mr. Moti Sagar for the appellants and Lala Sardha Ram for the respondents.

The main points on which arguments have been addressed to us are two: (1) that the plea as to want of notice had been given up in a statement made in Court by Kishori Lal, the manager and representative of the defendant firm, on the 3rd December 1917. (2) That no notice to the parties by the arbitrators was necessary. Some other points of minor importance were dealt with in arguments but as we think the decision of these two main issues will decide the case it is hardly necessary to discuss the other points.

Mr. Moti Sagar lays stress on the statement of Kishori Lal, dated the 3rd December 1917, to the following effect:—

"The award of the arbitrators is not binding because I have filed a suit against my own seller."

To this are added the words "*aur koi wajah nahin hai*," *i. e.*, there is no other reason. He contends that these words clearly show that what was meant was that Kishori Lal gave up the pleas he had previously taken and confined his case to the plea above alluded to, whereupon an amended issue was framed which ran thus: "Whether the fact that a suit has been instituted by the defendant against his own seller is any reason why the award should not be binding." Mr. Moti Sagar says that his clients understood that the case was limited to that one issue and on that ground produced no evidence and that the Court practically decided the case on that point. He goes on to say that the defendants, in their grounds of appeal before the lower Appellate Court, did not take any exception to this part of the judgment of the Trial Court and the learned Judge should not have allowed them to set up a new case in appeal. Lala Sardha Ram's reply to this argument is, that the statement does not amount to a waiver of the previous pleas. Kishori Lal never intended to give up the previous pleas embodied in the written statement as to want of notice and proper inquiry. The plea he advanced on the 3rd December was in fact an additional plea and the words "*aur koi wajah nahin hai*" obviously meant no reason in addition to the reasons already urged. He argues that the defendant's subsequent conduct in summoning the arbitrators as witnesses and questioning them as to notice, etc., shows that he had not given up the earlier pleas and the plaintiffs never objected to the production of that evidence as they would have done had they really understood that the pleas originally advanced had been given up. We find that Kishori Lal was never asked by the Court if he gave up his original pleas and we do not think in such circumstances it can be held that there was any waiver of the pleas originally raised. The new issue framed, it must be remembered was not an amended issue but was struck as a preliminary issue and the issues already framed were allowed to stand. The Trial Court did not base its decision merely on this preliminary issue but also decided that, as a matter of fact, the defendants had knowledge of the hearing and did not require notice. We hold, therefore, that no waiver of the previous pleas on the part of Kishori Lal is established.

Coming now to the question of notice, we have before us a finding of fact by the lower Appellate Court that "no notice was given" and it is based on the evidence of the arbitrators who do not remember having given any notice to the parties nor do they remember the fact that the defendants were present before them. The award is thus given in the absence of the defendants and without any notice as to the time or the place where the arbitrators would sit to decide the dispute. This is clearly illegal. Mr. Banerji says in his "Law of Arbitration in India" (2nd Edition), at page 194: "Each party is not only entitled to present his own case, both by evidence and argument, before the arbitrators, but is also entitled to be present whenever witnesses or arguments are heard on behalf of his opponent. Hence arises the necessity that each party should have notice of the time, and place appointed for hearing.....
.....
The necessity that by some means or other sufficient notice should be actually brought home to all the parties is absolutely imperative. If there has not been such notice, there cannot be a legal hearing, nor a legal award (Morse on Arbitration, 117)." We are of opinion that there has been no legal award in this case for want of notice to the defendants. The decision of the District Judge, is, therefore, correct and is hereby upheld and this appeal is dismissed with costs.

N. H.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1057 OF 1920.

December 8, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Coming.

RAM KUMAR MAZUMDAR AND ON HIS DEATH HIS HEIR AND LEGAL REPRESENTATIVE SITAL CHANDRA MAZUMDAR AND RAM DUDAL (DULAL IN *Vakalatnamah*) MOZUMDAR —PLAINTIFFS—APPELLANTS

versus

MOHIM CHANDRA DUTTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Easement—Right of way—Servient tenement not to be saddled with heavier burden than proved—Mode of user.

In a claim of an easement over another's property the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving. [p. 579, col. 2.]

But when a particular mode of user is not heavier than the mode of user proved the plaintiff may be allowed to use it in that particular way, *e. g.*, the user of a way for horses may include the right to lead smaller animals as well but not larger animals or loads. [p. 579, col. 2.]

Where the user of a path is restricted to the passage of men, carts and palanquins the carrying of corpse through it does not add a heavier burden on it. [p. 580, col. 1.]

Appeal against a decree of the Subordinate Judge, Third Court, Tipperah, dated the 20th November 1919, modifying that of the Munsif, Third Court, at Comilla, dated the 2nd December 1918.

FACTS appear from the judgment.

Babu *Upendra Kumar Roy*, for the Appellants.—I beg to submit that the lower Appellate Court is wrong in restricting my general right of way over the passage in question. I succeeded in proving that I carried animals, processions, carts, palanquins, etc., over this strip of land. Refers to Pollock on Easement, at page 510 and *Raj Manick Singh* v. *Ruttun Manick* (1).

Babu *Upendra Lal Roy*, for the Respondents.—It is a well-settled principle of law that the servient tenement cannot be saddled with a heavier burden than what the plaintiff has succeeded in proving. Refers to Gale on Easement, 9th Edition, pages 316, 319, and Mitter's Law of Easement, page 416. The restriction of the right as ordered by the learned Judge is quite in accordance with law and the evidence adduced by the appellants to prove how far their rights extend.

Babu *U. K. Roy*, in reply, submitted that at least the plaintiff's right to carry corpses through the strip of land to the cremation ground should be allowed.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff appellant for a declaration of right of way over a strip of land belonging to the defendants. From the pleadings and findings of the Courts below we take it that the path claimed was a private path. Both the Courts below have found in favour of the plaintiff, but they have differed as to the extent of the user. The Court of first instance gives the plaintiff a general right of way including the right of way for carriages, carts, palanquins, processions, elephants, corpses, etc. On appeal by the defendants the lower Appellate Court has held that the plaintiff claiming a right of way over another's property he should not be allowed a higher right than what he has been able to prove. On the evidence he has found that the plaintiff has succeeded in proving the user of the pathway for men, carts and palanquins. The said Court has accordingly restricted the use of the path to these three modes of user and disallowed the general right of way over it.

The plaintiff appeals to this Court and contends that he ought to have had a declaration that he is entitled to have a general right of way for carriages, processions, elephants, etc.

We think the learned Subordinate Judge is right in the view of the law he has taken. It being an easement claimed over another's property the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving. We may refer for the principle of law governing this case to Gale on Easements, 9th Edition, page, 316, and Goddard on the Law of Easements page 377. We may also refer to section 28 of the Indian Easements Act which, though not applicable to this case, codifies this well-known principle of law. But when a particular mode of user is not heavier than the mode of user proved the plaintiff may be allowed to use it in that particular way, *e. g.*, the user of a way for horses may include the right to lead smaller animals as

(1) 15 W. R. 40.

well but not larger animals or loads. The learned Subordinate Judge has restricted the user of this path to the passage of men, carts and palanquins and has disallowed the plaintiff's claim to take cattle, processions and corpses. By allowing the plaintiff to take his carts we understand he means carts drawn by ordinary animals. But we are not inclined to agree with the lower Appellate Court as to the restriction on the user by preventing corpse to be carried through it. We do not think it adds any heavier burden to the user. With this modification, namely, that the plaintiff will have a right of user for the passage of men, carts, palanquins and corpses, we disallow the plaintiff's claim, affirm the decision of the lower Appellate Court and dismiss the appeal. As the appellant has failed in greater part of his claim he must pay the respondent's costs of this appeal.

J. P. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2711 OF 1917.

November 21, 1921.

Present :—Mr. Justice Scott-Smith and Mr. Justice Abdul Qadir.

NIGAHIA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAGU MAL—PLAINTIFF—RESPONDENT.

Document, reading of—Question of fact—Appeal, second—Limitation, plea of—Question of law.

In a case where it is possible to read the words of a document in two ways, it is open to the first Appellate Court to adopt whichever reading appears to it to be more reasonable after considering all the connected circumstances. A finding as to what the words in dispute really are is a finding of fact and cannot be questioned in second appeal. [p. 581, col. 1.]

An objection that an appeal presented to the lower Appellate Court was barred by time can be taken in second appeal. [p. 581, col. 1.]

Second appeal from a decree of the District Judge, Ferozepore, dated the 9th July 1917, reversing that of the Senior Subordinate Judge, Ferozepore, dated the 16th January 1917.

Dr. *G. C. Narang*, for the Appellants.

Lala *Hukam Chand*, for Mr. *L. C. Mehra*, for the Respondent.

ORDER.—The suit out of which this second appeal has arisen was brought by one Bhagu Mal against Nigahia Ram and Nihal Chand, two brothers, for Rs. 2,000 on account of principal and interest and was based on an entry in the plaintiff's *bahi*. The entry was in Hindi and was dated the 3rd January 1911, to the effect that Rs. 800 were borrowed from the plaintiff by Nigahia Ram, defendant No. 1, in the name of himself and his brother Nihal Chand. Under the Hindi entry appeared an acknowledgment of the debt in the Urdu in the handwriting of Nigahia Ram. Nigahia Ram admitted the Urdu writing to be his but pleaded that no payment in cash was made to him and that the money was due on an old account, which had been brought on to page 16 from page 13 of the *bahi*. He stated that he had paid the debt and that this fact was noted on page 13 but that page had been removed by the plaintiff. Reliance was placed by him on the words "*baqi panna* 13" which, according to him appeared at the end of the Urdu entry and from which it could be inferred that the item of Rs. 800 was a balance from the accounts at page 13. The Trial Court dismissed the plaintiff's suit accepting the defendants' version as to the entry and the adjustment of the debt and the removal of page 13 of the *bahi* by the plaintiff. On appeal the lower Appellate Court reversed the decree of the Court of first instance, finding that "there is no satisfactory proof that any account ever existed on page 13, nor is there any satisfactory evidence that Nigahia Ram ever liquidated his account with the plaintiff." It may be mentioned that Nihal Chand did not appear before the Trial Court and the proceedings were *ex parte* against him.

Against the above decision the defendants have come up to this Court in second appeal and we have heard Dr. Narang on their behalf and Mr. Hukam Chand on behalf of the respondent. It is contended by Dr. Narang that, in spite of the findings of fact above alluded to, there is ground for second appeal because the concluding portion of the entry on page 16 has been misread. The misreading relied upon is that the words at the end of the entry which, according to the defendant, are "*baqi panna* 13" have been read "*baqi rupia nahin hai*" by the learned

District Judge, though the Trial Court had adopted the reading of the defendant. We think, however, that in a case like the present where it is possible to read the words in dispute either way, it was open to the District Judge to adopt whichever reading appeared to be more reasonable to him after considering all the connected circumstances and as he has done so, his finding as to what the words in dispute really are, is a finding of fact which cannot be questioned in second appeal. We may add that the learned District Judge has given good reasons for rejecting the reading which suited the defendant. We cannot, therefore, allow this question to be re opened now.

Dr. Narang attacks the decree of the lower Appellate Court on two other grounds:—(1) That no decree should have been passed against Nihal Chand, as the lower Appellate Court has not decided the question of his responsibility nor has it come to any finding as to his being a member of a joint Hindu family or as to the debt having been incurred for any joint family business; (2) that the plaintiff's appeal before the lower Appellate Court was time-barred and should have been dismissed.

We think these contentions are not without force. As to the responsibility of Nihal Chand, the lower Appellate Court has certainly come to no finding and apparently the matter has been left unconsidered by an oversight. As regards the question of limitation, it is true that the point has been raised for the first time in second appeal but it is a point of law and can be taken up even at a late stage. The learned Counsel points out that the suit was decided by the Court of first instance on the 16th January 1917 and the appeal was filed on the 22nd February 1917. The application for copies was received on the 22nd January 1917 and the copies were delivered to the appellant on the 23rd January 1917. Thus, only two days being allowable for the time taken up in obtaining the necessary copies, it is contended that the appeal is time-barred. This, again, is a matter which has not been gone into by the lower Appellate Court. It may be noted that the application which was received on the 22nd January 1917 appears to have been dated the 17th January 1917 but there is no explanation as to this delay, nor is it known who was responsible for that. We, therefore, remand this case to the lower Appellate Court under Order XLI, rule 25, Civil Procedure Code, to enquire into the question whether Nihal Chand was a member of a joint Hindu family and responsible for the debt incurred by Nigahia Ram and also into the question of limitation and to record its findings on these points according to law. We direct that a return may be made to this Court within three months.

Z. K. *Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1501 OF 1920.

December 19, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

NAFAR CHANDRA PAL CHOWDHURY—PLAINTIFF—APPELLANT

versus

BHUSI MOLLA—DEFENDANT—RESPONDENT.

Landlord and tenant—Ex parte *rent-decree does not operate as* res judicata *as to rate of rent—Execution of decree, effect of—Estoppel against Statute—Bengal Tenancy Act (VIII of 1885), ss. 29, 147A.*

An *ex parte* decree for rent at the rate claimed by the plaintiff in a suit in which no issue was raised as to the rate at which the rent was payable nor was there any decision with regard to such rate cannot operate as *res judicata* in favour of the landlord as to the rate of rent. [p. 582, col. 2.]

Modhusudun Shaha Mundul v. *Brae*, 16 C. 800; 8 Ind. Dec. (N. S.) 97 (F. B.), followed

An *ex parte* decree for arrears of rent which has been duly executed is of some evidence as to the rate of rent. [p. 582, col. 2; p. 583, col. 1.]

Madhu Munjari v. *Jhumar Bibi*, 1 C. W. N. 120 and *Mati Lal Poddar* v. *Nripendra Nath Ray*, 2 C. W. N. 172, relied on.

Nil Madhub Sarkar v. *Brojo Nath*, 21 C. 236; 10 Ind. Dec (N. S.) 789, referred to.

There cannot be any estoppel against Statutes. [p. 583, col. 1.]

A defendant in a suit for rent at a certain rate is not incompetent to raise a defence under section 29 of the Bengal Tenancy Act by reason of the fact that that defence was not taken in a previous suit for rent which resulted in a decree at the rate claimed by the plaintiff. [p. 583, col. 1.]

The whole scheme of the Bengal Tenancy Act is to prevent the landlord from circumventing the provisions of the Act to the detriment of the illiterate tenants. Section 147A of the Act shows the scheme on which the Act was framed. [p. 583, col. 1.]

NAFAR CHANDRA PAL v. BHUSI MOLLA.

Appeal against a decree of the District Judge, Nadia, dated the 3rd March 1920, affirming that of the Munsif, Second Court, at Krishnagar, dated the 21st December 1918.

FACTS appear from the judgment.

Babu *Amarendra Nath Bose* (with him Babu *Radhikaranjan Guha*), for the Appellant. —I venture to submit that the appellant is entitled to claim rent at the rate of Rs. 8·11·12½ *gundas*. The appellant bases his claim on two rent-decrees which he got against the respondent and which mention the rate of rent to be that which he now claims. How can the respondent now turn round and go back upon those two rent-decrees which make the present matter *res judicata*? Moreover, I claim protection under proviso (1) of section 29 of the Bengal Tenancy Act. I submit that the Courts below are wrong when they say that the question of rate of rent is not *res judicata*, as also the defence under section 29 of the Bengal Tenancy Act. This defence ought to have been raised in the previous case. *Modhusudun Shaha Mundul* v. *Brae* (1) has been cited as if this case concludes me, but I submit it does not touch me at all. It is not an authority against me. These questions now agitated are barred by the prinsiple of constructive *res judicata*. Refers to *Raj Kumar Roy* v. *Alimaddi* (2) and *Banee Madhub Banerjee* v. *Bhagbut Pal* (3). *Nilmoney Singh* v. *Heera Lal Dass* (4) takes a contrary view to that of *Banee Madhub Banerjee* v. *Bhagbut Pal* (3).

Further, I submit that as no defence under section 29 of the Bengal Tenancy Act was taken in the previous rent-suits, such defence cannot now be raised, see Explanation 4 of section 11, Civil Procedure Code.

Babu *Monmotho Nath Roy*, for the Respondent.—There cannot be any *res judicata* as the question of rate of rent was not specifically raised and agitated in the previous suits. And there was no decision as regards such rate. I contend that *Modhusudun Shaha Mundul* v. *Brae* (1) is directly against my learned friend's submission.

The defendant's claim under section 29, Bengal Tenancy Act, cannot be barred by reason of the previous rent-decrees.

Babu *Amarendra Bose Nath* replied.

JUDGMENT.—The suit giving rise to this appeal was a suit for rent brought by the plaintiff-appellant claiming rent at the rate of Rs. 8·11·12½ *gundas*. The defendant alleged that the rent was Rs. 6·7 a year. It has been proved that the plaintiff got two rent-decrees one for the rent for 1313 to 1316 and the other for the period 1317 to 1320 at the rate of rent claimed by him. These decrees were *ex parte* decrees but they were put into execution and in both cases the money was paid out of Court. The Court of first instance treated these decrees as evidence in the case but gave effect to the defendant's contention that the plaintiff was not competent to claim the rent at the rate alleged by him in contravention of the provisions of section 29 of the Bengal Tenancy Act. It was found from the evidence on the record that the rent of the holding was Rs. 6·7 a year. On appeal the learned District Judge raised a presumption in favour of the plaintiff as to the rate of rent under section 51 of the Bengal Tenancy Act on the basis of the above two decrees obtained by him against the defendant but held that the tenant is not precluded from contending that that rate is illegal being in contravention of the provisions of section 29 of the Tenancy Act. The appeal was dismissed and the plaintiff has preferred this second appeal to this Court.

It is argued on his behalf that the two rent-decrees ought to have been given effect to as *res judicata* against the defendant. In these decrees no issue was raised as to the rate at which the rent was payable by the defendant. Nor was there any decision with regard to such rate. The decrees were *ex parte* and the suits were decreed at the rate claimed by the plaintiff in those suits. Such decrees, therefore, cannot operate as *res judicata* in favour of the plaintiff. [*Modhusudun Shaha Mundul* v. *Brae* (1)] decided by a Full Court. The question as to the effect of an *ex parte* decree which has been put into execution was left open. It has since been held in several cases that an *ex parte* decree for

(1) 16 C. 300; 8 Ind. Dec. (N. s.) 197 (F. B.).
(2) 16 Ind. Cas. 911; 17 C. W. N. 627 at p. 630.
(3) 20 W. R. 466.
(4) 7 C. 28; 8 C. L. R. 257; 3 Ind. Dec. (N. s.) 565.

arrears of rent which has been duly executed is of some evidence as to the rate of rent. *Madhu Munjari* v. *Jhumar Bibi* (5) and *Mati Lal Poddar* v. *Nripendra Nath Ray* (6). Both the Courts below have treated *ex parte* decrees as evidence in the case. The learned Munsif observes with regard to the first decree: "It should be considered only as a piece of evidence as to the rate at which the defendant actually paid rent to the plaintiff during the period in claim in the suit, that is 1313 to 1316 B. S. It is not *res judicata* about the rate of rent". As such, he has found as a fact that the defendant made payment of rent for 1313 to 1316 and 1317 to 1320 at the rate of Rs. 8-11-12½ *gundas* a year. The learned District Judge has also taken these decrees into consideration as raising a presumption in favour of the plaintiff under section 51 of the Bengal Tenancy Act. It cannot, therefore, be said that the Courts below have not taken these important pieces of evidence into consideration. But they have concurrently found that the rent paid by the defendant was originally Rs. 6 7 a year and that it was for the landlord to explain the enhancement which he has failed to do.

It is next argued that the defendant not having taken in the previous rent suits the defence under section 29 of the Bengal Tenancy Act is incompetent to raise that defence in this suit under section 12 Explanations 2 and 4 of the Civil Procedure Code. We do not think that there is any force in this contention. There cannot be any estoppel against Statutes and even if the previous rent decrees were *res judicata* the plaintiff could not do what the Legislature specifically laid down that he should not be allowed to do. The whole scheme of the Tenancy Act is to prevent the landlords from circumventing the provisions of the Act to the detriment of the illiterate tenants. Section 147A of the Tenancy Act shows the scheme on which the Act was framed.

On the authority of the case of *Nil Madhub Sarkar* v. *Bro;o Nath* (7) it is argued on behalf of the respondent with some force that the previous rent decrees did not bar the defendant's claim under section 29 of the Tenancy Act and hence would not prevent the defendant from raising a plea on that ground in the present suit.

All the points taken by the appellant having failed this appeal is dismissed with costs.

B. N. *Appeal dismissed.*

(5) 1 C. W. N. 120.
(6) 2 C. W. N. 172.
(7) 21 C. 236; 10 Ind. Dec. (N. s.) 789.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 107 OF 1921.
January 19, 1922.
Present:—Mr. Justice Ryves.

FIRM PARBHOO LAL-RAM RATAN —PLAINTIFFS—APPLICANTS
versus
THE BENGAL NORTH-WESTERN RAILWAY COMPANY, THROUGH ITS AGENT AT GORAKHPUR, AND THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY, THROUGH ITS AGENT AT BOMBAY —DEFENDANTS—RESPONDENTS —OPPOSITE PARTIES.

Railways Act (IX of 1890), s. 76—Risk Note Form A—Consignment in damaged condition—Contract not to hold Railway liable—Shortage—Burden of proof.

Certain "Bakoos" of Tobacco were consigned from Bombay to Agra under Risk Note Form A which contained an entry that the consignment was in bad condition and was liable to damage, leakage and wastage as the "Bakoos" were old and torn and the contents were wet and the consignors agreed to hold the Railway Company harmless and free from all responsibility for the condition in which the goods may be delivered to the consignee at destination and for any loss arising from the same. On delivery there was shortage in weights and the consignee sued the Company for the price of the difference in weights:

Held, that under the circumstances of this case the burden lay on the plaintiff and not on the Railway Company under section 76 of the Railways Act to prove that the shortage was due to pilfering by the Railway Company's servants. [p. 584, col. 1.]

Revision against a decree of the Judge, Small Cause Court, Agra, dated the 26th May 1921,

ABDUL RAKIB KHAN v. JALAL AHMED.

JUDGMENT.—This application in revision arises out of a suit brought by the plaintiffs against the Bengal North Western Railway in the Small Cause Court at Agra. Twenty three "bakoos" of tobacco were despatched sometime in March last to Agra Fort consigned to the plaintiffs. The weight consigned to the Railway was 101 maunds. At Agra Fort when delivery was taken the consignment was found 28 maunds short in weight and this suit was brought to recover the difference in price. The Court has found that the tobacco when despatched was raw and wet and was not securely packed. It has come to the conclusion that the shortage in weight was due most probably to the drying up of the moisture originally contained in it. The consignment did not arrive in Agra until sometime in April. The Court held that some of the shortage may be due to wastage owing to defective packing and that the plaintiffs had failed to prove that the shortage was due to pilfering by the Railway Company's servants. It is argued that, under section 76 of the Railways Act, the onus did not lie on the plaintiffs to prove this, but in this case there was a specific contract between the parties. The goods were consigned under Risk Note Form A. The note is on the record. It is stated in it that the consignment was in bad condition and was liable to damage, leakage and wastage as the "bakoos" were old and torn and the contents were wet, and the consignors agreed to hold the Railway Company harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same. It is next argued that the Risk Note A does not properly apply to this consignment. I do not agree with this. Under these circumstances, it seems to me that I cannot interfere in revision. I, therefore, reject the application with costs.

J. P. *Application rejected.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 783 of 1920.

December 5, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

ABDUL RAKIB KHAN—PLAINTIFF—APPELLANT

versus

JALAL AHMED AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 22—Amending Act (I B. C. of 1907), whether retrospective.

Where a tenure-holder bought the subordinate *raiyati* interest of a tenant before the amendment of section 22 of the Bengal Tenancy Act in 1907 the subordinate right did not cease to exist by the alteration in the law subsequently made by the Amending Act of 1907. [p. 585, cols. 1 & 2.]

Act I B. C. of 1907 is not retrospective in its effect. [p. 585, col. 2.]

Appeal against a decree of the Additional District Judge, Noakhali, dated the 22nd of November 1919, affirming that of the Munsif, Hatiya, dated the 8th of May 1918.

FACTS appear from the judgment.

Babu *Asiranjan Chatterjee* for Babu *Satyendra Chandra Mitra*, for the Appellant.—I am a *raiyat* and also a co-sharer landlord. The question is whether there was a merger. The defendants were non occupancy *raiyats* and so they were liable to ejectment. The defendants are under *raiyats*. The provisions of amending Act can have no retrospective effect. Refers to section 22, Bengal Tenancy Act (E. B. portion) as it stands after the amendment. Sub section 2 of that section has been apparently applied to the facts of the case by the Appellate Court. Reads the old law before amendment of 1907. 'It' here refers to occupancy right. See *Ram Mohan Pal* v. *Sheikh Kachu* (1). This case was before the amendment. A vested right cannot be taken away by a subsequent Statute. Refers to *Nabin Chandra Pal* v. *Banga Chandra Choudhury* (2), case of ejectment of an under-*raiyat*. If the two rights did not coalesce into one they could not coalesce subsequently. I submit there was no merger. The same view as in *Nabin Chandra Pal* v. *Banga*

(1) 32 C. 386; 9 C. W. N. 249; 1 C. L. J. 1 (F. B.).
(2) 15 Ind. Cas. 705.

Chandra Chowdhury (2) is also taken in *Alimaddin* v. *Ainaddin Majumdar* (3). Subsequent purchase of superior *howla* right does not improve the position of the under-*raiyat*. *Akhil Chandra Biswas* v. *Hasan Ali Sadagar* (4). *Sukhoda Gobind Saha* v. *Raja Sosi Sekhareswar Roy Bahadur* (5) says that there is no retrospective effect of the amendment. Defendants are liable to be ejected as the old law applies.

Babu *Jitendra Kumar Sen Gupta*, for the Respondents.—The question is whether the case is to be governed by old law or new law. Lease was granted after the amendment was made. This suit should be determined with regard to the lease which is the starting point. Section 22, Bengal Tenancy Act, as amended by the Act of 1907, should apply. In all the cases cited by my learned friend the lease and purchase were before the amending Act. Can a co-sharer landlord remain a *raiyat* after the amending Act was passed? I submit no.

Babu *Asiranjan Chatterjee* replied.

JUDGMENT.—The only question that arises in this appeal is whether, in a case where the tenure-holder bought the subordinate *raiyati* interest before the amendment of section 22 of the Bengal Tenancy Act in 1907, the subordinate right lost its separate existence and got merged in the superior right after the amending Act of 1907 came into force; or, in other words, whether the amending Act of 1907 has any retrospective effect.

The plaintiff was a co-sharer of a *howla* under which there was a *raiyati* right which was purchased by the plaintiff on the 18th Magh 1312 B. S. and subsequently he let out to the defendant's predecessor on the 18th Pous 1315 in under-*raiyati* right for 9 years which term expired in the end of 1323 B. S. He has consequently brought this suit under section 49 of the Bengal Tenancy Act to secure ejectment of the defendants from the lands in suit.

The defence is that the subordinate right having got merged in the superior right after 1907 the defendants occupy the status of a *raiyat* and are not liable to be ejected under section 49A of the Bengal Tenancy Act. Both the Courts below have given effect to this plea and held that the defendants are *raiyats* occupying the status of a settled *raiyat* of the village and are not liable to be ejected. They have taken the view that section 22 of the Bengal Tenancy Act, as amended in 1907, extinguished the *raiyati* interest purchased by the plaintiff which got merged in his *howla* right.

We are satisfied that this view of the law is erroneous. Whatever right the plaintiff acquired by his purchase in 1312 did not, in our opinion, cease to exist by the alteration in the law subsequently made by the amending Act of 1907. We do not think that that Act has any retrospective effect. In support of our view we may refer to the Appeal from Appellate Decree No. 2304 of 1909, decided on July 16, 1912 [*Nabin Chandra Pal* v. *Banga Chandra Chowdhury* (2)] and Appeal from Appellate Decree No. 1272 of 1915, decided on January 25, 1917 [*Alimaddin* v. *Ainaddin Majumdar* (3)]. The same view has been very recently taken by Chatterjea and Panton, JJ., in the case of *Profulla Nath Tagore* v. *Secretary of State for India in Council* (6).

We, therefore, set aside the decrees of the lower Courts and decree the plaintiff's suit with costs in all the Courts.

B. N.

Decree set aside.

(3) 38 Ind. Cas. 534.
(4) 20 Ind. Cas. 698; 18 C. L. J. 262; 19 C. W. N. 246.
(5) 1½ C. W. N. cxxxii (132) (*Notes*).
(6) 63 Ind. Cas. 892; 26 C. W. N. 100.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 23 OF 1920.

January 13, 1922.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Babu NIHAL SINGH—DEFENDANT—APPELLANT

versus

Musammat NAJUBAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2

NANDKISHORE SINGH *v.* MATHURA SAHU.

—*Failure to sue for portion of claim*—Bona fide *mistake—Subsequent suit for that portion, whether maintainable.*

Where in a previous suit for profits the plaintiffs under an impression that the profits were paid annually failed to include in the claim profits of six months which had fallen due and it subsequently transpired that the profits were paid half-yearly a subsequent suit for the profits of those six months is not barred by Order II, rule 2 of the Civil Procedure Code.

Letters Patent Appeal against the judgment of Justice Sir George Knox, Kt., dated the 9th February 1920 in Second Appeal No. 413 of 1917.

Dr. *M.L. Agarwala* and Mr. *Haribans Sahai*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—The only point in this appeal that has given us any difficulty is the question whether the plaintiffs were barred by Order II, rule 2 from including in their claim the profits for the Kharif of 1320 Fasli. The Judge in the lower Court undoubtedly assumed that the reason why those profits had been omitted in an action which was commenced on the 29th of July 1913 was, because the plaintiffs at that date were under the impression that the profits were paid annually and not, as was subsequently shown to be the fact, half yearly. In that view he accepted the authority of the case to which he refers in this judgment. In this Court the learned Judge upheld the decision of the lower Appellate Court and we think that we ought to do the same. That really is the substantial point in the appeal. The other points which are raised have no substance, and we, therefore, dismiss the appeal with costs and fees on the higher scale.

J. P.

Appeal dismissed.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 116 AND 117 OF 1920.

July 5, 1921.

Present:—Mr. Jwala Prasad, Acting Chief Justice, and Mr. Justice Das.

NANDKISHORE SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

MATHURA SAHU AND OTHERS—DEFENDANTS —RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 22 (2)—Co-proprietors—One co-proprietor purchasing kasht *land—Partition—*Kasht *land fallen to share of other co-proprietor, effect of—Estates Partition Act (V B. C. of 1897), ss. 49, 119—*Kasht *and* Bakasht, *meaning of—Civil suit, bar of.*

A co-proprietor who purchases *kasht* land in his Zemindary, which on a partition falls into the *takhta* of the other co-proprietor, is entitled to hold possession of the land on payment of rent to the other co-proprietor under section 22 (2) of the Bengal Tenancy Act. [p. 589, col. 2.]

Ram Prasad v. *Gopal Chand*, 58 Ind. Cas. 955; 2 P. L T. 163 at p. 164, followed.

Ram Brich Narayan Singh v. *Ambika Prosad Singh*, 19 Ind. Cas. 90; 17 C. W. N. 586 at p. 587 and *Baldeo Sahai* v. *Brijnandan Sahay*, 43 Ind. Cas. 359; 3 P. L. W. 266; (1918) Pat. 164, referred to.

The terms *kasht* or *bakasht* are words of art introduced in the Revenue Records for the purpose of understanding the possession of lands by the proprietors and the tenants. The former term is one of recent creation by the Settlement Authorities. The latter, in its true sense, equally applies to the cultivation of lands by the proprietors and the tenants. [p. 589, col. 2.]

If a defendant seek to bar a plaintiff's suit under section 119 of the Estates Partition Act he must clearly show in what respect the order of the Revenue Authorities is affected or sought to be set aside. [p. 588, col. 1.]

Letters Patent Appeals against the judgment of Mr. Justice Adami, dated the 12th August 1920, reported as 59 Ind. Cas. 87.

Mr. *S. M. Mullick*, for the Appellants.

Messrs. *Kulwant Sahay* and *Sambhu Saran*, for the Respondents.

JUDGMENT.

JWALA PRASAD, A. C. J.—These are appeals under the LettersPatent from a decision of Mr. Justice Adami, dated the 12th August 1920. By his decision Mr. Justice Adami upset the decision of Mr. Boyse, District Judge of Shahabad, and restored that of the Munsif of that District, with the result that the plaintiffs' suit has been dismissed.

The suit arises out of delivery of possession under a *batwara* which took place on the 24th February 1916, the disputed lands

having fallen into the *takhta* of the defendants. After the delivery of possession the defendants instituted criminal proceedings under section 144 of the Code of Criminal Procedure in which an order dated the 2nd June 1916 restraining the plaintiffs from using the lands in question was passed. The plaintiffs and defendants were co-sharers in the estate and had held a mortgage of the 4-annas share of another co-sharer of the villages Semraon and Akbari. The plaintiffs purchased the occupancy holdings of certain tenants under *kobilas* and also took certain plots of land in *rehan* from different persons. The mortgagors redeemed the mortgage and brought separate suits against the plaintiffs, the defendants and others, in the Court of the Subordinate Judge at Arrah. That case was fought up to the High Court. The High Court held that the mortgagors were entitled to treat the holdings purchased by the mortgagees as accessions to the mortgaged property and to obtain possession of them on paying the purchase-money. The decision of the High Court is reported as *Ram Brich Narayan Singh* v. *Ambika Prosad Singh* (1). The purchase-money was not paid and the plaintiffs continued in possession of the holdings. In the Survey and Settlement Record the lands were shown as *bakasht* and in possession of the plaintiffs under section 22 (2) of the Bengal Tenancy Act. After the publication of the Record of Rights there was a Collectorate partition under the Estates Partition Act in 1916 between the co-sharers. Under section 49 the Survey Record of Rights was accepted as the basis of the partition. The lands in dispute 9·35 acres in area which were recorded in the Survey as *bakasht* and in possession of the plaintiffs under section 22 (2) were allotted to the *patti* of the defendants. The plaintiffs claim to hold the land in their possession under section 22 (2) on the strength of the Survey Record of Rights as well as the *batwara khatian* which followed the Survey. The defendants, on the other hand, claim to hold the land in their possession as being *bakasht* or *serait* of the proprietors. They assert that whatever rights the plaintiffs may have acquired by the purchase prior to partition were done away with by the *batwara* proceedings. They also dispute the plaintiffs' right to institute the present suit and refer to section 119 of the Estates Partition Act. The contentions of the defendants succeeded before Mr. Justice Adami, and the plaintiffs challenge before us the soundness of the view taken by that learned Judge.

The strongest point urged by Mr. Kulwant Sahay on behalf of the defendants in support of the judgment is that based on section 119 of the Estates Partition Act. It is said that the present suit virtually seeks to upset the valuation of the allotment of the lands by the *batwara* proceedings and that the plaintiffs, who were parties to the proceedings, are estopped from claiming the lands as against the entries made in the *batwara khatian*, describing the land as the *bakasht* of the proprietors and as having fallen into the *pattis* of the defendants. It is also urged that the present action seeks to disturb the direct possession of the land in suit awarded to the defendants under section 94, Chapter X, of the Estates Partition Act. The ingenious argument of Mr. Kulwant Sahai lent great colour to the simple point involved in this contention. True, the plaintiffs being co-sharers and parties to the partition proceedings are estopped from claiming otherwise than the Record of Rights, as approved by the *batwara* proceedings, purports to give them. I am in full accord with the view expressed in the case of *Baldeo Sahai* v. *Brijnandan Sahay* (2) that a co-sharer is not permitted to show that land entered as *raiyati* land was, as a matter of fact, *zerait* land. This is, however, not the scope of the plaintiffs' suit. The plaintiffs' case, if I understand it aright, is founded upon the *batwara khatian* and the description of the lands mentioned therein. That *khatian* has, as observed above, simply adopted the Survey Record of Rights. The lands no doubt in both the Survey Record of Rights and *batwara khatian* have been described as *bakasht* lands. Both the records state that the same are in possession of the plaintiffs as purchasers thereof. The Survey Record makes it still clearer by describing the possession of the plaintiffs to be under section 22 (2) of the Bengal Tenancy Act.

(1) 19 Ind. Cas. 90; 17 C. W. N. 586 at p. 587.

(2) 43 Ind. Cas. 359; 3 P. L. W. 266; (1918) Pat. 164.

The *batwara khatian* has, therefore, to be interpreted with the help of the Survey Record of Rights, for under section 49 the entire Record of Rights was accepted for the purposes of the partition, and under the subsequent section there is nothing to show that the Record of Rights was in any way varied. The plaintiffs nowhere say that they have been aggrieved in any way by the *batwara* proceedings. In paragraphs 7 and 8 the plaintiffs have clearly based their claim upon the *batwara* proceedings and say that their former possession was continued by the *batwara* proceedings. Their grievance originates after the delivery of possession and the termination of the *batwara* proceedings and the order passed under section 144 of the Code of Criminal Procedure at the instance of the defendants. In this view section 119 can be of no avail to the defendants nor need we consider it Mr. Kulwant Sahai has, however, failed to show what particular order the suit of the plaintiffs seeks to set aside. Section 119 acts as a bar to a suit being brought against certain orders of the authorities passed under the Estates Partition Act. If the defendants seek to bar the plaintiffs' suit under that section they must clearly show in what respect the order of the Revenue Authorities is affected or sought to be set aside in the present suit. This Mr. Kulwant Sahai has failed to do. The contention must, therefore, be overruled.

The next contention is upon the status of the plaintiffs with respect to the lands in suit. It is said that the lands were *bakasht* of the proprietors and as such the plaintiffs had no right to the same if they fell into the *pattis* of the defendants in the partition proceedings. This would be so if the land was the *bakasht* of the proprietors prior to the partition. It is admitted that the lands formed originally the occupancy holdings of the tenants of the village. They were purchased by the plaintiffs, when they were part proprietors of the village and had held the other shares as mortgagees. Reliance has been placed upon the judgment of the High Court at Calcutta referred to above [*Ram Brich Narayan Singh* v. *Ambika Prosad Singh* (1)] in order to shew that the lands were purchased by the 16-annas proprietors and the status of the proprietors holding the lands was that described in section 22 (1) of the Bengal Tenancy Act and not in section 22 (2). It is, however, said, the difference between the two clauses is that, under the former, when the 16-annas proprietor purchases a holding of a tenant, the interest of the landlord and the *raiyat* become united in the same person. In other words, the tenancy right is merged in the proprietary interest, whereas under clause (2) when a part proprietor of a holding purchases the holding he is entitled to hold possession of the same subject to the payment of the proportionate rent to the other co-proprietor. Mr. Kulwant Sahai says that no rent was ever paid for this holding by the plaintiff to any of the proprietors and, therefore, clause (2) of section 22 does not apply. The circumstance under which no rent was paid was fully explained in the decision of the High Court relied upon by Mr. Kulwant Sahai. In that litigation both the plaintiffs and the defendants in the present case were defendants. Chatterji, J., one of the Judges who decided that case, observed:

"The defendants, though holding different interests in the *mahal* and in the mortgage, represented between themselves the entire interest of the landlord for the time being when the purchases were made. There was no one else to whom the portion of the rent which was payable for the lands purchased by them, could be paid during the subsistence of the mortgage."

The mortgage has been redeemed and the plaintiffs and the defendants are not the entire 16 annas proprietors of the Mouza. The mortgagor is also in possession of certain shares in the village. The question is not whether any rent was ever realised but whether any rent was payable. There can hardly be any doubt that the purchase in the present case was by the plaintiffs co-sharers, and they were liable for the payment of the proportionate rent to the other co-sharers, but, in the circumstances set forth in the judgment of the High Court, there was no rent due from them on accounts being taken between the several proprietors and the mortgagees. The Survey Record of Rights states clearly that the possession of the plaintiffs was under section 22 (2). No doubt, that is the status descrip-

ed under the law, but the Survey Authorities being conversant with the Bengal Tenancy Act must be presumed to have fully appreciated the true scope and meaning of clauses (1) and (2) of section 22. The real import of the entry is one of fact that the plaintiffs as part proprietors had purchased the holdings and were in possession thereof as part proprietors. In this view the Survey Authorities made the aforesaid entry that their possession was under section 22 (2).

It is then contended that, whatever the possession or status of the plaintiffs might have been before the partition, the partition effected a complete change in that status, inasmuch as the plaintiffs ceased to be co-proprietors after the partition, separate *pattis* or estates having been allotted to the several co-proprietors. The plaintiffs are not now the co-proprietors in the *pattis* allotted to the defendants wherein the land in dispute has fallen, and consequently they cannot now claim possession of the land under section 22 (2). To this I replied in the case of *Ram Prasad* v. *Gopal Chand* (3), in the following words:—

"It will be anomalous and indeed unjust to permit a co-proprietor, after the *kasht* lands in the estate have been purchased by another co-proprietor at great expense, to go to the Collectorate partition and to claim the same as *bakasht* and to share in the acquisition to which he has not contributed a single farthing. The section clearly empowers a co-proprietor to hold possession of the *kasht* land purchased by him, the only condition imposed upon him being that he should pay rent therefor to his co-sharers. There is no limit of time of his possession nor is it controlled by any event, such as the partition of the estate. If his possession was to remain only for so long as the estate was not partitioned, it would have been clearly and unmistakably expressed by the Legislature. I do not, on principle, see any reason why a flourishing co-sharer of a small fractional share in the village should be deprived of an opportunity of purchasing lands in his occupancy holdings in the village, just in the same way as a stranger would be allowed to do. Neither law nor equity would make him worse than a stranger."

(3) 58 Ind. Cas. 955; 2 P. L. T. 163 at p. 164.

The authorities quoted by Mr. Kulwant Sahay have also been dealt with in that judgment.

The term *kasht* or *bakasht* also does not at all embarass me in any way. They are words of art introduced for the purpose of understanding the possession of lands by the proprietors and the tenants. The former term is one of recent creation by the Settlement Authorities. The latter, in its true sense, equally applies to the cultivation of lands by the proprietors and the tenants. However, the question of status does not arise in the present case. The real question is, whether the plaintiffs are entitled to continue to hold possession of the land in the same way as they used to do before the partition of the estate. I have discussed in detail the question in the case referred to above [*Ram Prasad* v. *Gopal Chand* (3)], and I do not want to repeat my arguments here. For the sake of brevity I would prefer to refer to the said judgment. I have no doubt that the plaintiffs are entitled to hold possession of the land on payment of rent to the defendants under section 22 (2) of the Bengal Tenancy Act.

I would, therefore, respectfully differ from the view taken by my learned brother, Mr. Justice Adami, and would decree these appeals and consequently the suits of the plaintiffs with costs throughout.

DAS, J.—I agree.

J. P.

Appeals allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1155 OF 1920.

December 13, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Ghose.

UDOY CHANDRA BASU AND OTHERS—APPELLANTS

versus

MAHAMMAD ALI BEPARI AND OTHERS—RESPONDENTS.

Landlord and tenant—Holding over, effect of—Creation of new tenancy—Enhancement of rent, suit

UDOY CHANDRA BASU v. MAHAMMAD ALI FEPARI.

for—Presumption—Bengal Tenancy Act (VIII of 1885), ss. 50, 105, 105A.

When a tenant holds over after the expiration of the term of a tenancy, it is a new tenancy coming into operation after the date of the expiration of the term of the previous tenancy. [p. 591, col 2.]

A *kabuliyat* executed in 1282 B S. creating a tenancy for a term of 3 years stated that, after the termination of the period of settlement, the tenants would take a fresh settlement on a proper rent. After the tenancy had come to an end in 1284 B. S., the tenants held over and continued paying rent at a uniform rate for more than 20 years. In a proceeding for enhancement of rent on the ground of rise in prices of staple food crops:

Held, that the origin of the tenancy should be considered to be from the year 1285 B. S., that the presumption under section 50 of the Bengal Tenancy Act had been rebutted, and that, consequently, the landlords were entitled to have fair and equitable rent settled under the provisions of the Bengal Tenancy Act. [p. 591, col. 2.]

Appeal against a decree of the Additional District Judge, Noakhali, dated the 24th of January 1920, affirming that of the Assistant Settlement Officer of that District, dated the 23rd of September 1918.

FACTS appear from the judgment.

Babu *Bepin Chandra Bose*, for the Appellants.—The landlord is not precluded from having a fair and equitable rent settled. In the lease itself there is a provision for further settlement and thus the presumption under section 50 of the Bengal Tenancy Act does not arise. The effect of holding over by the tenants is the creation of a new tenancy upon the same terms as to the payment of rent. The tenants by agreeing to pay proper rent are estopped from questioning my right to enhance the rent. Refers to *Upendra Nath Ghose* v. *Dwarkanath Biswas* (1). Then in the finally published Record of Rights the tenants are recorded as settled *raiyats*. The question of the status of the tenants is thus *res judicata*.

Babu *Asiranjan Chatterjee*, for the Respondents.—The position is this that, although there was a recital in the *kabuliyat* as to the payment of proper rent, yet in point of fact rent was never enhanced. I take a hypothetical case that if a tenant holds over under such a *kabuliyat* from 1793 up to the present time and pays an uniform rent all along there can be no question of the rebuttal of the presumption under section 50 of the Bengal Tenancy Act. Then there was no new tenancy as the *kabuliyats* were never acted upon. Refers to *Abhoy Shankar Mozumdar* v. *Rajani Mandal* (2) and *Biseswar Ray Chowdhry* v. *Rajendra Kumar Singha* (3). Again, payment of rent at a uniform rate for a long series of years raises a presumption of fixity of rent. See *Golab Missir* v. *Kumar Kalanand Singh* (4).

Babu *Bepin Chandra Bose*, was not called upon to reply.

JUDGMENT.—In this case the only question raised on behalf of the appellants, who were the petitioners before the Settlement Officer, is whether they are precluded from having a fair and equitable rent settled with regard to the land in the occupation of their tenants, the defendants, opposite parties, on the grounds of excess area and that the rate of rent is lower than the prevailing rate and also on account of rise of prices of staple food crops.

The proceedings were started under sections 105 and 105A of the Bengal Tenancy Act The record was finally published on the 20th September 1917. The Assistant Settlement Officer dismissed the application and on appeal the Special Judge has affirmed the decision.

The first question for decision, as stated in the judgment of the learned Special Judge, was (1) "whether the defendants' rent is consolidated? Is there any excess area and can plaintiffs get any increase on that count?" The learned Judge has found, and we agree with his finding, that the landlord has not been able to show that the tenants are occupying more land than what they got at the time when they were let into the land. Two *Kabuliyats* have been produced in this case dated the 2nd and 3rd of Agrahayan 1282 B. S. The landlords' case was that the tenancy commenced from those dates. The tenants alleged no, these *kabuliyats* were only confirmatory of the lease of the land which they held from before. The leases were for a

(1) 44 Ind. Cas. 593; 22 C. W. N. 322.

(2) 47 Ind. Cas. 353; 22 C. W. N. 904; 29 C. L. J 371.

(3) 25 Ind. Cas. 228; 18 C. W. N. 949.

(4) 6 Ind. Cas. 217; 12 C. L. J. 107; 14 C. W. N. 884.

term of three years which would come to an end in 1284. Upon the terms of the leases there is no doubt that they were in confirmation of the tenancy which existed from before.

Then, the second and third questions that arose for determination in the Court of the learned Judge were, "whether the plaintiffs can get enhancement on the ground of rise in prices of staple food crops and what would be the fair and equitable rent and from which year will it take effect?" The learned Judge has decided these two questions against the landlord on the ground that the defendants were paying rent at a unifrom rate for more than 20 years for these lands and, therefore, the presumption under section 50 of the Bengal Tenancy Act was in their favour that they were holding the lands from the time of the Permanent Settlement at a uniform rate of rent and the rent was, therefore, not liable to enhancement on the grounds stated.

The question before us is, whether it should be considered, having regard to the terms of the *kabuliyats* mentioned above, that the presumption under section 50 of the Bengal Tenancy Act does not arise in this particular case. The terms specially referred to are: "That after the termination of the period of settlement we shall take a fresh settlement on a proper rent." Then, towards the end, it is further stated in the *kabuliyat* that "we shall enjoy the "tenancy for a fixed term under the conditions stated above and to this effect we execute this *raiyati kabuliyat* for a fixed period." The contention on the part of the appellants is that whatever might be the origin of the original tenancy, that came to an end at the expiration of 1284 B. S., the fact that the tenants held over from that time should be held to be under a new tenancy created when the period mentioned in the *kabuliyat* expired and, therefore, the presumption under section 50 of the Bengal Tenancy Act has been rebutted. It is contended, on the other hand, that as the landlords did not exercise their right to take possession of the tenure or to alter the rent after the expiration of the term of the *kabuliyats* these *kabuliyats* were never acted upon and that the tenancy which existed from before the date of the *kabuliyats* continued throughout, and so the presumption under section 50 of the Bengal Tenancy Act has not been rebutted. It is also contended that a new tenancy cannot be inferred from the fact that the landlords did not take any step to exercise their right under the terms of the *kabuliyats* after the expiration of the period mentioned therein. We may state that no authority has been cited which really covers the point now in controversy. We are of opinion that, on general principles, when a tenant holds over after the expiration of the term of the tenancy it is considered to be a new tenancy coming into operation after the date of the expiration of the term of the previous tenancy; and we have not been referred to any authority that this general principle should not apply to this case. The *kabuliyats*, we may state, were executed before the Bengal Tenancy Act came into operation and the term mentioned therein also expired before that date. There was nothing to prevent the landlords from enforcing the terms of the *kabuliyat* after the expiration of the year 1284 B. S. and the fact that they did not take possession or otherwise alter any of the terms of the previous tenancy gives rise to this inference that a new tenancy commenced from after that date upon the same terms as regards payment of rent and other stipulations except the stipulation with regard to the period of settlement. That being so, the origin of the present tenancy should be considered to be from the year 1285 B. S. and, in our opinion, the presumption under section 50 of the Bengal Tenancy Act has been rebutted in this case.

We think, therefore, that the landlords are entitled to have fair and equitable rent settled under the provisions of the Bengal Tenancy Act. The case is, therefore, sent back to the Court of first instance for fixing a fair and equitable rent.

Costs to abide the result. We assess the hearing fee in this Court at one gold *mohur*.

B. N.

Case sent back.

ABDUL GANI v. NABENDRA KISHORE ROY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1445 OF 1920.

December 19, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

ABDUL GANI—DEFENDANT No. 2—APPELLANT

versus

NABENDRA KISHORE ROY AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Wakf—*Decree for rent against one of two* mutwallis, *effect of—Decree for rent against some heirs of deceased tenure-holder does not affect other heirs.*

A suit for rent against one of two *mutwallis* of a *wakf* estate is bad. The decree obtained in such a suit does not bind either the other *mutwalli* or the *wakf* estate where there is nothing to show that the judgment-debtor *mutwalli* represented the other *mutwalli* or the *wakf* estate in the landlord's *sherista*. [p 593, col. 1]

Abdul Rab Chowdhury v. *Eggar*, 35 C. 182; 12 C. W. N. 160, followed.

Where on the death of a tenure-holder, a decree is obtained for rent against some of his heirs the interest of those heirs that are not parties to the decree is not affected either by the decree or by sale under that decree. [p 593, col 2.]

Faizannessa v. *Gaganeswari*, 63 Ind. Cas. 706; 26 C. W. N. 138, referred to.

Appeal against a decree of the District Judge, Noakhali, dated the 13th of February 1920, reversing that of the Munsif, Second Court, at Feni, dated the 5th of September 1918.

FACTS appear from the judgment.

Babu *Asiranjan Chatterjee* (with him Babu *Nagendra Nath Bose* for Babu *Satyendra Chandra Mitra*), for the Appellant.—The lower Appellate Court has misread the evidence in the case and on such misreading he has reversed the judgment of the learned Munsif. I beg to submit that the rent-decree obtained by the Maharaja of Tipperah and the sale following that cannot affect the *wakf* property. The *wakfnamah* was executed in 1300 B. S. and by that my client was appointed a joint *matwali*. There is no evidence to contradict the sworn statement of my client that the landlord was perfectly aware of the *wakf*. Minnatali was never appointed as the representative or agent of my client. My client states that the rent was paid by Minnatali and himself jointly as they were joint *mutwallis*. There is nothing to show that Minnatali represented my clients or the *wakf* estate in the landlord's *sherista*. So the suit against one of the two *mutwallis* is bad in law. The rent decree cannot affect my client or the *wakf* estate. The suit must be properly framed and all necessary parties must be made parties to it.

Abdul Rab Chowdhury v. *Eggar* (1).

On the authority of the case reported as *Faizannessa* v. *Gaganeswari* (2) I contend that the rent-decree cannot affect the interests of those that are not parties to the decree.

No one appeared for the other side.

JUDGMENT.—The property in suit which appertains to *Taluk* Durga Ram Mazumdar was sold in execution of a decree for rent obtained by the landlord, the Maharaja of Tipperah, against, amongst others, Minnatali, defendant No. 1, as representing his father Kamarali who had a share in the *taluk*. Kamarali had executed a *wakfnamah* in 1300 B. S. by which he appointed his two sons Minnatali and Abdul Gani, the second defendant, as *Mutwallis*. The plaintiffs as purchasers in the said execution sale brought this suit for recovery of possession of the share of the *taluk* which was owned by Kamarali against all the heirs of Kamarali. Defendant No. 2 contended that the rent decree obtained by the Maharaja of Tipperah and the sale consequent upon it did not affect the *wakf* estate. On these pleadings two issues were raised:—(1) Had the landlord notice of the *wakfnama*? (2) Did defendant No. 1 represent the defendants or *mutwallis* in the landlord's *sherista*? Both these issues were found against the plaintiffs by the learned Munsif who tried the case in the first instance. On appeal by the plaintiffs the lower Appellate Court has found that the landlord had no notice of *wakf* and that Minnatali represented the *wakf* estate and defendant No. 2 in the landlords' *sherista* and hence the rent-decree and the auction-sale passed the *wakf* estate and whatever interests defendant No. 2 had in it.

Defendant No. 2 appeals to this Court and it is contended on his behalf that the learned District Judge has misread the

(1) 35 C. 182; 12 C. W. N. 160.
(2) 63 Ind. Cas. 706; 26 C. W. N. 138.

whole of the evidence and his findings are based upon such misreading of the evidence. We have gone through the evidence in the case and we find that the contention of the appellant is correct. The learned Judge says: "There is nothing to show that the landlord was aware of this *wakf*;" we find that defendant No. 2 swears that the landlord was aware of the *wakf* and there is no evidence contradicting this statement. The learned Judge has in several places in his judgment remarked that defendant No. 2 has deposed that rent was paid *marfat* defendant No. 1, Minnatali, and he adds that, such being the case, "it is clear that Minnatali after the death of his father Kamarali represented all the heirs of Kamarali and as such representative paid the rent:" then, again, "This *marfat* according to defendant No. 2 was entered in the *dakhilas*. That shows by implication consent of defendant No. 2 to be represented by defendant No. 1. Defendant No. 2 as unregistred tenant is bound by the proceeding against the registered tenant, *i. e.*, defendant No. 1." All these findings are based on the supposition that defendant No. 2 has stated in his examination in Court that the rent was paid through Minnatali as *marfatdar* and that *dakhilas* were issued in the name of Minnatali as such. Whereas, on reading the evidence, it is clear that he says that the rent was paid by defendant No. 1 and defendant No. 2 jointly as they were joint *mutwallis*, and he adds: "In the *dakhilas* we were described only as *marfatdars*, that was because we were the only co sharers of the *taluk*." This is exactly contrary to what the learned Judge thinks defendant No. 2 deposed in Court. There is no evidence, as the learned Munsif observes, on the plaintiffs' side to show that defendant No. 1 represented defendant No. 2 or the *wakf* estate in the landlord's *sherista*. The suit against one of the *mutwallis* is, therefore, bad [See the case of *Abdul Rab Chowdhury* v. *Eggar* (1)]. Accepting the findings of the Munsif that defendant No. 1 did not represent defendant No. 2 or *wakf* estate in the landlord's *sherista*, we cannot but hold that the rent-decree obtained by the landlord did not bind either defendant No. 2 or the *wakf* estate and that on that date defendant No. 1, Minnatali, had no interest which could pass by the decree obtained against him in his personal capacity.

It is now settled beyond dispute that, on the death of a tenure-holder, if a decree is obtained for rent against some of his heirs the interest of those heirs that are not parties to the decree will not be affected either by the decree or by sale under that decree [*Fa'zinnessa* v. *Gagneswari* (2)].

We accordingly set aside the decree of the Court of Appeal below and restore that of the Court of first instance. The appellant will get his costs both in this Court and in the Court of Appeal below.

S. N.

Decree set aside.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 857 OF 1920.

January 17, 1922.

Present:—Mr. Justice Stuart.

Musammat BHANGA—PLAINTIFF—APPELLANT

versus

Sheikh DIN MOHAMMAD—DEFENDANT—RESPONDENT.

Hindu Law—Prostitutes—Succession.

The property of a deceased Hindu prostitute, whether she was married or not, devolves upon her heirs, and is not inherited by the Crown in preference to them. [p. 594, col. 1.]

Second appeal from a decision of the Sessions and Subordinate Judge, Mirzapur, dated the 8th May 1920.

Mr. *Surendra Nath Gupta*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—Janki and Kali, deceased, were Hindu women who made their living as professional prostitutes. There is no evidence to show whether Janki had ever been married. Janki purchased a house. After the death of Janki and her sister, Kali, this house was claimed by their mother, Bhanga, the present appellant, as the heir of Janki, and by Shaikh Din Mohammad, who claimed under a Will

from Kali. Sheikh Din Mohammad obtained possession. Bhanga sued him for possession and recovery of certain ornaments and mesne profits. Her suit was decreed by the Munsif who found that the house and ornaments belonged to Janki and that the Will by Kali conferred no title. Din Mohammad appealed. The learned Subordinate Judge upheld the finding that all the property belonged to Janki, but he dismissed Bhanga's suit on the finding that, inasmuch as Janki was a prostitute, she must be taken to have been an unmarried woman who had become unchaste and that, under the Hindu Law, the property of an unmarried woman who has become unchaste must be inherited by the Crown, as she can have no heirs. In the first place, there is nothing to show whether Janki was or was not unmarried. It is well known law in connection with Hindu widows who have become prostitutes, that the succession is as the succession of married women. I have not been able to discover a case deciding the succession to an unmarried woman who has become a prostitute. Considering the fact that the large majority of Hindu girls do get married and that prostitution is uncommon amongst Hindus except in the case of widows, the absence of precedents is not surprising. In all probability, if the facts had been gone into, it would have been discovered that Janki was a widow. The Mitakshara Law recognises two forms of descent to a Hindu woman's self-acquired property, according as to whether she is married or unmarried.

There is nothing in the Hindu Law which states that when an unmarried woman has fallen from chastity, no one can succeed to her property except the Crown. It is not really of great importance whether Janki was married or not. Her property would go, in any circumstances, to her mother who is her only heir. I, therefore, allow this appeal, set aside the decree of the learned Subordinate Judge and restore the decree of the learned Munsif. Sheikh Din Mohammad will pay his own costs and those of the plaintiff in all Courts which will include fees on the higher scale.

N. H.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2011 OF 1919.

November 18, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

RAM SARAN ROY—PLAINTIFF—APPELLANT

versus

SHOSHI BHUSAN GHOSE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific performance—Incomplete contract.

In a suit for specific performance of a contract alleged to have been entered into by defendants Nos. 1 and 2 to sell a certain property it was found that it was agreed between the plaintiff and defendant No. 1 that the latter and defendant No. 2 would sell the property to the plaintiff:

Held, that as the agreement proposed was between the plaintiff on the one hand and defendants Nos. 1 and 2 on the other and as defendant No. 2 had not agreed, there was no completed contract which could be specifically enforced. [p. 595, col. 2.]

Appeal against a decree of the Subordinate Judge, Bankura, dated the 21st of July 1919, affirming that of the Munsif, Third Court, at Bishunpur, dated the 21st of March 1918.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Rishindra Nath Sircar*, for the Appellant:—The appeal arises out of a suit for specific performance of contract. Both Courts dismissed the suit on the ground that specific performance of the contract could not be claimed as of right. The contract was to the effect that the defendant No. 1 and the defendant No 2, together, would sell a two annas share of a tank and an entire plot of land to the plaintiff. There was a further agreement that if defendant No. 2 did not consent to sell his share the defendant No. 1 would sell his own share to the plaintiff. I am entitled, at any rate, to the half share of the defendant No. 1. Refers to section 15 of the Specific Relief Act; *Shama Charan Kotal* v. *Kumed Dasi* (1). The case reported as *Jatindra Nath Basu* v. *Peyer Deye Debi* (2) does not apply to the

(1) 42 Ind. Cas. 378; 27 C. L. J. 611 at p. 614.
(2) 34 Ind. Cas. 69; 24 C. L. J. 67; 14 A. L. J. 527; 20 C. W. N. 863; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. 218; 43 C. 990; 43 I. A. 108 (P. C.).

present case. The case in *Abdul Rahman* v. *Jadunandan Singh Jha* (3) is distinguishable, inasmuch as it is a case under the Mitakshara School of Hindu Law. It does not, therefore, apply to the facts of the present case. Refers to *Lumley* v. *Ravenscroft* (4).

Babu *Mohendra Nath Roy* (with him Babu *Bhupendra Kumar Ghose*), for the Respondents.—The plaintiff states that both the defendants would execute the Kobala. There was a second allegation that there was a contract by the defendant No. 1 and that his share would be sold. The Courts below find that the second allegation was not made out; as regards the first allegation it has been found that defendant No. 1 did not contract to sell on behalf of his brother, defendant No. 2. Therefore, there was no contract enforceable in law. Section 15 of the Specific Relief Act presupposes the existence of a contract enforceable in law. Refers to *Shama Charan Kotal* v. *Kumed Dasi* (1). Section 15 of the Specific Relief Act would apply only when the contract between the parties is proved to be valid and enforceable in law. Here the facts prove otherwise.

Dr. *Dwarkanath Mitter*, in reply.—Refers to Fry on Specific Performance, 384; *Burrow* v. *Scammell* (5), *Hexter* v. *Peirce* (6).

JUDGMENT.—This appeal arises out of a suit for specific performance of a contract.

The plaintiff's case is, that it was agreed that the defendant No. 1 and the defendant No. 2, *together*, would sell a 2-annas share of a tank and an entire plot of land to the plaintiff. A further agreement was set up, *viz.*, that if the defendant No. 2 did not consent to sell his share, the defendant No. 1 would sell his own moiety share.

The defendant No. 2, it is found, had never agreed to sell his share. Both the Courts below have come to the conclusion that the plaintiff was not entitled to specific performance of the contract.

The only question raised before us is, whether the plaintiff was entitled to specific performance of the contract so far as the share of the defendant No. 1 was concerned.

In the present case, there was no agreement by defendant No. 1 to sell on *behalf* of defendant No. 2. He did not profess to have any authority to do so and there was no contract that he would sell the property for self and on behalf of defendant No. 2. The Courts below have come to the conclusion that there was no completed contract which could be enforced.

It appears from the judgment of the Munsif that, when the proposal was made, the defendant No. 1 told the plaintiff that he would consult his mother, brother and co sharers and would then let the plaintiff know. The Munsif points out that, though the defendant No. 1 probably held out some hope to the plaintiff that his brother would agree, the plaintiff knew very well that without consulting his brother, the defendant No. 1 could not give his final word. The learned Subordinate Judge in one place of his judgment says that it was agreed between the plaintiff and defendant No. 1 that the latter and defendant No. 2 would sell the property to him, but further on he says that it was a contract which could be enforced. This is explained by what we have stated from the judgment of the Munsif. The agreement proposed was between the plaintiff on the one hand, and the defendants Nos. 1 and 2 on the other, but the defendant No. 2 did not agree. That being so, we think that the Courts below were right in holding that there was no completed contract.

It has been pressed upon us that the question of intention ought to have been gone into. But the plaintiff set up an alternative case, *viz.*, that there was an agreement that the defendant No. 1 would sell his own share even if the defendant No. 2 did not agree. That case has been found against the plaintiff by both the Courts. But the fact that such an alternative case was set up indicates how the agreement was understood by the parties. Besides, the plaintiff did not invite either of the

(3) 21 Ind. Cas. 528; 18 C. L. J. 344.
(4) (1895) 1 Q. B. 678 at p. 684; 64 L. J. Q. B. 441; 14 R. 347; 72 L. T. 382; 43 W. R. 534; 59 J. P. 217.
(5) (1882) 19 Ch. D. 175; 51 L. J. Ch. 233; 45 L. T. 698; 30 W. R. 310; 46 J. P. 185.
(6) (1900) 1 Ch. 341 at p. 345; 69 L. J. Ch. 143; 82 L. T. 109; 48 W. R. 130; 16 T. L. R. 94.

Courts below to go into the question of intention. In both the Courts below he insisted upon the alternative case, namely, that there was an agreement that the defendant No. 1 would sell his own share even if the defendant No. 2 did not agree; and both the Courts below have found against the plaintiff.

The Court of first instance found that the plaintiff never tendered any consideration money to the defendants. The lower Appellate Court has not come to any finding on the point. It is unnecessary, however, to consider the point.

The appeal fails and is dismissed. We make no order as to costs in this Court.

B. N.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 90 OF 1921.

January 18, 1922.

Present :—Mr. Justice Ryves.

SRI BHAGWAT CHAUDHRI AND OTHERS—APPLICANTS

versus

BALKARAN SAITHWAR AND ANOTHER —OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17, scope of—Application for setting aside an ex parte decree—Deposit of full decretal amount necessary.

The provisions of section 17 of the Provincial Small Cause Courts Act are mandatory and the entire amount of the *ex parte* decree must be deposited with the application for setting it aside. [p. 597, col. 1.]

Where a decree was passed for a certain sum of money and the applicant did not deposit the amount at the time of making the application for setting aside the decree, but asked leave to deposit a lesser sum later and deposited it, and then applied to deposit the balance:

Held, that the Court had no power to order the balance to be deposited later and to hear the application. [p. 597, col. 1.]

Jagan Nath v. *Chet Ram*, 28 A. 470; 3 A. L. J. 318; A. W. N. (1906) 93, followed.

Lochi Lal v. *Mewa Ram*, 14 Ind. Cas. 242, referred to.

Civil revision against an order of the Judge, Gorakhpur, dated 4th April 1921.

Mr. *Akhil Nath Sanyal*, for the Applicants.

Mr. *Sankar Saran*, for the Opposite Party.

JUDGMENT.—This is an application in revision from an order of the Small Cause Court of the City of Gorakhpur, dated the 4th of April last, rejecting an application to restore an *ex parte* decree. It appears that on the 25th of February 1921 an *ex parte* decree was passed against the present applicant. The suit in which that decree was passed was a suit to recover an ox or its price, namely, Rs. 80 and costs. The Court decreed Rs. 80 to the plaintiff *plus* Rs. 14-4-0 costs. On the same day the applicant here applied for the restoration of the case and asked leave to deposit Rs. 80 within a fortnight. Thereupon, the Court ordered notice to go to the other side and fixed the 2nd of April for hearing the application. Nothing was said in the order about depositing any money. The decree in the case was drawn up on the 1st of March showing a sum of Rs. 94-4-0 as due from the defendant-applicant here. On the 14th of March the applicant deposited Rs. 90. On the 2nd of April the case was taken up in the presence of the parties. The applicant asked for one day's adjournment the reason for which was not disclosed. The Court adjourned the case to the 4th. On the 4th, apparently, the notice of the Court was drawn to the fact that Rs. 90 only had been deposited whereas the amount decreed was Rs. 94-4-0. Thereupon the Court passed this order: "Judgment-debtor to pay R. 4-4-0 before the restoration application can be taken up. Put up to morrow." Some time on the same date the Court recorded the following order: "The above order is cancelled now. Turning to section 17 of the Provincial Small Cause Courts Act, I find that an application for setting aside an *ex parte* decree shall be accompanied with the deposit in Court of the amount due from the judgment-debtor under the decree. The application was put in on the 25th of February 1921 and Rs. 90 out of Rs. 94-4-0 was deposited on the 14th of March 1921. The provisions of the law are thus frustrated. I am afraid I cannot extend the time to the judgment-debtor. The application is, therefore, rejected." It appears that sometime on that date, whether before or after the passing of

this order, Rs. 4-4-0 was tendered by the applicant. It looks as if the attention of the Court was drawn to section 17 of the Provincial Small Cause Courts Act for the first time on the 4th of April 1921. I am asked to interfere in revision and direct the Court to accept the tender of Rs. 4-4-0 thus making up the whole amount due under the decree and to restore the application for restoration. It seems to me that I have no power to do so. The words of section 17 of the Provincial Small Cause Courts Act are mandatory as was held by a Divisional Bench of this Court in the case of *Jagan Nath* v. *Chet Ram* (1). The learned Counsel for the applicant relies on the case of *Lachi Lal* v. *Mewa Ram* (2). In that case a decree was passed *ex parte* in favour of the plaintiff for Rs. 190 *plus* Rs. 20 8-0 costs. The decree holder subsequently applied for execution of his decree and a notice was issued to the judgment-debtor to show cause why the decree should not be executed. The notice which was issued by the Court to the judgment debtor stated that the decree was for Rs 190. The judgment-debtor then applied for restoration of the suit and deposited Rs. 190 the amount shown in the notice which he had received from the Court as the amount due on this decree. At the hearing it was objected that the provisions of section 17 had not been complied with and the Court accepted that view and refused the application. On revision to this Court, a learned Judge, sitting alone, held that, as the full amount alleged to be due under the decree had been deposited, the Court could entertain the application, and the case in *Jagan Nath* v. *Chet Ram* (1) was distinguished. In that case, however, the only notice which the judgment debtor had of the amount decreed against him, was what was stated in the summons of the Court itself, because *ex hypothesi* if his application was *bona fide*, he had no previous notice that a suit even had been instituted against him, much less what amount had been decreed. Under these circumstances, it might well be held that he was entitled to accept as accurate the summons of the Court as to what had been decreed, and that, having paid that amount with his application for restoration, he had done all that was required of him. But, even if the ruling in that case were applicable to the facts here, I think I am bound by the Divisional Bench case quoted above.

It was then argued that there was here "a substantial compliance" with the words of the section. I do not understand what is meant by "a substantial compliance." Either the provisions of the section were complied with or they were not. In the first instance, no money at all was deposited, and leave was asked to deposit Rs. 80 only. On the 14th March Rs. 90 and not Rs. 80 were paid in, obviously suggesting that the applicant was conscious that something over and above the Rs. 80 claimed must have been decreed, presumably for costs or interest, or both. He appeared in Court that very day, and if he had made inquiries then, or had taken the trouble to look at the decree, which was prepared on the 1st March he would have seen that the amount decreed against him was Rs. 94-4-0. It seems to me doubtful whether, even on the 14th of March, if he had deposited the full amount of Rs. 94-4-0 that he would have complied with the provisions of section 17. In my opinion the Court had no jurisdiction to entertain the application without following the procedure prescribed in section 17; that is to say, it should have satisfied itself that the deposit had been made as provided in that section, or else that security had been given to its satisfaction. I reject the application with costs.

N. H.

Application rejected.

(1) 28 A. 470; 3 A. L. J. 318; A. W. N. (1903) 93.
(2) 14 Ind. Cas. 242.

ANNADA CHARAN v. HABIBULLA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1928 OF 1919.

January 5, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Cuming.

ANNADA CHRAN DESARKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Nawab Khaleh HABIBULLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Deed, construction of—"Kar," *meaning of*—Kar, *if includes cesses.*

The word "*kar*" is wide enough in its ordinary meaning to include the word cess

A clause in a deed of partition and exchange provided as follows:—"The second party will not have to pay to any one any *kar* whatsoever; should any body ever recover any *kar* from them then the first party should re-imburse them":

Held, on the interpretation of the document, that the second party would not have to pay either revenue or rent or any kind of taxes including road cess.

Appeal against a decree of the Additional Subordinate Judge, Baekerganj, dated the 4th June 1919, reversing that of the Munsif, Third Court, at Patuakhali, dated the 24th June 1918.

FACTS appear from the judgment.

Babu *Surendra Chandra Guha*, for the Respondents took a preliminary objection that the present second appeal is barred under the provisions of section 102 of the Code of Civil Procedure, inasmuch as the suit is of a Small Cause Court nature for Rs. 21.

[NEWBOULD, J.—The suit is for a declaration that the plaintiff is not liable to pay cesses and is, therefore, not of a Small Cause Court nature.]

Maulvi *A. K. Fazlul Haq* (with him Babu *Abinash Chandra Ghose*), for the Appellant: The appeal depends on the construction of a deed of partition and exchange. Under the document it has been agreed that the second party to it will not have to pay any *kar* whatsoever. The word *kar* is wide enough to include cesses.

Babe *Surendra Chandra Guha*, for the Respondents:—The statutory liability to pay cesses is on the party in possession. In the document referred to by my learned friend there is nothing to show that we undertook to pay cesses. The word '*kar*' cannot include cesses for in the document itself *kar* and cesses have been separetely described,

Maulvi *A. K. Fazlul Huq*, was not called upon to reply.

JUDGMENT.—The facts of the case are set out in the judgments of the lower Courts and need not be recapitulated. The only point we have to decide in this appeal is the meaning of the word "*kar*" used in a document (Exhibit 11), a deed of partition and exchange. The claim of the plaintiffs in this suit is based on paragraph 10 of that document in which these words appear, "In respect of the same the second party will not have to pay to any one ary *kar* (?) whatsoever should any body ever recover any *kar* from them, then the first party should re imburse them". The question is, whether the word *kar* in this sentence includes cesses as well as rent. We find in Haughton's Dictionary the meanings of this word are as taxes and revenue and also on a reference to Sen's English to Bengali Dictionary we find the word "*kar*" is given as a translation of the word cess; also the road cess recoverable under the Cess Act is commonly spoken of in Bengali as Pathkar. It seems, therefore, that there is no doubt that the word *kar* is wide enough in its ordinary meaning to include the word cess. We think the clause "the second party will not have to pay any *kar* whatsoever" means, that the second party will not have to pay either revenue or rent or any kind of taxes including road cess.

Our attention has been drawn on behalf of the respondents to the fact that in another paragraph of the same document reference is made to the entire *kar* and cesses. But we do hold that it does not necessarily follow that when the word '*kar*' is used alone it cannot be held to include cess also.

The lower Courts differed in opinion as to the proper interpretation of the document. The interpretation we put on it is that of the First Court and not of the lower Appellate Court. The result, therefore, is that this appeal is decreed with costs. The decree of the lower Appellate Court is set aside and that of the Court of first instance restored.

The appellants will get their costs in the lower Appellate Court also.

J. P.

Appeal decreed.

KHETRA NATH DAS *v.* MOHANANDA DAS.

CALCUTTA HIGH COURT.
CIVIL RULE No 500 OF 1921.
December 1, 1921.
Present :—Mr. Justice Suhrawardy
and Mr. Justice Cuming.
KHETRA NATH DAS—DEFENDANT No. 2—
PETITIONER
versus
MOHANANDA DAS—PLAINTIFF—
—OPPOSITE PARTY.

Practice—Procedure—Evidence—Hearing of suit without affording parties opportunity of examining their witnesses, propriety of.

On the day to which a Small Cause Court suit had been adjourned for hearing both the parties to the suit applied for time on the ground that their witnesses had not come The Court rejected the application and proceeded with the hearing of the suit with the result that, after examining the plaintiff and two of his witnesses and the defendant, the Court decreed the suit:

Held, that, under the circumstances of the case, the Court ought to have allowed time to the parties to produce their evidence before it for the purpose of coming to a just decision in the case and that the defendant having been prejudiced by the procedure adopted by the Court, the case ought to be re-heard.

Rule against an order of the Judge of the Court of Small Causes at Munshiganj.

FACTS appear from the judgment.

Babu *Bhupendra Chandra Guha*, for the Petitioner.—The petitioner comes up before your Lordships in revision under section 25 of the Provincial Small Cause Courts Act; the provision therein gives your Lordships ample jurisdiction in a case like this where justice and equity both demand that the case should be fully gone into. There have been grave irregularities leading to flagrant miscarriage of justice. As it was not proper service under the law, I applied for fresh service upon witness. Some attempts ought to be made for proper service. Refers to *Cohen* v. *Nursing Dass Auddy* (1), *Ganesh Narayan Sathe, In re* (2) and *Huree Dass Bysack* v. *Meer Moazzum Hossein* (3).

Babu *Bankim Chandra Banerji*, for the Opposite Party—Small Cause Courts are for speedy trial of cases. The defendant took time to file statements. The rulings cited by my learned friend are applicable to Presidency Small Cause Courts and not to Provincial Small Cause Courts. Unless there is substantial injury or failure of justice, your Lordships will not interfere.

Babu *B. C. Guha*, replied,

JUDGMENT.—Defendant No. 2 has obtained this Rule against the decree of the Small Cause Court Judge of Munshiganj, Dacca, on the ground that he was not afforded a full opportunity of examining his witnesses. He filed his written statement on the 13th May 1921, when the case was adjourned till the 21st June 1921 for hearing. On that day both the parties applied for time on the ground that their witnesses had not come. The plaintiff said that his witness, Sarat Chandra Acharjya, had not come with the necessary papers and another witness, Rajani, was seriously ill and could not come. Defendant No. 2 applied for process against his witness, Durga Mohan Chakravartty, on the ground that the summons had not been served on him on the previous occasion.

The learned Small Cause Court Judge refused both the applications and proceeded with the hearing of the suit with the result that after examining the plaintiff and two witnesses and the defendant No. 2 he decreed the suit against that defendant.

In the circumstances above set forth, we are of opinion that the learned Judge ought to have allowed time to the parties to produce their evidence before him for the purpose of coming to a just decision in the case. We are not satisfied that the defendant was not prejudiced by the procedure adopted by the learned Judge.

We, therefore, make the Rule absolute, set aside the decree passed by the Small Cause Court Judge of Munshiganj, Dacca, on the 21st June 1921, and direct that the case be re-heard. No order as to costs.

B. N.

Rule made absolute.

(1) 19 C. 201; 9 Ind. Dec. (N. S.) 579.
(2) 18 B. 600 at p. 628; 7 Ind. Dec. (N. S.) 397.
(3) 15 W. R. 447.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 111 OF 1921.

October 10, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, Mr. Justice Shah and Mr. Justice Fawcett.

DATTATRAYA GOVINDSETH LUBRI—APPELLANT

versus

PURSHOTTAM NARAYANSETH DALI—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 73—Execution—Rateable distribution—Court distributing assets, whether can inquire if decree obtained by fraud.

A Court distributing assets under section 73 of the Civil Procedure Code cannot go behind the decrees, which are presented by the various decree-holders asking for rateable distribution, to deal with the question whether any of the decrees had been obtained by fraud or other improper means. [p. 600, col. 2.]

Chhaganlal v. *Fazarali*, 13 B. 154; 7 Ind. Dec; (N. s.) 103, overruled.

Saravana Pillai v. *Arunachalam Chettiar*, 38 Ind. Cas. 117; 40 M. 841; 21 M. L. T. 225; (1917) M. W. N. 280; 5 L. W. 538; 32 M. L. J. 553, referred to.

Application against an order passed by the First Class Subordinate Judge, at Ratnagiri, in Darkhast No. 243 of 1920.

Mr. *K. N. Koyajee*, for the Appellant,

Mr. *P. B. Shingne*, for the Opponent.

JUDGMENT.

MACLEOD, C. J.—This is an application to this Court under section 115 of the Code of Civil Procedure. The applicant obtained a decree against his debtor, presented a Darkhast for execution, and applied therein for rateable distribution of the proceeds of a sale in execution of another decree obtained by the opponent against the same judgment-debtor.

The opponent raised a plea that the applicant's decree had been obtained by fraud. The lower Court considered this question and, being bound by the decision in *Ohhaganlal* v. *Fazarali* (1), decided that the Court could decide the question of fraud in execution proceedings, where the rival decree-holder raised the point, notwithstanding that a concurrent remedy by a regular suit was left open to him. It is necessary, therefore, to consider the ruling in *Ohhaganlal* v. *Fazarali* (1). Sir Charles Sargent, C. J., said:—

"The question referred to us is not without difficulty, but we are disposed to adopt the ruling of the Calcutta High Court *Sunder Dass, In re* (2) that the Court distributing the proceeds of execution under section 295 of the Civil Procedure Code (Act XIV of 1882) should inquire into the *bona fides* of the decree holders if called in question and decide it in the same manner as all other questions that arise in execution."

This question arose in *Saravana Pillai* v. *Arunachalam Chettiar* (3). The learned Judges, after considering the Calcutta case and also the decision of *Ohhaganlal* v. *Fazarali* (1), came to the conclusion that it was not open to a Court exercising its duties under section 73 of the Code of 1908 to inquire into the legality or validity of a decree brought to its notice in distributing the assets.

Our attention has been drawn by Mr. Koyajee to section 272 in the Code of 1859 which says:—

"If it shall appear to the Court, upon the application of a decree holder, that any other decree under which property has been attached has been obtained by fraud or other improper means, the Court may order that the applicant shall be satisfied out of the proceeds of the property attached, so far as the same may suffice for the purpose, if such other decree be a decree of that Court, or if it be a decree of another Court, may stay the proceedings to enable the applicant to obtain a similar order from the Court by which the decree was made."

Therefore, under that Code the Court which was distributing the assets amongst the decree holders had the power to deal with the question whether any of the decrees passed by itself had been obtained by fraud or other improper means. But this power was not given by section 295 of Act XIV of 1882 nor by section 73 of the present Code. Section 73 directs that the assets, after deducting the costs of realization, shall be rateably distributed among all such persons as shall have made applications to

(1) 13 B. 154; 7 Ind. Dec. (N. S.) 103.

(2) 11 C. 42; 5 Ind. Dec (N. S.) 785.

(3) 38 Ind. Cas. 117; 40 M. 841; 21 M. L. T. 225 (1917) M. W. N. 280; 5 L. W. 538; 32 M. L. J. 553.

the Court for the execution of decrees for the payment of money passed against the same judgment debtor. On general principle, the Court which would be merely a distributing agency, would not have any power to deal with the question whether any of the decrees had been obtained by fraud or other improper means just as in an ordinary case of execution the Court which executes the decree cannot go behind the decree. So it would appear that, where the Court is only concerned with distributing assets under section 73, it cannot have any greater power to go behind the decrees which are presented by the various decree-holders asking for rateable distribution. Sub-section (2) of section 73 expressly provides that where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets on the ground that such share of the distribution was obtained by fraud or collusion. No doubt if any such suggestion is made to the distributing Court, the applicant making it would be given an opportunity of filing a regular suit to set aside the decree which he alleges had been obtained improperly, and the distribution might be stayed till that suit was decided. But that would be a matter purely for the distributing Court to decide, because sub-section (2) implies that, in spite of an objection, the assets have been distributed, in which case the suit would be one for the refund of the amount distributed, on the ground that the person who obtained such amount had got a decree passed in his favour either by fraud or other improper means. I think, therefore, the decision in *Ohhagonlal* v. *Fazarali* (1) must be overruled. The Rule must be made absolute and the distribution must proceed in the lower Court in the light of this judgment.

Costs to be costs in the execution in the lower Court.

SHAH, J.—I agree.

FAWCETT, J.—I agree.

J. P.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1196 OF 1920.

December 14, 1921.

Present:—Mr. Justice Suhrawardy, and Mr. Justice Cuming.

HARI CHARAN CHAKRABURTTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

JITENDRA NATH GANGULLY, MINOR, BY HIS MOTHER AND GUARDIAN *Sreemutty* SATYABATY DEBI—PLAINTIFF—RESPONDENT.

Local inspection by Court—Omission to reduce to writing result of local investigation, effect of—Appeal—Pleadings—Point of limitation cannot be raised for first time in second appeal.

When a Court bases its judgment on the result of a local investigation held by it, it ought to enter the result of such investigation on the record in order to enable the parties to adduce evidence in respect thereof. [p. 602, col. 1.]

Raikishori Ghose v. *Kumudini Kanta Ghose*, 14 Ind. Cas. 377; 15 C. L. J. 138 and *Joy Coomar* v. *Bundhoo Lall*, 9 C. 363; 12 C. L. R. 490; 5 Shome L. R. 142; 4 Ind. Dec. (N. S.) 891, referred to.

But where the Court visits the locality in order to ascertain if the map which was put in by the plaintiff correctly depicts the locality and does not base its judgment on the result of the local investigation, the defendant cannot in any way be prejudiced by the fact of the local investigation being not put into writing. [p. 602, col. 1.]

A High Court in second appeal cannot enter into the question whether the plaintiff's suit was barred by limitation or not unless the point was taken before the lower Courts. [p. 602, col. 2.]

Appeal against a decree of the Subordinate Judge, Howrah, (Hooghly) dated the 6th March 1920, affirming that of the Munsif, Third Court, at Howrah, dated the 23rd of July 1918.

FACTS appear from the judgment.

Babu *Lalit Mohan Banerjee*, for the Appellants:—My clients have been materially prejudiced by the fact that result of the local investigations held by the Courts below has not been put into writing. See *Joy Coomar* v. *Bundhoo Lall* (1) and *Raikishori Ghose* v. *Kumudini Kanta Ghose* (2). My next contention is that there ought to have been a measurement by a qualified surveyor. The last ground upon which I challenge

(1) 9 C. 363; 12 C. L. R. 490; 5 Shome L. R. 142; 4 Ind. Dec. (N. S.) 891.
(2) 14 Ind. Cas. 377; 15 C. L. J. 138.

the decision of the Court below is that the lower Appellate Court ought to have held that the plaintiff's suit was barred by limitation.

Babu *Pannalal Chatterjee*, for the Respondent:—The judgment of the lower Appellate Court is not based on the result of the local investigation held by it. Had the judgment been based upon the result of the local investigation, then there might have been a ground of compilant, Reads *Raikishori Ghose* v. *Kumudini Kanta Ghose* (2). As regards the objection of my learned friend that there was no measurement by a qualified surveyor, my submission is that the defendants never objected to the plan on that score. As a matter of fact, the plan was prepared in their presence. Then, as regards the question of limitation, the point not having been taken before the Court below should not be entertained by your Lordships in second appeal.

Babu *Lolit Mohan Banerjee* replied.

JUDGMENT.—In this appeal by the defendants against the judgment of the Subordinate Judge of Hooghly, affirming the decree of the Munsif at Howrah, three points have been urged before us.

First, that the Courts below should have reduced to writing the result of the local investigation held by them, and in support of this contention the cases of *Raikishori Ghose* v. *Kumudini Kanta Ghose* (2) and *Joy Coomer* v. *Bundhoo Lall* (1) have been cited. The learned Subordinate Judge and the learned Munsif visited the locality in order to ascertain if the map which was put in by the plaintiff correctly depicted the locality and it appears that they did not base their judgments on the result of the local inspections held by them. The law as to local inspection is that, when a Court bases its judgment on the result of the local inspection held by it, it ought to enter, the result of such investigation on the record in order to enable the parties to adduce evidence in respect thereof. In this case the Courts simply tried to ascertain the correctness of the map filed by the plaintiff. We do not think that the defendants were in any way prejudiced by the fact of the local investigation not having been put into writing.

The second point taken is that there ought to have been a measurement by a qualified *amin* of the locality. It is evident from the judgment of the lower Appellate Court that the defendants never objected to the accuracy of the plan, Exhibit 3, before that Court. They did not traverse the evidence in the case that the map was prepared in their presence.

The third point is that the lower Appellate Court should have considered the evidence in order to determine whether the plaintiff's suit was barred by limitation or not. No such point was taken before that Court and we cannot enter into that question in second appeal.

The result is the appeal is dismissed with costs.

B. N. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 27 OF 1921.

October 13, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

BAI GULAB—PLAINTIFF—APPELLANT

versus

JIVANLAL HARILAL—DEFENDANT—RESPONDENT.

Hindu Law — Marriage — Anuloma *marriage— Marriage between* Vaishya *and illegitimate daughter of* Vaishya *born of* Sudra *woman, validity of—Evidence— Custom of caste—Attitude of caste people, relevancy of—Presumption—Marriage in fact marriage in law.*

According to the Hindu Law, the marriage between a *Vaishya* and the illegitimate daughter of a *Vaishya* born of a '*Sudra*' woman is valid. [p. 605, col. 1.]

Bai Lakshmi v. *Kaliansing*, 2 Bom. L. R. 128 and *Bai Kashi* v. *Jamnadas*, 16 Ind. Cas. 133; 14 Bom. L. R. 547, referred to.

In Smritis there is no prohibition as distinguished from disapproval of *anuloma* marriages. [p. 607, col. 2: p. 608, col. 1.]

Where there is any plea of special custom or usage of a caste, the attitude of the caste people is relevant as bearing on the existence of such a custom [p 604, col. 2.]

Reg. v. *Karsan Goja*, 2 B. H. C. R. 117 at p. 124 and *Reg.* v. *Sambbu Raghu*, 1 B. 347; 1 Ind. Jur. 380; 1 Ind. Dec. (N. S.) 231, referred to.

Where there is a marriage in fact, there is a presumption in favour of there being a marriage in law. [p. 605, col. 1.]

BAI GULAB v. JIVANLAL HARILAL.

Inderun Valungypooly Taver v. *Ramasaumy Pandia Talaver*, 13 M. I. A. 141; 12 W. R P. C. 41; 3 B. L. R. P. C. 1; 2 Suth. P. C. J. 267; 2 Sar. P. C. J. 498; 20 E. R. 504, referred to.

Appeal from the judgment of Mr. Justice Kajiji.

Mr. *Munshi* (with him Mr. *M. V. Desai*), for the Appellant.

Messrs. *Jinnah* and *Taraporevalla*, for the Respondent.

JUDGMENT.

SHAH, J.—This is an appeal from the judgment of Mr. Justice Kajiji in a suit filed by one Bai Nandubai as the next friend of the minor, Bai Gulab, for a declaration that the marriage of the minor with the defendant was null and void and for certain other reliefs.

The defendant is a Visa Modh Bania of Ahmedabad living in Bombay. The next friend of the minor is a Luhana by caste, and the minor, whose caste is a point in dispute between the parties, lived under the care of Bai Nandubai at the time of the marriage.

The plaintiff filed the suit alleging that the marriage between the minor and the defendant was the result of fraud, that the minor girl was a Sudra and that the marriage was invalid. A sum of Rs. 10,000 was claimed as damages.

The defendant pleaded that the girl was the daughter of a Bania named Jagjivandas; that the marriage was properly and openly performed as a marriage would be performed among Banias according to Hindu rites; that the girl was in fact a Bania girl and not a "Sudra." He repudiated the allegations as to fraud and damages and made a counter-claim for the restitution of conjugal rights as the husband of the minor girl.

Several issues were raised, but at the hearing, issues Nos. 4 and 7 relating to the fraudulent character of the marriage ceremony and the claim for damages were abandoned.

It was admitted before the Trial Court that the marriage ceremony was performed and that consummation had taken place. It was also admitted that the minor girl was born of the connection between Jagjivandas and one Durgabai, a Maratha woman, and that Durgabai was not married to Jagjivandas.

On a consideration of the evidence the learned Trial Judge held that the girl was a "Sudra" but was accepted as a Bania girl at the time of the marriage as she lived with Jagjivandas, who looked after her practically as his daughter until she went to live with Dhangavri, the legitimate daughter of Jagjivandas, who put her in charge of Nandubai. The learned Judge found that the marriage was valid as she was practically recognised as a Bania girl at the time. Certain other improper suggestions made by the plaintiff in the course of the hearing were found on the evidence to be unfounded, and accordingly a decree was passed disallowing the plaintiff's claim and allowing the defendant's counter-claim.

In the appeal before us it is urged that the marriage is invalid as the girl is, in fact, a Sudra girl; that the circumstance that the girl was recognised as a Bania girl by the caste people cannot make the marriage valid, if it be otherwise invalid, and that, according to the Hindu Law, a marriage between a Vaishya male and a Sudra female is invalid.

As regards the caste of the girl, on the facts admitted in these proceedings, it is clear that her mother was a Maratha woman and her father is a Visa Modh Bania. It appears from the evidence that she was brought up by the father as a Bania girl. In the Birth Register the caste is described as Wani and the names of the parents are mentioned. It appears from Gulab's evidence that her mother died when she was about two years old, and apparently she lived as a Bania girl with her father. A few months before the marriage in question, which took place in December 1919, the girl was sent away to Dhangavri, the daughter of Jagjivandas. Then Nandubai, who was a neigbour of Dhangavri, came to have charge of the girl, and the marriage in question was arranged apparently by Nandubai with the defendant. Though there is no evidence on the point, under the circumstances it is not unlikely that at least in the beginning Nandubai was acting with the knowledge and acquiescence of Dhangavri—and perhaps of the father of the girl—and it is also not unlikely under the circumstances that the parties concerned might have been aware of the parentage of the girl. However that may be, apparently the marriage was

brought about on the footing that she was a Bania girl. As a fact, however, her parentage is known now, and the question arises whether she was a Sudra or occupied any better status. The lower Court has recorded the finding that she was a Sudra, but has found that her caste is a matter of doubt according to law and that as she was treated as a Bania girl for the purpose of the marriage, she must be treated as a Bania girl. It is also urged on behalf of the defendant-respondent that, according to Hindu Law, as stated in *Brindavana* v. *Radhamani* (1), the caste of the girl would be higher than that of the mother and lower than that of the father and reliance is placed upon Manu, Chapter X, Verse 41 and Yajnavalkya, Verses 91, 92, 95, and 96 of the Yajnavalkya Smriti, Acharadhyaya with Vijnaneshwara's commentary thereon, as supporting the view that the girl in the present case cannot be treated as a Sudra. Apart from the decision in *Brindavana* v. *Radhamani* (1), the difficulty in the way of accepting this argument is that where the *anulomajas* are referred to they are referred to as born of the wedded wife of a lower class: and where the *pratilomajas* are described there is no reference to the lawful wedlock. We are not concerned here with the *pratilomajas* but in the case of *anulomajas* Yajnavalkya and Vijnaneshvara refer to those born of a wife though she may be of a different class. The word used is *vinna* which indicates a married state and not any irregular connection. It is true no doubt that in *Brindavana's* case (1) the learned Judges held that a son born of a Kshatriya male and Sudra female though not married was higher in caste than a Sudra. In fact, they applied the principle applicable to the *anulomajas* to the case of an illegitimate son. They observe at page 85 of the report as follows:—

"Though the illegitimate children of members of the regenerate classes are excluded from inheritance by the author of the Mitakshara, they are substantially recognised by him as members of their father's families for purposes of maintenance, and the absence of legal marriage is, in our judgment, no bar to the determination of their caste with reference to the law applied to the *anulomajas*, the point in analogy being the conventional notion in regard to the superior efficacy of the seed."

If the learned Judges in Madras were prepared to go so far on the strength of these texts, I am unable to discover any serious difficulty in applying the same rule in this Presidency. Of course, if this rule be applied Bai Gulab would not be a Sudra. In view of the difficulty of applying these texts in their entirety on account of the mixed marriages being very uncommon, the absence of any precedent in this Presidency on this point and the special features of the caste system on this side of India, I prefer to leave this question open, and to deal with the case on the footing that the girl is a "Sudra."

The fact that the caste people of her father, who is a Visa Modh Bania of Surat, raised no objection to her father treating her as a Bania girl before the marriage, and that the marriage was celebrated as though she were a Bania girl without any objection on the part of the caste at Ahmedabad, to which the defendant belongs, does not appear to my mind to afford a sufficiently firm basis for the view that the marriage is valid, even though otherwise it may not be valid. It is urged for the defendant that as the caste people of the defendant have raised no objection to the marriage and are not shown to be likely to do so, the marriage must be accepted as valid. No doubt where there is any plea of special custom or usage, the attitude of the caste people would be very relevant as bearing on the existence of such a custom. But it is very doubtful to my mind whether the validity of a marriage can be determined solely with reference to the position which the caste people may take up with regard to it. Their power to deal with the matter socially whenever they find any departure from the usual practice of marriage within their own circle, is undefined and practically unlimited. But this Court has not recognised the power of the caste to decide questions as to the legal validity of a particular marriage. That must be decided ultimately with reference to the

(1) 12 M. 72; 2 Ind. Dec. (N. S.) 399.

provisions of law subject, of course, to the proof of any special usage having the force of law. For instance, in *Reg* v. *Karsan Goja* (2) and *Reg.* v. *Sambhu Raghu* (3) the Court refused to recognise the interference of the caste as having any effect on the question whether the particular marriage was void or not. These rulings have no direct application here, but the principle underlying them is capable of application to this case; and, even apart from these decisions, on principle the position is clear to my mind.

The question, therefore, that arises for decision is whether, according to the Hindu law, the marriage between a Vaishya (in this case a Visa Modha Bania of Ahmedabad) and the illegitimate daughter of a Vaishya (in this case a Visa Modh Bania) born of a "Sudra" (in this case a Maratha woman) is valid. It is valid if, according to law, the marriage between a Vaishya and Sudra is not prohibited by law. If it is prohibited, it would be invalid. The *pratiloma* marriages have been held to be invalid in this Presidency. In *Bai Lakshmi* v. *Kaliansing* (4) a marriage between a Brahmin girl and a Rajput male was set aside. In *Bai Kashi* v. *Jamnadas* (5) it was held that a Brahmin woman cannot contract a valid marriage with a "Sudra." Mr. Justice Chandavarkar has discussed the various texts bearing on this question and the judgment is very helpful in deciding the question now under consideration. Both these were decisions relating to *pratiloma* marriages. But there is no decision of this Court, so far as I am aware, and none has been cited to show that *anuloma* marriages also are invalid.

It is clear that where there is a marriage in fact, there is a presumption in favour of there being a marriage in law: *Inderun Valungypooly Tater* v. *Ramasawmy Pondia Talaver* (6). The argument on behalf of the appellant has been that mixed caste marriages even of *anuloma* nature are not only obsolete but are prohibited by the Hindu law. This is a point of great importance and it is desirable to deal with it in some detail. It is important to remember at the outset that what is out of practice or obsolete is not necessarily prohibited, and the argument is based upon the assumption that what is obsolete is prohibited by law. The importance of the difference between the two positions will be clear when I refer to the texts bearing on this point.

In the first place, we have the texts of Manu (Chapter III, Verses 12 and 13) which point out that, while for the first marriage of twice born men (wives) of the same class are recommended, the *anuloma* marriages are permissible, see Sacred Books of the East, Vol. XXV, pp. 77 and 78. The following Verses Nos. 14 and 19 express disapproval of marriages of higher classes with Sudra women. But where, first, there is a provision for such marriages and, next, any strong disapproval thereof is expressed, the fair meaning is that such marriages are disapproved but option is given and they are not prohibited. That is the meaning which a commentator like Medhatithi has put upon them; and Kulluka Bhatta has interpreted them to mean that the prohibition is to be understood as limited to *pratiloma* marriages and not to be extended to *anuloma* marriages. Mr. Justice Chandavarkar has referred to these views in *Bai Kashi's* case (5) at pages 551, 552* of the report, and it is clear that, so far as Manu is concerned, no prohibition of *anuloma* marriages can be inferred.

I shall now refer to the Verses in the Yajnavalkya Smriti and Vijnaneshvara's commentary thereon bearing on the point as the position is very clearly stated there. In the third Chapter of Acharadhyaya, which relates to marriages, Yajnavalkya first lays down rules as to the selection of the bride and of the bridegroom some of which are mandatory and others clearly recommendatory only. It is not necessary to refer to them in detail. Thereafter, he proceeds to lay down the rules as to intercaste marriages in Verses 56 and 57. It will be convenient to quote here the translation of these Verses as well as of Vijnaneshvara's commentary thereon given

(2) 2 B. H. C. R. 117 at p. 124.
(3) 1 B. 347; 1 Ind. Jur. 380; 1 Ind. Dec. (N. s.) 231.
(4) 2 Bom. L. R. 128.
(5) 16 Ind. Cas. 133; 14 Bom. L. R. 547.
(6) 13 M. I. A. 141; 12 W. R. P. C. 41; 3 B. L. R. P. C. 1; 2 Suth. P. C. J. 267; 2 Sar. P. C. J. 498; 20 E. R. 504.

*Pages of 14 Bom. L. R.—[*Ed.*]

in the translation of Acharadhyaya by Srisachandra Vidyarnava (published by the Panini Office. Bhuvaneshwari Ashrama, Allahabad, in 1918) at pp. 120, 121, 122, 128 and 129:—

"Marriages are of three kinds, as they are either for the sake of enjoyment, or for the sake of a son, or for the sake of Dharma (religion.) Among these, the marriage for the sake of a son is of two kinds, necessary (Nitya) and optional (Kamya). In the necessary (Nitya) marriage for the sake of a son from the text 'the bridegroom must be of the same class and learned,' it is shown that the wife of the same class is the principal.

Now, the author mentions an optional rule with regard to Kamya marriages (In Kamya marriages, a man may marry a girl of the same caste, as in the Nitya marriage, or of lower caste). This is on the strength of the maxim, that an option may be allowed in the cases of the Kamya in relation to a Nitya form of any ceremony."

YAJNAVALKYA.

LVI.—Though it has been said that a twice born may take a wife from a Sudra family, yet that is not my opinion, because out of her, he is born himself—55.

Though it has been said:—"but for those who through desire proceed (to marry again) the following females (chosen) according to the (direct) order (of the castes), are most approved" (Manu III. 12) After having premised this (another sage, Vishnu, XXIV, 1 to 5) says:—"(1) Now a Brahmin may take four wives in the direct order of the (four) castes, (2) a Kshtriya three, (3) a Vaishya two, and thereby (though these authors, Manu and Vishnu, would allow) to the twice born men, marriages with Sudra women, yet, "it is not my," Yajnavalkya's "opinion." "Because he," the twice born, "is born himself therein." As says a Shruti (Aitareya Brahmana VII, 13, 10 or 7):—"His wife is only then a real wife (jaya from jan to be born) when he is born (jayate) in her again." Hereby assigning the reason "that out of her he is born himself," the author prohibits a marriage with a Sudra woman for one who is desirous of begetting a Naityaka (necessary) son. But in the case of not being able to produce a Naityaka son, in producing an optional son for a Brahmana, a Kshatriya, a Vaishya woman, and for a Kshatriya, a Vaishya woman, are allowed.

* * * *

Now the author describes the order in which such inter marriage may take place for him who is still desirous of sexual gratifications, though he has got a son, or has lost his wife and is not entitled to enter another order (asrama), but is anxious to remain in the order of the house-holder.

YAJNAVALKYA.

LVII.—Three, according to the order of the caste, so also two, and one for a Brahmana, a Kshatriya and Vaishya respectively (may be the wives). To a person born as a Sudra, a girl of her own caste is his wife.—57.

According to the order of the classes, for the Brahmana three, for the Kshatriya two wives, and for the Vaishya one wife are ordained. A Sudra can have only one wife born in the same class.

It is an established rule that a wife of the same class has precedence over all other wives. In the absence of her that precedes, she that follows takes precedence (as the principal wife) in the due order (of classes). This is also the order in the injunction of begetting a son either as a substitute for a necessary (Nitya) son, or an optional (Kamya) son.

As to the son of a Sudra woman being counted among sons and being described in the Chapter on Partition, *s. q.*, where the author after enumerating the son begotten by a Brahmana upon his Kshatriya wife, is Murddhavasikta, etc., ends with "this rule refers to wives regularly married," (Verses 90 and 91) that refers to the son of a person desirous of sexual enjoyment or who is simply desirous of remaining in the Asrama (order of house-holder) and does not refer to twice-born in legitimate wedlock.

* * * *

The author now describes the special ceremonies to be observed in marrying girls of the same or of different classes.

YAJNAVALKYA.

LXII.—In marrying a girl of the same class the hand should be taken, the Kshatriya girl should take hold of an arrow, the Vaishya should hold a goad, in the marriage with one of higher class—62.

In marrying a girl of one's own class, the hand should be taken, according to the rules of one's own Grihya Sutra. A Kshatriya girl should hold an arrow, a Vaishya girl should hold a goad in her marriage with persons of higher classes. A Sudra girl should take hold of the end of the skirt. As it has been said by Manu (III. 44):—

"A Sudra girl marrying one of higher class should take hold of the hem of the (bridegroom's garment)."

Taking the Verses of Yajnavalkya without the commentary, it is clear that in the opinion of Yajnavalkya a twice-born person should not take a wife from a Sudra family but if at all a person is inclined to depart from that rule, he can do so on the lines indicated in Verse No. 57. Far from there being a prohibition, there is a provision for what Yajnavalkya is not in favour of. Here Yajnavalkya has adopted a style of expression which, to my mind, is clearly indicative of disapproval on his part of such marriages; but of readiness to recognise departures from approved lines within the limits indicated in the next Verse, Vijnaneshvara makes this clear in his commentary. The word *nishedha* (meaning prohibition) used by him in the commentary in Verse No. 56 must be read subject to the limitation which he points out in that very sentence and also subject to what he clearly lays down in his commentary on Verse No. 57. This meaning is clear from the phraseology adopted by Yajnavalkya and Vijnaneshvara in Verse No. 92 in the next Chapter in the same Adhyaya. While speaking of *anulomajas* both Yajnavalkya and Vijnaneshvara use the word *vinna* (married woman) which indicates the recognition by them of valid marriages among those classes in their order. No such word is used in Verses Nos. 93 and 94 relating to *pratilomajas* Yajnavalkya expressly states in Verse No. 95 that all *pratilomajas* are bad (*asanta*) and *anulomajas* are good (*santa*).

Further, while speaking of the shares of sons belonging to different classes in Chapter I, section 8 (in the Chapter on Dayavibhaga in the Mitakshara), there is provision made for sons born of *anuloma* marriages, but there is no provision for *pratilomajas* (see Stokes' Hindu Law Books, page 402, Mitakshara, Chapter I, section 1, paragraphs 4 to 6). That indicates the validity of and not prohibition against *anuloma* marriages. I refer to these provisions only for the purpose of the present point and not as necessarily governing the rights of such sons at present.

Lastly, in the Prayaschitta Adhyaya Vijnaneshvara has made the meaning clear once more in his commentary on Verse No. 22 of that Adhyaya. I do not consider it necessary to quote the translation here but the relevant passages may be found in the second paragraph of clause 109 and clause 111 at p. 49 of the translation of the Prayaschitta Adhyaya published by the Panini Office, Bhuvaneshvari Asrama (Allahabad) in 1913.

Thus, Yajnavalkya and Vijnaneshvara, whose opinions are binding upon us, do not lay down any *prohibition* as distinguished from disapproval of *anuloma* marriages.

The next authority that we have to consider is Nilakantha's opinion as expresd in his Mayukhas. In his Vyavahara Mayukha he refers to the division of property among sons of wives of different classes and has incidentally referred to *anuloma* and *pratiloma* marriages (see Mandlik's Hindu Law, pp. 46 and 47). No doubt there the author does not deal with the question of marriage. He deals with it in his Samskara Mayukha in the chapter relating to marriages under the heading of *vivahi krama* (order of marriages). The passage may be found at p. 98 of the edition published by the Gujarati Press. The Verse No. 57 from Yajnavalkya is quoted and explained as referring to marriages other than a marriage with the woman of the same class; and the passage taken as a whole clearly shows that Nilakantha practically accepts the view as propounded in the Mitakshara that *anuloma* marriages are permissible. The passage concludes with a reference to Yajnavalkyas' Verse No. 62 and a part of Manu's Verse (III, 44) which is also quoted by Vijnaneshvara in his commentary on Verse No. 62. The translation of this part of the Mitakshara is already quoted above.

Nilakanthas's view appears to be further clear from his treatment of the subject of *anulomajas* and *pratilomajas* in the Samas-

kara Mayukha at pp. 120, 121 of the same edition.

It would thus appear that Manu and Yajnavalkya, Vijneshvara and Nilakantha are agreed that the *anuloma* marriages are not prohibited. This reading of the Mitakshara and the Saunskara Mayukha conflicts with certain observations of Chandavarkar, J., in *Bai Kashi's* case (5), in which he refers to Vijnaneshara as prohibiting such marriages. It must be remembered that the learned Judge had to deal with a *pratiloma* marriage and his observations were mainly directed to such marriages. He has fully realised the difference between the two kinds of marriages and has refrained from expressing any definite opinion as to *anuloma* marriages, as would appear from his observations at p. 553* of the report in *Bai Kashi's* case (5).

Thus, the argument for the appellant derives no support from the two principal Smritis nor from the Mitakshara and the Saunskara Mayukha. How is, then, the prohibition to be inferred contrary to these opinions? The only ground suggested is that such marriages are obsolete and must be taken to be prohibited by usage. I am unable to accept the view that, because such marriages are obsolete, they are illegal or prohibited by law. The prohibition must be found in the law-books or in the usage having the force of law. Such usage must be proved like any other fact. It may be that the fact of their being obsolete may render the proof of such usage easy. But in the present case not only is there no proof of such usage, but the evidence, such as it is, goes to show that such marriages are not treated as illegal or void by the castes concerned. It seems to me that far too much weight is sought to be placed upon the circumstance that the *anuloma* marriages are more or less obsolete. The opinions of Manu and Yajnavalkya and Vijnaneshvara and Nilakantha, if I may say so, are fairly reflected in the general attitude of the castes in these matters. They approve of marriages within their respective circles, and, generally speaking, disapprove of marriages outside their circles. They do not, however, necessarily refuse to recognise the marriages outside their circles but extend the same toleration socially to those who depart from the usual rule as the Smriti writers and the commentators have extended legally to *anuloma* marriages. The readiness on their part to recognise socially what is legally not prohibited depends necessarily upon the circumstances of each case as it arises, including the nature of the usual rule and the attitude of the parties concerned. But the attitude of the castes, which is stated in different modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages according to the rules of practice of each different caste. It does not afford a sufficient justification for treating as illegal what has not been prohibited but in terms contemplated and allowed by law.

I have discussed the question specially with reference to the principal authorities of Hindu Law accepted in this Presidency and to the decisions of this Court. I have considered the decisions of other High Courts; but as a matter of law I have not been able to find any basis therein for inferring any legal prohibition of such marriages, and, so far as they are based on usage, I do not think that they could be applied in their entirety to this Presidency. I have not, therefore, referred to them specifically. I may add that I do not see anything in these judgments which necessarily conflicts with my view. No other legal objection to the marriage is suggested. I am, therefore, of opinion that the marriage in question is valid.

I would affirm the decree appealed from and dismiss the appeal with costs. The costs to be payable by the next friend.

MACLEOD, C. J.—I agree.

J. P.

Appeal dismissed.

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OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 234 OF 1921.

August 1, 1921.

Present:—Mr. Daniels, J. C.

Musammat PARBATI—ACCUSED—APPELLANT

versus

EMPEROR—COMPLAINANT.

Reformatory Schools Act (VIII of 1897), s. 31 (1), applicability of, to girls—Girl of eleven—Murder.

Section 31 of the Reformatory Schools Act, 1897, applies to girls as well as boys.

A girl of eleven who caused the death of a child of three was sentenced to transportation for life:

Held, on appeal, that it was undesirable that a girl of such tender age should be sent to prison, and that, under the provisions of section 31 of Act VIII of 1897, she should be delivered to her father on his executing a bond to be responsible for her good behaviour for twelve months.

Appeal against an order of the Additional Sessions Judge, Sitapur, dated 4th July 1921.

Mr. *J. P. C. Bhattacharji*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—*Musammat* Parbati, a girl of ten or eleven years, has been convicted of murder under section 302, Indian Penal Code, and sentenced to transportation for life. The circumstances are unparalleled in my experience. *Musammat* Parbati and another little girl named Pachui, whose age is given as six or seven years, took *Musammat* Bishan Dei, a girl of three, with them to the jungle near the village promising to give her some *karaunda* berries. Having got her there and fed her with *karaunda* berries they proceeded to strip off her ornaments and finally pushed her into a well in which, as the medical evidence shows, she was drowned. *Musammat* Bishan Dei was missed in the evening and accused and *Musammat* Pachui were questioned, as it was known that they and the deceased had been playing together. *Musammat* Parbati denied all knowledge. The younger girl on being pressed admitted what she and *Musammat* Parbati had done. The two girls took *Musammat* Bishan Dei's mother and others to the well, which was pointed out either by Pachui or by both girls—the witnesses differ on the point. The dead body of *Musammat* Bishan Dei was found in the well and recovered. She was found to have been stripped of the ornaments which she was wearing when she left her house. The accused and *Musammat* Pachui both admitted having taken off the ornaments and buried them and took the witnesses to a spot from where the ornaments were dug up. All this took place before the Police were informed, and is proved by the deceased's mother and other witnesses of the village. The *chaukidar* was then called and made a report in which the essential facts are stated. However extraordinary such conduct may be in a child of such a tender age, there is no room for doubt that *Musammat* Parbati and *Musammat* Pachui did strip *Musammat* Bishan Dei of her ornaments and push her into the well. *Musammat* Parbati herself does not deny that deceased was dropped into the well intentionally. She seeks to lay the whole blame on *Musammat* Pachui, who was too young to be charged with a criminal offence. Apart from the fact that *Musammat* Parbati and *Musammat* Pachui had gone to the jungle together, no one can possibly believe that a child of six or seven could have carried out this transaction without the aid of the elder girl. The learned Sessions Judge, I have no doubt, would have been very glad if he could have seen his way to acquit the accused but he felt that the facts were too strong.

The learned Sessions Judge considered that he had no option but to pass a sentence of transportation for life and proposed to move the Local Government for a reduction of the sentence. It appears to me that section 31 of the Reformatory Schools Act, 1897 provides a way out. This section applies "notwithstanding anything contained in this Act or in any other enactment for the time being in force" and unlike section 8 of the same Act, it applies to girls as well as boys. Whatever she may have done, it is obviously undesirable that a girl of this tender age should be sent to prison. Under the provisions of this section I accordingly direct that the accused shall be delivered to her father on his executing a bond in one hundred rupees to the satisfaction of the District Magistrate to be responsible for the accused's good behaviour during twelve months.

N. H.

SHAMLAL KALWAR *v.* EMPEROR.

PATNA HIGH COURT.
CRIMINAL REVISION No. 506 OF 1921,
November 8, 1921.
Present:—Mr. Justice Jwala Prasad
and Mr. Justice Adami.
SHAMLAL KALWAR AND OTHERS—ACCUSED
—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Charge, alteration and addition of—Fresh examination of accused, omission, whether vitiates trial.

The accused were examined at the proper stage as required by section 342, Criminal Procedure Code, and were then called upon to enter into their defence. On the date fixed for entering into defence the prosecution amended the charge and also added a fresh charge whereupon the accused re-called and cross-examined afresh the prosecution witnesses. There was no further examination of the accused It was contended in the High Court that there should have been a fresh examination of the accused after the prosecution witnesses were cross-examined after the addition and alteration of the new charges:

Held, that on the addition and alteration of a charge the trial did not commence *de novo* and that if the Court was of opinion that there would be no prejudice to the accused it was not necessary to examine the accused afresh under section 342, Criminal Procedure Code. [p. 611, col. 2.]

Criminal revision against an order of the Sessions Judge, Champaran, dated the 31st August 1921.

Mr. *Nandkeolyar*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

JWALA PRASAD, J.—The petitioners have been convicted of rioting and with the loot of gram and wheat which the servant of one Santlal was carrying on three carts having received the same as his Maliki share from the Bataidars. Shamlal Kulwar, petitioner No. 1, has further been convicted under section 325, Indian Penal Code for having caused grievous hurt to Chethru by breaking his right ulna; Shamlal has received 18 months' rigorous imprisonment under section 147, 379, and another three months under section 325, the sentences to run consecutively. Thus, Shamlal has received 21 months' rigorous imprisonment in all. Bireh Koeri has received nine months under section 147 and six months under section 379 read with section 75, the sentences to run concurrently and the rest of the petitioners have received three months' rigorous imprisonment under each of the sections 147 and 379, the sentences to run concurrently.

The occurrence is said to be the outcome of a long standing dispute between the petitioner No. 1, Shamlal, and Santlal. Santlal claimed the land by virtue of sale deed, executed in his favour by one Amirband, father-in-law of Shamlal, who previously had got a sale-deed in his name from Shamlal. Shamlal disputed the title of Santlal in the land by virtue of the sale-deed, for he claimed that Amirband was a mere Farzidar. The dispute as to the possession of the land was set at rest by an order under section 145, Criminal Procedure Code, in favour of Santlal. Shamlal was, however, convicted in a case under section 304, Indian Penal Code, and was sentenced to two years' rigorous imprisonment. He has just come out of jail and has started the dispute with Santlal again about this land.

The case of the prosecution is that on the day of occurrence Santlal's servant Chethru went to get the Maliki share of the crop from the Bataidars with carts. The carts were loaded and started off; one was some distance, the other two were together. Accused came and beat Chethru and drove away the carts. Shamlal, on the other hand, states that he was in possession of the land through his Bataidar Bireh Koeri, petitioner No. 2, and that on the day of occurrence the complainant's men tried to loot bundles from Birsha's Kalihan and a fight occurred. Undoubtedly a fight between the parties did take place as two men on the side of the complainant, and Hira and Bireh on the side of accused were hurt.

The chief question for determination is as to how and where the occurrence took place. Both the Courts below have concurrently held that the occurrence took place as alleged by the prosecution while the carts were being taken by Chethru. This is corroborated by the fact that two of the loaded carts were found in the Kalihan of Bireh Koeri which is on the north west part of the village. The Kalihan of the Bataidar of Sant Lal is on the south and the place of occurrence is further

south. We have, therefore, no hesitation in accepting the finding of the Court below as to the occurrence itself.

Learned Counsel also moved before us for the reduction of the sentences passed upon the accused. Shamlal, petitioner No. 1, has acted in a high-handed manner and the history of the litigation shows that he disregarded the order of the Magistrate under section 145, Criminal Procedure Code, in raking up the dispute as to the possession of the land without having gone to the Civil Court. He, therefore, deserves a severe punishment and the sentence passed upon him does not, in the circumstances of the case, appear to be severe. Birsh Koeri no doubt has had a previous conviction under section 379 and, therefore, he has received an imprisonment of six months under that section. He has further received a sentence of nine months under section 147. We reduce his sentence under the latter section to six months' rigorous imprisonment and make both the sentences run concurrently. Thus, he gets six months in all. He certainly deserves a somewhat severe sentence inasmuch as he appears to have fully supported the case of Shamlal, and the two cart loads of gram and wheat were found in his Kalihan. He is also said to be the Bataidar of Shamlal. The rest of the accused appear to be mere servants and underlings of Shamlal and do not seem to have had particular interest in the dispute. They have received three months' rigorous imprisonment under each of the sections 379 and 147, the sentences running concurrently. We reduce their sentences to the term already undergone by them.

It may be mentioned that the learned Counsel on behalf of the petitioners raised a law point founded on section 342 of the Criminal Procedure Code, urging that the entire trial was vitiated and that there shouldbe a re-trial. We have carefully examined this contention with the facts and circumstances and we are of opinion that there is no substance in it. The examination and cross-examination of the prosecution witnesses finished on the 24th May 1921 and the charge was then framed. The accused were asked if they would cross-examine any of the prosecution witnesses after the charge but they declined and consequently they were called upon to enter on their defence, fixing the 11th June. On the 11th June, at the instance of the Public Prosecutor, a charge under section 325 was added against one of the accused Shamlal Kulwar and the charge under section 147 was verbally altered. The prosecution witnesses were then re-called and were cross examined on the 17th June. On the 25th of June the previous convictions against two of the accused Shamlal and Birsh Keori were framed and five defence witnesses were examined on behalf of the defence and discharged. It is not disputed that the prosecution evidence then closed and the accused were called upon to enter on their defence on the 24th May 1921 upon the charges that were originally framed. It is, however, contended that after the alteration of the charge under section 147 and the addition of the charge under section 325 on the 11th June the procedure under sections 255 to 257 of the Code of Criminal Procedure re-opened and the prosecution case, therefore, was closed on the 25th June 1921 when the accused should have been examined, and the omission to do so contravened the mandatory provisions of section 342 of the Code. In my opinion sections 255 to 257 have no application to a case when a charge is altered or added. Section 342 has consequently no application when the accused were already called on to enter on their defence prior to the alteration or the addition of the charge. The procedure for the trial in regard to the alteration or addition of a charge is laid down in sections 227 to 231 of the Code. Section 228 empowers the Court to proceed with the trial as if the new or altered charge had been the original charge. Section 229 empowers the Court either to direct a new trial or to adjourn a trial for such period as may be necessary if the Court be of opinion that the proceeding immediately with the trial is likely to prejudice the accused or the prosecution. Section 231 entitles the prosecutor and the accused to re-call or summon or re summon and examine, with reference to the altered or added charge, any witness who may have been examined and also to call any further witness whom the Court may think to be material. The addition or the alteration of a charge does not open up the trial from the beginning and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused,

In order to safeguard the interests of the parties section 231 gives them the right to re-call or re-summon any witness. The re-calling of the prosecution witness for further cross-examination in the present case by the accused was evidently under that section. Under section 227 the added or altered charge has to be read and explained to the accused. These safeguards appear to have been deemed sufficient to protect the interests of the prosecution or the accused in the case. The trial, as already observed, does not commence *de novo*, so that if the accused had been already called upon to enter on their defence there is no further obligation upon the Magistrate to examine the accused under section 342 of the Code. Therefore, the authorities on the subject, of which we are so well cognisant, do not at all apply to the present case. The contention is, therefore, overruled.

ADAMI, J.—I agree.

M. L. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 241 OF 1921.

July 29, 1921.

Present:—Mr. Daniels, J. C.

GAYA DIN *alias* NANGA—ACCUSED—APPELLANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 419, 420—Appeal from jail decided—Appeal through Counsel not maintainable.

Where an appeal received from an appellant while in jail is dismissed, a subsequent appeal on his behalf filed through Counsel cannot be entertained because there is no warrant in the Code of Criminal Procedure for differentiating between a judgment passed on an appeal filed under section 420 of the Criminal Procedure Code by an appellant in jail and a judgment on a similar appeal filed through Counsel under section 419.

Hulai v. *Emperor*, 36 Ind. Cas. 133; 3 O. L. J. 326; 17 Cr. L. J. 453, not followed.

Appeal against an order of the Additional Sessions Judge, Lucknow, at Unao, dated 6th July 1921.

Mr. *K. N. Chak*, for the Appellant.

JUDGMENT.—The appeal of this appellant having been already dismissed by this Court no further appeal lies. The view

taken in *Hulai* v. *Emperor* (1) has to my knowledge not been shared by other Judges of this Court. There is no warrant in the Code of Criminal Procedure for differentiating between a judgment passed on an appeal filed under section 420 by an appellant who is in jail and a judgment passed on a similar appeal filed through Counsel under section 419. They both stand on the same level, and the one is just as much a binding and final judgment as the other. I, therefore, hold that the present appeal does not lie, the appeal having already been decided, and I accordingly reject it.

J. P. *Appeal re ected.*

(1) 36 Ind. Cas. 133; 3 O. L. J. 326; 17 Cr. L. J. 453.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 591 OF 1921.

(CASE REFERRED No. 65 OF 1921.)

December 2, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

In re PONNUSAMI THEVAN AND ANOTHER—ACCUSED.

Penal Code (Act XLV of 1860), ss. 161, 171-E—Bribery of Panchayat—Complaint against member—Sanction of Government—Madras Village Courts Act (II of 1920).

A member of a village Panchayat, constituted under the Madras Village Courts Act, is a Judge, and the sanction of the Government is an essential precedent to the prosecution of such member of an offence under section 161 or section 171-E of the Penal Code. [p. 613, col. 1.]

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the Sessions Judge, Madura Division, in his letter, dated the 24th August 1921.

Mr. *S. Subramania Iyer*, for the Accused.

Mr. *O. Adam*, Public Prosecutor, for the Crown.

ORDER.—The complainant came before the Sub-Divisional First Class Magistrate, Usilampati with a complaint alleging that the second accused, one member of the Village Panchayat Court, lately established in his village under Madras Act II of 1920, approached

the first accused to persuade him to give his vote for the Presidentship of the Court in his favour and that he eventually paid Rs. 250 to the first accused, which the latter accepted. On these allegations the complainant charged the first accused with committing an offence punishable under section 161, Indian Penal Code, and the second accused with abetment thereof. The Magistrate returned this complaint, not with reference to the Indian Penal Code but to Act XXXIX of 1920, observing that the offence more properly fell under section 171-E, Indian Penal Code, as amended by that Act, than under the general section relating to bribery, (section 161, Indian Penal Code) and that when the allegations in a complaint fall under a particular section of law, it is not proper to take them under a general section under the same or any other law. He then said that the prosecution for an offence under section 171-E required the sanction of the Local Government, and returned the complaint for want of such sanction.

We are not concerned at present to decide whether the Magistrate's action in returning the complaint and not dismissing it was in accordance with law The case has been submitted to us by the learned Sessions Judge on the ground that section 171-E will not apply to this case. The point has been argued at considerable length by the learned Public Prosecutor, but we need not, we think, decide it at present. For, in fact, whether the accused is charged under section 171-E or 161, Indian Penal Code, the sanction of the Local Government or other authority for his prosecution is essential, in the former case with reference to the amendment of section 196, Criminal Procedure Code, effected by section 3 of Act XXXIX of 1920, and in the latter with reference to section 197 of the Criminal Procedure Code. See also Act II of 1920 and sections 19 and 21, Indian Penal Code, as justifying the description of a member of a village Panchayat as a Judge.

It is then material that, in our opinion, the Sub-Divisional Magistrate had no right to disregard the fact that the complaint was made by the complainant under section 161, Indian Penal Code. That section has not, so far as we have been shown, been repealed by anything in Act XXXIX of 1920 and is still in force. If the complainant can establish the accused's responsibility under it, there is nothing in law to prevent his doing so; and we do not know how the Magistrate can claim any discretion to insist, in such circumstances, on a complainant proceeding under one of two sections either of which may apply to the facts he alleges, rather than under the other. In these circumstances, there is no ground for our interference in what has happened. Whether the complaint proceeds under section 161 or section 171-E, Indian Penal Code, he will require a sanction. It is for him to obtain such sanction as he may be advised and to institute proceedings again with it.

M. C. P.

W. C. A.

Reference answered.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 598 OF 1921.

November 3, 1921.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Martineau.

FARID—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 164, 533—Confession—Failure of Magistrate to ask whether confession made voluntarily—Illegality.

Section 164 of the Criminal Procedure Code makes it imperative for the Magistrate, before recording a confession made to him in the course of a Police investigation, to question the person making it as to whether it is made voluntarily. Telling an accused person that he should make his statement voluntarily and questioning him as to whether he is making it voluntarily are two very different things. [p. 614, col. 2.]

The omission to question an accused person before recording his confession as to whether he is making it voluntarily is a material omission which prejudices him and the defect is a fatal one not curable by section 533 of the Criminal Procedure Code. Such a confession is not, therefore, admissible in evidence. [p. 614, col. 2.]

Feroz v. *Emperor*, 45 Ind. Cas. 843; 11 P. R. 1918 Cr.; 19 Cr. L. J. 651, *Thein Maung* v. *Emperor*, 4 Cr. L. J. 198; 8 L. B. R. 178, *Nga Shwe*

FARID *v.* EMPEROR.

Sin v. *Emperor*, 4 Cr. L. J. 385; 12 Bur. L. R. 237; 3 L. B. R. 213, *Queen-Empress* v. *Viran*, 9 M. 224; 2 Weir 125; 3 Ind. Dec. (N. S.) 553, *Jai Narayen Rai* v. *Queen-Empress*, 17 C. 862; 8 Ind Dec. (N. S.) 1119. *Queen-Empress* v. *Bhairab Chunder*, 2 C. W. N. 702, *Buta* v. *Empress*, 52 P. R. 1887 Cr., referred to.

Appeal from an order of the Sessions Judge, Hoshiarpur, dated the 30th June 1921.

Pir *Tajud-Din* and Mr. *Abdul Aziz*, for the Appellant.

Diwan *Khialinda Ram*, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—The appellant Farid, who lives at Sham Churasi in the Hoshiarpur District, has been sentenced to death for the murder of a boy named Gurbachan Singh. One Fazal was tried jointly with Farid for the murder, but has been acquitted. Gurbachan Singh, whose home was at Bhagowal, went on the 27th March last to his sister's house at Laroi. He was a student of the Government School at Hoshiarpur, and on the 31st March he left Laroi for Sham Churasi in order to take the train for Hoshiarpur, as he wanted to be present at the school on the 1st April, when the result of the first Middle School examination in which he had lately appeared was expected to be announced. On the 2nd April his dead body was found near the field of one Chiragh Din at Sham Churasi. There was a wound on his neck, and his hands were tied with his turban, which had been wound round his neck and body. The body was naked from the waist downwards, and the *pyjamas*, a book, a bundle, and some other articles were lying close by. There was also blood on the ground. The prosecution theory is that Fazal and Farid committed an unnatural offence on the boy and then murdered him.

No clue was obtained by the Police till the 11th April, when they received a letter from one Miran Bakhsh in which it was mentioned that two men named Buland Khan and Ata Muhammad had met the boy in Sham Churasi, and that Ata Muhammad had left him with Farid. Farid's house was searched and a blood stained *khes* was found in it, while the shirt that Farid was wearing was also found to have a number of small stains of blood on it. He was arrested on the 13th April, and on the 14th a *gandasa* (not blood stained) was found in a well which he pointed out in Chiragh Din's field near which the body had been found. On the 15th his confession was recorded by Sheikh Abdul Aziz, Magistrate of the First Class, and it is mainly on this confession that the conviction rests. The important question is, whether the confession, which was retracted in the Committing Magistrate's Court, is admissible in evidence, the contention of Counsel for the appellant being that the Magistrate who recorded it made no inquiry as to whether it was made voluntarily, and that it is for that reason inadmissible. In the memorandum written by Sheikh Abdul Aziz, before recording the confession, he noted that the accused was made to understand that he should make his statement voluntarily without any inducement or influence, and that he was given time to satisfy himself and make his statement voluntarily. In his evidence also he says that it was explained to Farid that whatever statement he was going to make he should make voluntarily and without influence of any sort, and that he was told that the confession could be used against him. He says that the appellant made the statement of his own accord, but he does not say, nor is it mentioned in the memorandum, that he asked the appellant whether he was making it voluntarily. Telling an accused person that he should make his statement voluntarily and questioning him as to whether he is making it voluntarily are two very different things. Section 164 of the Criminal Procedure Code makes it imperative for the Magistrate, before recording a confession made to him in the course of a Police investigation, to question the person making it as to whether it is made voluntarily. In the present case it appears that this was not done, and the question to be determined is, whether the failure to comply with the provisions of section 164 in this respect renders the confession inadmissible.

If it were not for the provisions of that section of the Criminal Procedure Code the confession would be admissible under section 21 of the Evidence Act, in the absence of proof that it was caused by any inducement,

threat or promise such as would render it irrelevant under section 24, and it may appear anomalous that the confession should be inadmissible on account of the Magistrate's omission to question the person making it as to its voluntary nature, notwithstanding that it would have been admissible if made orally, *Feroz* v. *Emperor* (1), the Magistrate not being required by law to make such an inquiry in the case of an oral confession. The authorities, however, are in favour of the view that such an omission is a fatal one.

It was held in *Thein Maung* v. *Emperor* (2) that unless the Magistrate has made a real and substantial inquiry as to the voluntary nature of a confession, the confession recorded by him under section 164 of the Criminal Procedure Code is inadmissible in evidence and the same view was taken in *Nga Shwe Sin* v. *Emperor* (3).

In *Queen-Empress* v. *Viran* (4) it was held that section 533 of the Criminal Procedure Code would not render a confession recorded under section 164 admissible where no attempt has been made to conform to the provisions of the latter section.

In *Jai Narayan Rai* v. *Queen-Empress* (5) the learned Judges said on page 871 that a confession recorded in direct violation of sections 164 and 364 would not be a confession recorded under them, and that the recorded statement to be proved, must mean a statement recorded in accordance with the provisions of the Act and not in violation of them.

In *Queen-Empress* v. *Bhairab Chunder* (6) it was held that the rule laid down in section 21 of the Evidence Act must be taken subject to the special provisions relating to confessions and statements of accused persons enacted in sections 164 and 364 of the Criminal Procedure Code, since, were it otherwise, confessions and statements of accused persons not recorded in accordance with the requirements of those sections of the Code might be proved as admissions by the accused, and the wholesome provisions elaborately laid down in those two sections practically reduced to a nullity. With regard to section 533 it was held that the defect which that section is intended to cure is one not of substance but of form only.

In *Buta* v. *Empress* (7) it was held that section 533 was presumbly not intended to override the law of evidence, and that when it was enacted that "such statement" (that is the statement recorded under section 164 or 364) "shall be admitted," the meaning is, that the document shall not be excluded merely by reason of the error of the recording Magistrate, but shall be admitted, as a matter of criminal procedure, subject to any just exceptions under the Evidence Act, other than an objection under section 91 of that Act. But in that case the error committed by the Magistrate who recorded the confession was one which had not prejudiced the accused, and as the confession was also not shown to have been improperly induced it was held to be admissible.

Section 533, after providing that when any of the provisions of section 164 or section 364 have not been complied with, the Court shall take evidence that the statement recorded was duly made, lays down that such statement shall be admitted if the error has not injured the accused as to his defence on the merits. The necessary implication appears to be that if the error is one that has injured the accused as to his defence on the merits the statement is not admissible. The omission to question the appellant before recording his confession as to whether he was making it voluntarily was a material omission which prejudiced him, and we are of opinion that the defect is a fatal one, not curable by section 533, and that the confession must, therefore, be excluded.

The rest of the evidence is insufficient to support the conviction. Ata Muhammad's statement that he left the boy with Farid is no proof of the latter's guilt in the absence of evidence to show what happened to the boy afterwards. The presence of blood stains on the appellant's shirt and *khes*, and his pointing out a well in which a

(1) 45 Ind. Cas. 848; 11 P. R. 1918 Cr.; 19 Cr. L. J. 651.
(2) 4 Cr. L. J. 198; 3 L. B. R. 178.
(3) 4 Cr. L. J. 385; 12 Bur. L. R. 237; 3 L. B. R. 218.
(4) 9 M. 224; 2 Weir 125; 3 Ind. Dec. (N. S.) 553.
(5) 17 C. 862; 8 Ind. Dec. (N. S.) 1119.
(6) 2 C. W. N. 702.

(7) 52 P. R. 1887 Cr.

CHULAI MAHTO v. SURENDRA NATH CHATTERJI.

gandasa, said to belong to Fazal, was found are also facts from which alone no inference of guilt can be drawn. The appellant is said to have pointed out other places also, but his doing so does not advance the case for the prosecution as it did not lead to the discovery of any material facts not already known.

We must accordingly hold that Farid's guilt has not been proved, and accepting his appeal we set aside the conviction and sentence and acquit him.

Z. K. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 388 OF 1921.

November 3, 1921.

Present :—Mr. Justice Adami and Mr. Justice Ross.

CHULAI MAHTO AND OTHERS—PETITIONERS

versus

SURENDRA NATH CHATTERJI AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 148—Magistrate, jurisdiction of, to depute Commissioner to survey and report—Report wrongly relied—Jurisdiction—"Local inquiry," meaning of—Estoppel.

A Magistrate who has drawn up proceedings under section 145, Criminal Procedure Code, is not empowered to delegate any of his judicial functions to any person other than a Magistrate or to direct any person to report as to who is in possession of the lands in dispute, but he has jurisdiction to direct a Pleader Commissioner to survey the disputed lands and report. [p. 617, col. 2; p. 618, col. 1.]

Achambit Das v. *Sarada Prasad*, 12 Ind. Cas. 88; 12 Cr. L. J. 480, referred to.

If a report is wrongly relied on by a Magistrate taking proceedings under section 145, Criminal Procedure Code, that would not amount to an error or want of jurisdiction which would warrant an interference of a High Court. [p. 618, col. 1.]

A mere survey of the lands in dispute in a proceeding under section 145, Criminal Procedure Code, after inquiry from all the parties as to what land is in dispute does not amount to a "local inquiry" within the meaning of section 148 of the Act but is a mere ministerial act. [p. 617, col. 2.]

A party who throughout asserts that the lands mentioned in the proceedings under section 145, Criminal Procedure Code, could be identified cannot be allowed on the judgment being against him to assert the contrary in High Court. [p. 618, col. 1.]

Marsden v. *Wardle*, (1854) 3 El. & Bl. 695 at p. 701; 2 Com. L. R 1707; 23 L J. Q. B. 263; 18 Jur. 578; 2 W. R. 455; 118 E. R. 1302; 97 R. R. 711 and *Kulada Kinkar Roy* v. *Danesh Mir*, 33 C. 33 at p. 45; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (F. B.), relied upon.

A plea of estoppel raises no question of jurisdiction. [p. 618, col 2.]

Application against an order of the Deputy Magistrate, Bhagalpur.

Mr. *S. N. Sahay*, for the Petitioner.

Messrs. *C. C. Dass* for Mr. *G. C. Pal* and *Satya Sunder Bose*, for the Opposite Party.

JUDGMENT.

ADAMI, J.—The petitioners were the third party to proceedings drawn up by the Deputy Magistrate, Bhagalpore, under section 145, Criminal Procedure Code; they apply to have the order passed in favour of the first party to those proceedings set aside.

It appears that after the proceedings under section 145 showing the boundaries of the lands in dispute had been served on all the parties, the first party on their written statement declared that the disputed 378 *bighas* of land with the boundaries as shown in the proceedings could not be identified, nor was there any trace of such lands to be found in village Dildarpur. On the 18th February 192 the Deputy Magistrate passed the following order :—

"First party states that the lands are not at all identifiable, the other parties assert that they are indentifiable. The first party offers to pay the costs of a Survey passed Pleader Commissioner for identifying the lands as per proceedings drawn up and report to this Court. I think this is reasonable and I direct the first party to deposit Rs. 100 and then I shall appoint a Commissioner."

A Commissioner was appointed, who went to the lands in dispute and submitted a map and report on the 10th of April. Copies of the report were furnished to the parties and the Pleader Commissioner was examined and cross-examined as a witness, and after his cross examination on the 14th of May the Vakil for the first party contended that as the report showed that the land, bounded as shown in the proceedings, was not identifiable, the proceedings should be cancelled. The other parties apparently resisted the contention. The Deputy Magistrate passed the following order :—

"Heard the parties on the contention of the learned Vakil of the first party that the Pleader Commissioner having reported that the lands are not fully identifiable according

to the boundaries given in the proceedings, the same, *i.e.*, the proceedings, should be cancelled. I hold that the Pleader Commissioner's report and evidence are only evidence and not a final judgment and that it is liable to be challenged by the parties who are entitled to produce further evidence in Court. I, therefore, decide to go into the evidence in the case."

On subsequent dates the witnesses produced by the three parties respectively were examined, and the Deputy Magistrate then delivered judgment declaring the first party to be in possession of the disputed lands.

The chief contention raised by Mr. S. N. Sahay on behalf of the petitioners is that the Deputy Magistrate, dealing with a case under section 145, Criminal Procedure Code, has no jurisdiction to direct a Pleader Commissioner to hold a local enquiry and cannot receive in evidence a report drawn up by the Commsisioner after completing the inquiry. He argues that Chapter XII of the Code of Criminal Procedure furnishes a complete code of procedure for the prevention of breach of the peace arising out of disputes as to immoveable property, and that the only provision in that Chapter allowing any delegation is that contained in section 148, which runs:—

"Whenever a local inquiry is necessary for the purposes of this chapter, any District Magistrate or Sub-Divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions" consistent with the law for the time being in force "as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid. The report of the person so deputed may be read as evidence in the case."

So that the Magistrate who has drawn up proceedings is precluded from deputing any one other than a Magistrate to hold any local inquiry whatever. He argues that if there is, in the opinion of a party, the necessity to have the lands demarcated or surveyed and inquiry made locally, that party should privately engage its own man to make the survey and inquiry and then put him into the witness-box and examine him like any other witness, and let him be cross-examind, for the Court is likely to give more weight to the evidence of an officer appointed by itself to do work locally than to that of a witness produced by one of the parties.

Now, if the question were whether a Magistrate who has drawn up proceedings under section 145, Criminal Procedure Code, is empowered to delegate any of his judicial functions to any person other than a Magistrate, or if such person were directed to report who was in possession of certain lands, there could, I think, be no doubt that the answer would be in the negative. Here, however, the direction was merely, "to survey the disputed lands and report within 15 days."

All the person had to do was to ascertain from the parties what lands were in dispute and then to survey the lands pointed out and to draw up a map and report what he had done. This was a ministerial act; whether the duty of survey was entrusted to a Pleader Commissioner or to an *amin* makes no difference; stress cannot be laid on the fact that the person selected to do the work bore the title of Pleader Commissioner.

I cannot hold that the mere survey of the lands after enquiry from all the parties as to what land was in dispute amounted to a "local inquiry" within the meaning of section 148, Criminal Procedure Code. It was a mere ministerial act.

It is to be noted that section 148, Criminal Procedure Code, gives the special privilege to a report made by a Magistrate under its provisions, that such report may be taken into evidence without calling the Magistrate to prove it. In the present case no such privilege was claimed and the Pleader Commissioner was called as a witness and examined and cross-examined.

If Mr. Sahay's contentions were correct a Magistrate who had drawn up proceedings under section 145, Criminal Procedure Code, would, in almost every case, be unable to get a map prepared of the disputed lands, for there are few, if any, Magistrates who are competent to carry out a survey and prepare a map. Directions to draw up a map of the disputed land in proceedings under section 145 have been frequent in the past and there is no decision to be found showing that the power to issue such directions has been disputed, except the

case of *Achambit Das* v. *Sarada Prosad* (1) where it was held that the Court has power to depute a *kanungo* to demarcate disputed lands in proceedings under section 145.

In the present case the Pleader Commissioner was examined and cross-examined by the present petitioners without objection by them as to his delegation, and I hold that the Court was fully empowered to refer to his evidence and to the map he prepared. His report should not have been admitted in evidence except for the purpose of proving that he surveyed lands, pointed out to him by the parties, as being in dispute and showing which, those lands were, but a perusal of the judgment shows that the Court did not rely on this report, the case was decided on the evidence as to possession given by the parties and the only reference made to the Commissioner or his report is the remark, after the finding that boundaries mentioned in *kabuliyats* relied on by the present petitioners were entered therein without a visit to the lands, "no wonder, therefore, that the Pleader Surveyor found that boundaries given in the *kabuliyats* of the tenants (third party) could not be identified on the spot."

Even if the report had been wrongly relied on, that would not amount to an error or want of jurisdiction which would warrant an interference of this Court.

I hold that there was no defect as to jurisdiction in the direction to the Pleader Commissioner to survey the disputed lands and report.

It is next contended that, as the first party asserted from the first that the lands could not be indentified, the Deputy Magistrate could not award them possession of lands which did not exist. This is not a question of jurisdiction, and apart from this, the petitioners throughout asserted that the lands mentioned in the proceedings could be identified, and they cannot now be allowed to assert the contrary; they "chose to wait and take the chance of judgment in their favour, and cannot now be heard to complain of excess of jurisdiction."

(1) 12 Ind. Cas. 88; 12 Cr. L. J. 480.

Marsden v. *Wardle* (2), *Kulada Kinkar Roy* v. *Danesh Mir* (3).

The third point argued by the learned Counsel for the petitioners, namely, that the petitioners were induced to execute *kabuliyats* in favour of the first party by their properly constituted agent, and that, therefore, the first party were estopped from giving evidence to show that they, and not the petitioners, were in possession, raises no question of jurisdiction, and, apart from this, the finding being that effect was not given to the *kabuliyats*, they do not stand in the way of evidence being given to show what the actual possession was at the time proceedings were taken.

I would dismiss the application.

Ross, J.—I agree.

J. P.

Application dismissed.

(2) (1854) 3 El. & Bl. 695 at p. 701; 2 Com. L. R. 1707; 23 L. J. Q. B. 263; 18 Jur. 578; 2 W. R. 455; 118 E. R. 1302; 97 R. R. 711.

(3) 33 C. 33 at p. 45; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (F. B.).

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 1307 OF 1921.

January 31, 1922.

Present:—Justice Sir William Chevis, KT.

Haji MUHAMMAD BAKHSH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 342, 537—Examination of accused—Summons-case—Irregularity—Illegality.

The procedure prescribed by section 342 of the Criminal Procedure Code is binding on the Courts, even in summons-cases, and the omission to comply with the provisions of that section is not a mere irregularity such as can be cured under section 537 of the Code, but is an illegality vitiating the trial. [p. 620, col. 2.]

Ghulla v. *Emperor*, 44 Ind. Cas. 184; 1 P. R. 1918 Cr.; 19 Cr. L. J. 280 and *Fernandes* v. *Emperor*, 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17, referred to.

MUHAMMAD BAKHSH v. EMPEROR.

Case reported by the Sessions Judge, Ferozepore, with his No. 185 of 1920.

FACTS.—On 5th March 1921 Balli Ram filed a complaint under section 447, Indian Penal Code, against Muhammad Bakhsh, Fateh Din and Ghulam Muhammad. It was alleged that the land on which the alleged trespass was committed belongs to the Nawab of Jalalabad. It was originally leased out to Shams Din and Feroz Din, and sub-let by them to Balli Ram, Arora, complainant in the case. This Balli Ram had a crop of gram standing on the land in Rabi 1920, and was shown accordingly in cultivating possession in the Revenue papers. Prior to this, however, the Estate Authorities, on the 2nd November 1919, had given this land to Haji Muhammad Bakhsh, accused, on lease. It was agreed that Haji Muhammad Bakhsh should not then disturb Balli Ram's possession, but that the latter should pay him *batai* in respect of the land in suit, and it was understood that Balli Ram should give up possession to Haji Muhammad Bakhsh after the cutting of his gram crop. It was alleged that Haji Muhammad Bakhsh and his sons took forcible possession of this land in Bhadon 1920.

The complainant put in six witnesses. The accused put in seven witnesses. The lower Court convicted the accused Haji Muhammad Bakhsh, Ghulam Muhammad and Fateh Din under section 447, Indian Penal Code, and sentenced each of the accused to 15 days' rigorous imprisonment.

GROUNDS.—Haji Muhammad Bakhsh and his two sons, Fateh Din and Ghulam Muhammad, have been convicted of criminal trespass, and sentenced under section 447, Indian Penal Code, to 15 days' rigorous imprisonment each, by Faqir Sahib Said-ud-Din, exercising the powers of a First Class Magistrate in the Ferozepore District. The land on which the alleged trespass was committed belongs to the Nawab of Jalalabad. It was originally leased out to Shams Din and Feroz Din, and sub-let by them to Bali Ram, Arora, complainant inlthe case. This Balli Ram had a crop of gram standing on the land in Rabi 1920, and was shown accordingly in cultivating possession in the Revenue papers. Prior to this, however, the Estate Authorities, on the 2nd November 1919, had given this land to Haji Muhammad Bakhsh, accused on lease. It was agreed that Haji Muham-mad Bakhsh should not then disturb Balli Ram's possession but that the latter should pay him *batai* in respect of the land in suit, and it was understood that Balli Ram should give up possession to Haji Muhammad Bakhsh after the cutting of his gram crop. It is alleged that Haji Muhammad Bakhsh and his sons took forcible possession of this land in Bhadon 1920, and it is on this account that the accused have been convicted.

Revision is sought on three grounds; firstly, that the Magistrate has not complied with the provisions of section 342 of the Criminal Procedure Code; secondly, that the lower Court is wrong in holding, in reliance on *Ram Saran* v. *Emperor* (1), that Balli Ram was in possession, and, thirdly, that there was no intent to annoy the complainant.

The correctness of the first ground is not really contested. Section 342, Criminal Procedure Code, requires that the Court shall question the accused generally on a case after the witnesses for the prosecution have been examined and before he is called on for his defence. This the Magistrate did not do. This particular provision of section 342, Criminal Procedure Code, has been held to be mandatory in *Ghulla* v. *Emperor* (2), and *Fernandez* v. *Emperor* (3). The section applies to all enquiries and trials, and is not affected by section 245 (*i*) of the Code under which, in summons-cases, the Magistrate has been given the discretion to examine or not to examine an accused; that section, moreover, appears to refer only to cases in which an accused is being acquitted. On this ground alone, therefore, the conviction would appear to be bad. This being so, it is unnecessary for me to examine the other grounds urged, but I may observe that, even on the facts as alleged, it is doubtful whether the Magistrate was right in convicting. He appears to have relied blindly on *Ram Saran* v. *Emperor* (1), and not to have examined that ruling in the light of the facts of the present case. It is doubtful whether the complainant could be held to have retained

(1) 12 P. R. 1906 Cr.; 4 Cr. L. J. 293; 54 P. L. R. 1907 (F. B.).
(2) 44 Ind. Cas. 184; 1 P. R. 1918 Cr.; 19 Cr. L. J. 280.
(3) 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17.

physical possession of the land after the Rabi crop in 1920 had been harvested. As the judgment quoted shows, the question of the interpretation of section 441, Indian Penal Code, is one of considerable difficulty [*cf. Vullappa* v. *Bheema Row* (4)] and, in the circumstances, I think that the Magistrate should have hesitated before recording a conviction.

Finally, the sentences passed appear to me to be inappropriate. Even if the convictions were to be maintined, I think that sentences of fine would meet the case. Haji Muhammad Bakhsh is a man of wealth and position, and I am strongly of opinion that he and his sons should not have been sent to prison. In this connection, and as showing the mental attitude of the Magistrate towards the accused, it may be mentioned that, although the evidence and arguments in the case had been completed on the 10th August 1921, which was Wednesday, judgment was postponed until Saturday, 13th August 1921, (it is stated that the Court had originally proposed to announce orders on the 12th August 1921 but that that date did not suit the accused) and that, on the Saturday, judgment was not announced until close upon 4 o'clock. The Sunday, Monday and Tuesday were all holidays, and consequently there would ordinarily have been no chance for the accused to move this Court until the following Wednesday, during which period they would have had to remain in jail. There was, moreover, a case between the same parties, under section 145, Criminal Procedure Code, and Wednesday, the 17th August 1921, was fixed for the announcement of orders. It is alleged that this day had been deliberately fixed in order that the accused might be subjected to the indignity of being publicly brought up in chains from the jail in order to hear the announcement of that order. In a connected case against the first two accused, under section 504, Indian Penal Code, judgment was announced at the same time, the accused were convicted and another sentence of 15 days' rigorous imprisonment in each case was passed. That case is also being forwarded to the High Court for revision.

(4) 43 Ind. Cas. 578; 41 M. 156; 6 L. W. 794; 33 M. L. J. 729; (1918) M. W. N. 81; 19 Cr. L. J. 162 (F. B.).

Messrs. *C. Bevan Petman* and *Zafarulla Khan*, for the Petitioner.

Mr. *Aziz Ahmad*, Additional Government Advocate, for the Crown.

Mr. *B. N. Kapur*, for Balli Ram, Complainant.

ORDER.—In this case Haji Muhammad Bakhsh and his two sons, Fateh Din and Ghulam Muhammad, have been convicted under section 447, Indian Penal Code, and sentenced to 15 days' rigorous imprisonment. The case has been referred to this Court by the learned Sessions Judge whose order of reference may be read along with this judgment.

The facts are fully given in the order of a reference, and there is no need to repeat them. In the first place, it is to be noticed that the provisions of section 342 were not observed. The procedure prescribed by the section is binding on the Courts and the omission to comply with the provisions of this section is not, in my opinion, a mere irregularity such as can be cured under section 537, Criminal Procedure Code, but is an illegality vitiating the trial [see *Ghulla* v. *Emperor* (2) and *Fernandez* v. *Emperor* (3)]. The conviction must, therefore, be set aside.

Having regard to the facts stated in the order of reference it seems to me impossible to hold that the land was at the time in physical possession of Balli Ram and even if it was in Balli Ram's possession, I do not think it could for a moment be said that the entry of Haji Muhammad Bakhsh and his sons was a criminal offence, the land having been leased to them by the owners and Balli Ram's tenure having long expired. Balli Ram, no doubt, had grown gram on the land in the Rabi of 1920, but it does not appear to me that he had any right to hold possession in Bhadon long after the gram had been removed or that he was, as a matter of fact, in possession. It is, therefore, out of the question to order re-trial in this case as I consider that Haji Muhammad Bakhsh and his sons have not committed any offence. The conviction is quashed.

Z. K.

Conviction quashed.

EMPEROR v. PHUMMAN RAM.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 723 OF 1921.

November 11, 1921.

Present:—Mr. Justice Harrison.

EMPEROR, THROUGH RATNA—COMPLAINANT—PETITIONER

versus

PHUMMAN RAM—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 547, whether applicable to livestock.

Section 547, Criminal Procedure Code, only provides a summary method for realising "money payable" and these words cannot be stretched so as to include livestock or other goods. [p. 622, col. 1.]

Case referred by the Sessions Judge, Ferozepore, with his No. 169 of 1921.

FACTS.—On 7th February 1919 Phumman Ram reported to the Police that his house was broken into and certain property was stolen. The Police sent up Gurditta, Ratna and Gajjan Singh for trial before Rai Sahib Dewan Gyan Nath who convicted the three accused under section 457, Indian Penal Code, on 16th July 1919, and ordered that the property be delivered to Phumman Ram and Kanhaya Lal after the result of appeal. Ratna and Gurditta, accused, appealed and were acquitted on 20th August 1919, by the Sessions Judge who said nothing as to who was to get the articles seized by the Police during the investigation. The District Magistrate had the things handed over to the complainant. Gurditta and Ratna applied to the Sub-Divisional Officer for restoration of the property unsuccessfully and then the Court ordered on 15th March 1920 that the articles be made over to them on the ground that the alleged offence has been held to be not proved. The complainant then appealed to the High Court for revision of the order dated 15th March 1920, and the High Court held that the property be restored to the apparent owner. Ratna had produced Rs. 17 himself and Rs. 140 were recovered from his uncle with whom he had deposited the sum. This property was not proved to have been stolen. Ratna claimed it as his own; Ratna applied to the Magistrate and then Phumman Ram, complainant, was summoned. Phumman Ram, complainant, stated that he had disposed of the property and had nothing to pay. The Magistrate referred Ratna to a Civil Court. Ratna has now applied for revision of this order urging that the Magistrate had power to realize the cash Rs. 157 from Phumman as a fine.

GROUNDS.—The applicant Ratna was convicted along with other persons in a case under section 457, Indian Penal Code, on 16th July 1919, but was acquitted in appeal. Certain property was recovered from the various accused and this was apparently delivered to the complainant in spite of the acquittal of the accused. The applicant, Ratna, first applied for restoration of the property to this Court and it was accordingly ordered to be restored. The complainant, Phumman Ram, who had been in possession of the property applied to the High Court for revision of this order, and it was held in the revision order that the property should be restored to the "apparent owner" (*vide* Criminal Revision No. 651 of 1920, order dated 25th June 1920). It will appear from the judgments of Original and Appellate Courts in the 457 Indian Penal Code case that applicant, Ratna, had produced Rs. 17 himself and Rs. 140 were recovered from his uncle, with whom he had deposited the sum. He was also found in possession of some sheep and goats believed to have been purchased with the stolen money. According to the order in appeal passed by Mr. Parker (Sessions Judge) this property in possession of Ratna was not proved to have been stolen. Ratna had claimed it as his own. In accordance with the revision order of the High Court, Ratna is, therefore, entitled to this property.

Ratna applied to the Magistrate for the purpose. Phumman Ram was summoned but he made a statement that he had disposed of the property and had nothing to pay. The Magistrate held that he had no power to realize the property from Phumman Ram under the circumstances and referred Ratna to a Civil Court. Ratna has now applied for revision of this order.

The only point urged before me is that the Magistrate had power to realize the cash Rs. 157, (Rs. 140 and Rs. 17) at any rate, from Phumman Ram as a fine under section 547, Criminal Procedure Code. *Crown* v. *Hira Nand* (1) is cited as an authority.

(1) 29 P. R. 1903 Cr.; 2 P.L. R. 1904; 1 Cr. L. J. 32.

The contention appears to be correct. I am of opinion that the Magistrate should have realized the sum of Rs. 157 as a fine from Phumman Ram and paid it to the applicant. I accordingly submit the records for the orders of the High Court.

Mr. *Ghulam Rasul*, for the Petitioner.

ORDER.—The facts are clearly explained in the order of reference of the learned Sessions Judge. On the conclusion of a criminal case of burglary by the acceptance of the appeal by the Sessions Judge, it was discovered that the articles and money which were to have been returned to the complainants on and only on the appeal being dismissed had been returned in anticipation of dismissal. After a fruitless application to the Sub Divisional Magistrate the Sessions Judge on revision ordered these goods and the money to be returned to the accused. From this order a revision was presented to the High Court and accepted by Chevis, J., so far as certain definite articles were concerned. The remainder were to be returned to the accused, that is to say, the original order of the Sessions Judge regarding them was allowed to stand. The accused, Ratna, applied to the Magistrate who referred him to the Civil Court and the Sessions Judge makes this reference so far as the cash in the hands of the complainant is concerned. Counsel urges that the complainant should also be ordered to return the 28 goats which are not covered by and included in the order of Chevis, J., or rather 27 goats and Rs. 10 realised by sale of the twenty-eighth, and that the value of the animals should be recovered from him as a fine. Although the order, as originally passed by the Sessions Judge, may have referred to the goats, section 547, Criminal Procedure Code, only provides a summary method for realising "money payable" and these words cannot be stretched so as to include livestock or other goods. The meaning of the word "money" is quite clear; section 547 applies to money only and, moreover, the value of such goods is not known and cannot be ascertained. I, therefore, accept the revision and direct the Magistrate to recover the money in the hands of the complainant as if it were a fine and to pay it over to the accused.

Z. K. *Revision accepted.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 563 OF 1921.

November 14, 1921.

Present :—Mr. Justice Chevis.

LALA—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Approver—Corroboration—Confession of co-accused.

In cases where a large number of persons have been arrested by the Police and confessions are obtained one after the other, it is likely enough that those confessions should agree with each other, and each man would be likely to name as far as possible those persons who have already been named in the previous confessions. The fact of any particular person having been named in the confessions of more than one of the co-accused cannot, therefore, be regarded as sufficiently reliable corroboration of the statement of the approver. In such a case, each person accused is entitled to claim that as against him the statement of the approver shall be corroborated by some reliable evidence. [p. 623, cols. 1 & 2; p 624, col 2]

Appeal from an order of the Sessions Judge, Karnal, dated the 29th April 1921.

Lala *Jai Lal*, R. B. Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—This is an appeal from a conviction under sections 395 and 435, Indian Penal Code, by the Sessions Judge of Karnal. Twelve persons were committed for trial in this case, of whom the learned Sessions Judge has acquitted three and convicted the remaining nine. Out of these nine, six have preferred appeals to this Court, namely, Bhartu, Lala, Harbal Nathu son of Badlu, caste Kahar, Dalip and Mangat. This judgment will cover all the six appeals.

On the night of 15-16th June 1920 a dacoity accompanied by arson was committed in the house of Surjan, a Bania of village Garh Sarnai, in the Karnal Tahsil. A telegram had previously been sent by the Circle Inspector of Bharaut in the Meerut District to the effect that a gang of dacoits were crossing the river Jamna to commit dacoity. This telegram unfortunately reached the Police Station at Gharanda in which Thana the village of Garh Sarnai is situate only after the dacoity had been committed. The Circle Inspector, Bharaut, had given orders that suspects absent from home should be watched and a Head Constable and two constables, who had gone to village Bam, found Nathu Lohar absent from home,

and on his returning to the village the Police caught hold of him. Property was recovered from him and various names were ascertained from him with the result that the present case was challaned and committed to Sessions.

The principal witness in this case is the approver, Mam Raj. The learned Sessions Judge is of opinion that his account of the dacoity is true, and I see no reason to come to a different finding But it is obviously necessary that there should be corroboration of the approver's statement as against each of the appellants.

In this case none of the witnesses, who saw any members of the gang on the way to and from the scene of the dacoity, is able to identify any of the prisoners and none of the villagers of Garh Sarnai can give evidence as to their identity. So the convictions rest solely on the statement of the approver corroborated by retracted confessions of certain co accused, and in some cases on evidence as to recovery of the stolen property. The property recovered has been fully identified.

The learned Sessions Judge has laid down as a test of the corroboration of the approver's story that any particular person implicated by the approver should also be implicated by the confessions of at least two co-accused. The Sessions Judge points out that there are no less than four independent confessions by persons other than the approver, and he considers that implication by one confession of a co-accused would be insufficient corroboration of the approver's statement, while implication by two co-accused would be sufficient. He argues that though retracted confessions may not be of great value, some weight must be attached to each confession, and that where the same individual is named by more than one of the co-accused confessing, the corroboration may be regarded as sufficient. I regret to say that I am unable to accept this view as a test. In cases where a large number of persons have been arrested by the Police and confessions are obtained one after the other it seems to me likely enough that those confessions should agree with each other, and that each man would be likely to name as far as possible those persons who have already been named in the previous confessions. It may, of course, be said that when a man confesses he does not necessarily know the details of a previous confession made by another accused, but I do not think it necessarily follows that he should be unable to ascertain what persons have been implicated in the previous confessions. In the course of the investigation it might easily be that the subordinate Police Officers concerned would know more or less the names of the persons who have been implicated in confessions, and a man who makes a confession might thus be able to ascertain what persons have been named in an earlier confession. I am unable, therefore, to regard the fact of any particular person having been named in the confession of more than one of the co-accused as sufficiently reliable corroboration of the statement of the approver. I will now take up the case of each of the appellants separately, and will first deal with the case of Lala.

This man himself made a confession before a First Class Magistrate and he pointed out that certain ornaments which had been satisfactorily proved to be a part of the property looted in this case of dacoity, were concealed in the rubbish heap near his house. He is named both by the approver and by other co accused before the Committing Magistrate. He admitted that he had made a confession but alleged that he had been beaten by the Police. He also charged the approver, Mam Raj, with enmity. At his trial he only called one defence witness, who is his own father, to corroborate his statement of having been beaten by the Police. I here note that the learned Sessions Judge has convicted all the appellants both of committing dacoity and also of committing arson, and has sentenced them to separate terms of imprisonment under both heads; the sentences to run concurrently. In the appeal of Lala to this Court I see that he appeals only from his conviction under section 395 and at the end of the appeal he states that he does not wish to appeal in the other case. So far as is known to me, there is no conviction against him except the convictions under sections 435 and 395, Indian Penal Code, in the present case, yet I fail entirely to understand how he can allege that he is innocent of the dacoity and has, at the same time, not appealed from his conviction under section 435 of arson committed in the course of the dacoity.

In taking the present appeal as an appeal from both convictions I still have no hesitation in rejecting the appeal. The assessors, too, were of opinion that the guilt of this man was proved. There is ample evidence against him in this case and his appeal will stand as dismissed.

Next, I will deal with the appeal of Harbal, who has also appealed only from his conviction under section 395, Indian Penal Code. Here the same remarks apply as in the case of the appeal of Lala. This man confessed before a First Class Magistrate and he is implicated by confessions of co-accused. Certain ornaments, which have been proved to be a part of the property looted in the dacoity, were recovered on search of his house from the persons of his mother and his sister in-law. He stated that these ornaments belonged to the persons from whom they were recovered. Three witnesses were produced for the defence. The first two merely stated that the jewellery was taken from his sister in-law, and this is, no doubt, correct, but they do not give evidence as to the ownership of this jewellery. The third witness was the sister in-law herself and she, of course, claimed the ornaments taken from her as her own. Harbal, like others, attempts to explain his confession by saying that the Sub-Inspector beat him and made him unconscious. In his case there is ample corroboration of the approver's story, and I agree with the assessors and the learned Sessions Judge as to the guilt of Harbal, and I dismiss his appeal.

Next comes the appeal of Bhartu. This man is implicated by the evidence of the approver and by three confessions of co-accused. None of the stolen property was recovered from him and there is no corroboration of the approver's evidence as against this appellant except the statement of the co-accused. I am unable to hold the evidence to be sufficient in this case and his appeal is accepted. I note that the assessors regarded the evidence as insufficient in his case.

I will now deal with the appeal of Mangat. Here the corroboration of the approver's story lies in the confessions of four co accused. Apart from this, there is no evidence against him except that he was absent from his village on the day after the commission of the dacoity. This man is a registered *badmash*. I do not see that the fact of his absence from the village on the night in question can be taken as any proof that he was at the scene of the dacoity. The assessors considered this man to be guilty, but I am unable to distinguish his case from that of Bhartu and I accept his appeal.

I next take up the appeal of Nathu Kabar. Here the only corroboration of the approver's story is the confession of three of the co-accused. The assessors regarded this as insufficient for conviction and I agree with them. His appeal is accepted.

Last comes the appeal of Dalip. Here the corroboration of the approver's story lies in the confession of two of the co-accused. The learned Sessions Judge himself hesitated before convicting Dalip, but the approver in one part of his story states that at the distribution of the plunder there was a scramble and Dalip got nothing, so all the rest of the dacoits contributed a little to make up his share. The learned Sessions Judge remarks that the approver could not have invented such a story. This is probably correct, but it does not in the least follow that Dalip is the man concerned. It would be perfectly easy for the approver to conceal the real name of the person concerned and to substitute the name of Dalip. It is obvious that it is always open to the approver to screen those men who are his real friends and accomplices, and to substitute the names of others who are not really concerned. Those persons whose names are substituted generally allege enmity but in most cases they are unable to prove such enmity. There is no satisfactory proof of the allegations of enmity in this case but still each person accused is entitled to claim that as against him the statement of the approver shall be corroborated by some reliable evidence. The appeal of Dalip is also accepted.

The result is that I accept the appeals of Nathu Kabar, Dalip, Bhartu and Mangat, and reversing their convictions and sentences I acquit them and order that they be released. In the cases of Lala and Harbal I confirm the convictions and sentences and dismiss their appeals.

Z. K.

Appeal dismissed.

GHULAM MUHAMMAD v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 1155 OF 1921.

December 9, 1921.

Present:—Mr. Justice Chevis.

GHULAM MUHAMMAD—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 263—Summary trial—Record, contents of—Conviction based on appearance of accused.

Section 263 of the Criminal Procedure Code requires that the Magistrate's record under that section shall state the offence complained of and the offence, if any, proved, the plea of the accused and his examination, if any, the finding and in case of a conviction, a brief statement of the reasons therefor. These particulars should be specified in different columns of the register and should not be lumped together in one column. [p 626, col. 1.]

A man cannot be convicted on his appearance and manner of speech An ugly, stammering, nervous man may be innocent, while a good looking, plausible man may be a scoundrel.[p 6 6, cols. 1 & 2]

Where a Magistrate in convicting an accused remarks in the judgment, "his appearance and the manner of his speech are such that I have no doubt he committed the offence", it is quite sufficient to condemn the whole judgment. [p. 626, col. 1.]

Case reported by the Sessions Judge, Lyallpore, with his No. 785 of 1921.

FACTS.—The accused applicant has been convicted in a summary trial of an offence under section 182, Indian Penal Code and has been sentenced to undergo one month's rigorous imprisonment. He has already undergone 14 days' imprisonment and is now on bail.

The accused on conviction by Khan Bahadur Sayyed Mehdi Shah, Honorary Magistrate, exercising the powers of a Magistrate of the First Class in the Lyallpore District, was sentenced, by order dated 22nd April 1921, under section 182 of the Indian Penal Code, to one month's rigorous imprisonment.

GROUNDS.—On behalf of the accused it is contended that a technical offence under section 182, Indian Penal Code should not have been tried summarily and in support of this view ruling cited as *Bakkhu* v. *Crown* (1), has been relied upon. On this point I need say nothing beyond this that the Legislature did not contemplate the removal of this offence from the category of offences scheduled as triable summarily.

The next objection is, that the judgment of the lower Court does not give the reasons of conviction as required under section 263 (*h*), Criminal Procedure Code. The judgment runs as follows:—"Accused does not plead guilty. Prosecution evidence supports the prosecution story. Witnesses are reliable. Defence evidence is not of much use, etc. Accused did lay out a false claim. His appearance and speech are such that I have no doubt that he committed the offence." Now, this judgment certainly does not give such reasons as would assist the Revisional Court in coming to any decision on the merits of the case. Similar and in fact more lengthy judgments have been set aside by different High Courts on account of this defect.

It is sufficient to refer to the following amongst other such judgments:—

1. *Punjab Singh, In the matter of the Petition of* (2), 2. *Queen-Empress* v. *Mukundi Lal* (3), in which it was remarked that brevity should not tend to obscurity.

3. *Queen-Empress* v. *Shidganda* (4), 4. *Mehtab* v. *Empress* (5), in which it was laid down that discussion relating to the weakness of the defence was not sufficient. 5. *Sher Singh* v. *Empress* (6).

In the judgment under reference the Magistrate does not even state what the false information was which the accused is said to have furnished, it does not say whether that information was false and how it was proved to be false and whether it was false to the accused's knowledge.

The record behind the trial shows that the accused had applied to the Superintendent of Police requesting that officer to order an enquiry into the high-handed conduct of certain *lambardars* and other people who, according to the accused's story, had belaboured and illegally confined his son and who had also robbed him of cash, etc. We do

(1) 2 P. R. 1874 Cr.

(2) 6 C. 579; 3 Ind. Dec. (N. S.) 377.
(3) 21 A. 189; A. W. N. (1899) 34; 9 Ind. Dec. (N. S.) 830.
(4) 18 B. 97; 9 Ind. Dec. (N. S.) 573.
(5) 7 P. R. 1887 Cr.
(6) 5 P. R. 1889 Cr.

not know how the falsity of this information was established in the summary trial before the Magistrate who has failed to make any mention of it in the brief judgment recorded by him.

In my opinion the judgment is not such as meets the requirements of section 263 (*h*), Criminal Procedure Code, and should be quashed. The case is to be referred to the High Court for orders. The accused applicant will remain out on bail pending decision of this reference.

ORDER.—Ghulam Muhammad has been convicted summarily of an offence under section 182, Indian Penal Code. The law requires that the Magistrate's record shall state the offence complained of and the offence, if any, proved, the plea of the accused and his examination, if any, the finding and in case of a conviction a brief statement of the reasons therefor, see section 262, Criminal Procedure Code. The register has been produced before me, and I find that the practice is to lump together in one column all the particulars required by clause, (*g*) to (*j*) of section 263. In the present case the judgment, if so it may be described, begins by saying the accused pleads not guilty. It next says the prosecution evidence supports the prosecution story and the witnesses are reliable. It then discusses the defence evidence, pointing out that one gives only hearsay evidence and the others plead ignorance. It then goes on to refer to a statement made by the accused, this is a reversion to clause (*g*). It says that accused apparently brought a false case in Court in "order to avoid the consequences of this case."

From this I gather that the charge against the accused is, that he supplied false information to the Police, charging some one with having committed a theft in his house. The judgment winds up by saying: "In my opinion the accused certainly brought a false case (this sounds as if he was being convicted of bringing a false case in Court). His appearance and the manner of his speech are such that I have no doubt that he committed the offence." This last sentense in itself is, I consider, quite sufficient to condemn the whole judgment. How far the Magistrate has convicted on the evidence and how far an accused's appearance it is impossible to say. Obviously, a man cannot be convicted on his appearance and manner of speech. An ugly, stammering, nervous man may be innocent, while a good looking, plausible man may be a scoundrel.

I set aside the conviction and sentence and, as the petitioner has already undergone 14 days of the month's imprisonment to which he was sentenced, I do not order a re trial.

Z K.

Conviction set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 63 OF 1921.

May 17, 1921.

Present:—Syed Wezir Hasan, A. J. C.

RAMPAL—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 45—Police already informed of commission of offence—Information, same, whether to be supplied.

The provisions of section 45, Criminal Procedure Code, are not intended to be punitive in themselves but are intended to facilitate information as to the commission of an offence and thereby to facilitate steps being taken in the investigation of the same; so that, when the Police has somehow been informed of the commission of an offence, no further duty or obligation lies upon the persons named in the section for adding their own weight to the information already supplied by furnishing fresh information on the same lines. [p. 628, col. 1.]

Empress v. *Sashi Bhusan Chuckrabutty*, 4 C. 623; 2 Ind. Dec. (N. S.) 895, *Queen-Empress* v. *Gopal Singh*, 20 C. 316; 10 Ind. Dec. (N S.) 214, and *Pandya Nayak, In the matter of the petition of*, 7 M. 436; 1 Weir 102; 2 Ind. Dec. (N. S.) 888, referred to.

Application against an order of the Sessions Judge, Lucknow, dated the 25th April 1921, confirming that of the Magistrate, First Class, Bara Banki, dated the 31st March 1921.

Mr. *Haider Husain*, for the Applicant.

The Government Pleader, for the Crown.

RAMPAL v. EMPEROR.

JUDGMENT.—This is an application under sections 435 and 439 of the Code of Criminal Procedure against an order of the Sessions Judge of Lucknow, dated the 25th April 1921, confirming an order passed by a Magistrate of the First Class of Bara Banki, dated the 31st March 1921, under which the applicant was sentenced to six months' rigorous imprisonment and a fine of Rs. 50 for having committed an offence under section 202 of the Indian Penal Code.

The facts of the case are as follows:—On the 31st May 1920 one Chote Lal killed a certain Sadhu with a spear in the village of Loni Katra. Chote Lal was tried and convicted by the Court of Session of an offence under section 304 of the Indian Penal Code. The applicant along with one Kamta and another person were subsequently tried under section 201 of the Indian Penal Code by the Magistrate mentioned above. The applicant was convicted by that Magistrate under section 202 and not under section 201 of the Indian Penal Code. The admitted facts show that about the evening of the 30th May 1920, the day on which the Sadhu was killed, two reports were made one after the other with an interval, the exactness of which it is difficult to discover, one by Kamta and another later by the Chaukidar of the village. The report which was made by Kamta was admittedly a false one. The report made by the Chaukidar of the village was a true one. The former stated that the Sadhu was killed by a bullock, while the latter said that he was killed by Chote Lal. At the time of the making of this report by Kamta, the applicant was also there and the true decision of this case depends upon what happened when Kamta was making his report to the Police Sub-Inspector and as to what part the applicant took in making the report. The events attending upon the making of the report can be granted only from the evidence of the Sub-Inspector. In my opinion this gentleman has tried to introduce a good deal of fencing in his evidence. Whatever he stated in the first instance he tried to negative in the next breath and the general impression left on my mind as to his evidence is, that the signatures which he obtained on the report in writing made by Kamta, of the applicant and the other man were in token of the fact that that report was made by Kamta. This is the view which has been taken of the evidence by the Deputy Magistrate also and I am glad I am in agreement with him in interpreting that evidence. The Sub-Inspector, so far as the oral statement of Kamta was concerned, stated that the accused (by which he intended to mean all the three including the applicant) first of all gave him the information orally. In almost the next breath he said, "Kamta gave me the information orally." It is impossible to draw any definite conclusion from the statements of this nature. I am, however, satisfied that the part which the applicant took with reference to Kamta's report was only this much that he identified Kamta to the satisfaction of the Sub-Inspector and that he also attested the fact that the report in writing was the one which was made by that Kamta. I am, therefore, of opinion that the applicant is not guilty of anything connected with the information contained in the report made by Kamta in writing. But this finding is not enough to exonerate him from the offence of which he has been convicted by the Courts below, that is, of section 202 of the Indian Penal Code.

It is admitted that the applicant himself made no report of the commission of the offence and if other elements of section 45 of the Code of Criminal Procedure were satisfied, I have no doubt that the applicant would be guilty of an offence under section 202 of the Indian Penal Code. Two points were urged before me by the learned Counsel for the applicant to take out the case from the provisions of section 202 of the Code,—(1) that it was not shown that the applicant was the headman or Mukhia of the village in which the offence was committed. This is a question of fact, which does not seem to have been raised at any stage of the proceedings before and the learned Sessions Judge in his judgment assumes, and no protest seems to have been made against the assumption, that the applicant is the Mukhia of the village Loni Katra. I, therefore, reject this contention.

The second point is more serious and it is to the effect that the report as to the commission of the offence having been admittedly

made in the presence of the applicant by the Chaukidar and that report being admittedly correct in all particulars no further duty or obligation lay upon the applicant under the terms of section 45, Criminal Procedure Code, for adding his own weight to the information supplied by the Chaukidar by furnishing fresh information on the same lines. In my opinion the contention is sound and must be accepted. It is admitted that, in consequence of the information furnished by the village Chaukidar, the Sub-Inspector took action, the result of which was the conviction of the offender, Chote Lal. Consequently, justice has been fully satisfied. The provisions of the section are not intended to be punitive in themselves but are intended to facilitate information as to the commission of an offense and thereby to facilitate steps being taken in the investigation of the same. All this object was attained by what happened in this case and particularly by what the Chaukidar had informed the Sub-Inspector in the clearest terms. This view of the law is supported by a series of authorities, three of which have been referred to by the learned Counsel for the applicant in the course of the arguments before me. They are 1. *Empress* v. *Sashi Bhusan Chuckrabutty* (1), 2. *Queen-Empress* v. *Gopal Singh* (2) and 3. *Panaya Nayak, In the matter of the petition of* (3).

I, therefore, accept the application, set aside the conviction and sentence of the applicant and direct that the bail, on which he stands at present, be cancelled and the fine, if paid, be refunded to him.

J. P. *Application allowed.*

(1) 4 C. 623; 2 Ind. Dec. (N. S.) 395.
(2) 20 C. 316; 10 Ind. Dec (N. S.) 214.
(3) 7 M 456; 1 Weir 102; 2 Ind. Dec. (N. S.) 888.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 637 OF 1921.

November 13, 1921.

Present :—Mr. Justice Abdul Qadir.

MUHAMMAD—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 457, 460—Death caused in house-breaking—"At the time of the committing of house-breaking by night," meaning of.

The expression "at the time of the commission of house-breaking by night" in section 460 of the Penal Code must be limited to the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time. [p. 629, col 2.]

Jaffir v. *Empress*, 2 P. R. 1887 Cr., followed.

Accused was one of several persons who broke into the complainant's house by effecting a breach in the wall. On issuing from the house the accused was caught while his companions ran away. Some of the latter were armed with *dangs* and inflicted blows on one of the pursuers as a result of which the latter died:

Held, that the accused was not guilty of an offence under section 460 of the Penal Code, inasmuch as the offence of house-breaking had become complete before death was caused, but that he was guilty of an offence under section 457 of the Penal Code. [p. 630, cols. 1 & 2.]

Appeal from an order of the Additional Sessions Judge, Montgomery, dated the 30th June 1921.

Dr. *Muhammad Iqbal*, for the Appellant.

JUDGMENT.—One Muhammad was committed to the Sessions on a charge under section 302, Indian Penal Code, and there was a charge in the alternative under section 460, Indian Penal Code. The Sessions Judge has acquitted him of the graver charge, in agreement with the opinion expressed by the Assessors, but has convicted him of an offence under section 460, Indian Penal Code and sentenced him to rigorous imprisonment for seven years including three months' solitary confinement. Against this conviction and sentence he has preferred an appeal through Dr. Muhammad Iqbal, who argues that section 460, Indian Penal Code is not applicable, and that the sentence awarded may be reduced if the conviction is altered to one under any other section.

MUHAMMAD v. EMPEROR.

The facts of the case are fully stated in the judgment of the learned Sessions Judge and may be only briefly summarised here. On the night of the 16th April 1921, there was a burglary in the village Khajjian, where four thieves broke into the house of Phallu by effecting a breach in the wall of his house. He was awakened by a noise and saw three men standing outside the breach and a fourth man just coming out of the hole. The three men ran away when they saw him but he secured the man whom he had noticed coming out of the breach in the wall. The other three returned to rescue the captured man and succeeded in rescuing him by beating Phallu with sticks. All the four burglars were running away when certain neighbours of Phallu arrived, including Hassu, deceased. Hassu is said to have caught hold of the same man who had been rescued from Phallu, but he received certain injuries of which he died on the spot. The story of the prosecution was, that the captured man, who is the present appellant, had an iron implement of house-breaking, called *sandhewa*, in his hand when he was caught and he thrust it with both his hands into the ribs of Hassu and thereby caused his death. It was on the basis of this story that Muhammad was charged with the offence of murder. The medical evidence in the case, however, showed that this story was not true. The three injuries caused to the deceased were all contused injuries resulting from blows by a blunt weapon like a *dang* or a *lathi* and the iron implement which had a pointed sharp edge was not found to have been thrust in the manner described by the eye-witnesses. The Court accepted the theory that Hassu must have been beaten by the companions of Muhammad who could not probably rescue him as a number of villagers arrived. It has not been held that any of the injuries to the deceased was caused by Muhammad and he was, therefore, acquitted of the charge under section 302, Indian Penal Code. In convicting him under section 460, Indian Penal Code, the Court observed that, "as death was caused in the commission of the house-breaking the accused as one of the gang of thieves is guilty under section 460, Indian Penal Code." Dr. Muhammad Iqbal's contention is that the offence of house breaking by night had been completed when Hassu arrived on the scene. The thieves were admittedly running away when Hassu tried to catch one of them and any injury that was caused to him by any companion of Muhammad could not be said to be caused at the time of committing the house-breaking or the house-trespass in question. I think this contention must prevail. It was held by Plowden, J., in a ruling published as *Jaffir* v. *Empress* (1) in a similar case, that "section 460, Indian Penal Code was not applicable, as the expression in that section 'at the time of the committing of house-breaking by night' must be limited to the time during which the criminal trespass continues which forms an element in house trespass, which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time." This authority appears to be on all fours with the present case and I hold that the conviction under section 460, Indian Penal Code is not correct and cannot be maintained.

There remains the question as to what other offence has been committed by the appellant. His learned Counsel does not dispute the fact that the appellant was caught at the spot immediately after the burglary. There can be no doubt that he was one of the burglars. It is argued, however, that his offence falls only under section 456, Indian Penal Code, being simple house-breaking by night, as there is no finding as to the intention with which the house-breaking was committed. It is obvious that, if it were presumed that the four men came with the intention of committing theft, an offence under section 457, Indian Penal Code would be clearly constituted and, considering that the thieves had *dangs* in their hands, section 458, Indian Penal Code, would also be applicable, as that would amount to having made preparation for causing hurt to any person. Dr. Iqbal urges that there is no convincing evidence that his client was armed with a *dang*. From the discrepant evidence produced by the prosecution it cannot be concluded that the possession of a *dang* by the appellant is

(1) 2 P.R. 1882 Cr.

proved. It is not unlikely that he was empty-handed when he crawled out of the breach in the wall and as he was the only one of the culprits who was arrested, the prosecution witnesses in their anxiety to have some one punished for the death of Hassu began to attribute to him the possession first of the iron implement and then of a *dang* in addition to that implement. Sardara, P. W. No. 2, says "the accused had a *dang* in his hand as well... The *sandhewa* was in one hand and the *dang* in the other." This describes a somewhat impossible position for a man who has been caught on crawling out of a hole in a wall. A *dang* and a *sandhewa* are said to have been found lying near the breach when the Police arrived and may have been left there by any of the four men. Phallu, P. W. No. 4, says "accused had a *dang* in his hand but did not strike Hassu with it.....When the accused issued from the breach he had the *sandhewa* in his hand but not the *dang*. When he escaped from me he had only the *sandhewa* in his hand. I did not see the *dang* in his hand when Hassu seized him." Allu (P. W. No. 5), son of Hassu, deceased, does not say that the appellant had any *dang* and adds that the *dang* was found on the ground. Jiwan (P. W. No. 6) also states that the *dang* in Court was near the breach. It cannot be said, therefore, that the appellant had been armed with a *dang* or had made preparation for causing hurt before he came to commit the offence. This view of the evidence may possibly exclude the applicability of section 458, Indian Penal Code, to the offence committed by Muhammad but I cannot accept the argument that the offence was only one under section 456, Indian Penal Code. I think an offence under section 457, Indian Penal Code, is clearly made out against the appellant. The presence of the *sandhewa* on the spot and the breach in the wall leave no doubt as to the intention with which the house-breaking was committed and I think the intention of theft can be very safely presumed. The Court below did not record a finding on that point because it held the offence to be one under section 460, Indian Penal Code. I hold that the appellant is guilty of an offence under section 457, Indian Penal Code and, though he was not charged with that offence, I do not think he can be prejudiced by his conviction being altered to one under section 457, Indian Penal Code. As it has been held that he was not directly responsible for the death of Hassu and as constructive responsibility is ruled out by the exclusion of section 460, Indian Penal Code, a reduction of the sentence awarded against him seems to be called for and his sentence is hereby reduced to one of four years' rigorous imprisonment for an offence under section 457, Indian Penal Code. To this extent his appeal is accepted.

Z. K.

Appeal partly accepted.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 523 OF 1921.

November 12, 1921.

Present :—Mr. Justice Chevis.

ATMA RAM—COMPLAINANT—PETITIONER

versus

ALLAH WASAYA—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145—Property in possession of tenants—Dispute—Procedure.

Where neither party is in actual physical possession of the land in dispute and the real dispute is whether the tenants, who are in actual possession, are the tenants of one party or of the other, a Magistrate is not competent to take proceedings under section 145 of the Criminal Procedure Code in respect of the land in dispute. [p. 631, col. 1.]

Sarbananda Basu, In the matter of, 15 C. 527; 7 Ind. Dec. (N. S.) 935, distinguished.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Magistrate, First Class, Multan, dated the 15th March 1921.

Lala *Hargopal*, for the Petitioner.

Sheikh *Nias Ali*, for the Respondent.

JUDGMENT.—The Magistrate has refused to take action under section 145, Criminal Procedure Code, on the ground that

the complainant himself says that he has not been in possession. I do not think that the complainant ever said or intended to say that he had had no sort of possession. But I gather from Counsel that the real facts are that the land is cultivated by tenants. Each side claims that the tenants are his. The defendant has for the last two years got the landlord's share of the produce from the tenants (the complainant in his complaint says defendant has taken it forcibly) and this year the defendant has turned off the land a man to whom the plaintiff has sold the landlord's share of the produce.

Lala Hargopal cites *Sarbananda Basu, In the matter of* (1) and argues that where the tenants attorn to a stranger the landlord has a right to ask the Court to proceed under section 145. But Lala Hargopal is unable to say that the tenants have so attorned; and the complaint itself says the defendant took the produce *forcibly*. If he did so this may, perhaps, have been criminal trespass, theft, robbery, extortion or some other offence, but I do not think it amounts to taking possession. The real dispute is as to whether the tenants are tenants of plaintiff or of defendant, or, to put it in other words, whether the land belongs to plaintiff or to defendant. This can only be settled by a Civil Court. Neither of the parties is in actual physical possession and I do not see how the Magistrate can decide which party is in constructive possession without going into the question of title.

This application for revision is dismissed.

Z. K. *Petition dismissed.*

(1) 15 C. 527; 7 Ind. Dec. (N. s.) 935.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 163-B OF 1921.

March 3, 1922.

Present:—Mr. Prideaux, A. J. C.

GANGARAMSA—ACCUSED APPLICANT

versus

VISHNUSA—COMPLAINANT—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 488—"Child," meaning of—Major child, whether can claim maintenance.

The word "child" in section 488 of the Code of Criminal Procedure means a person who has not attained the age of majority.

Krishnasamy Iyer v. *Chandravadhana*, 20 Ind. Cas. 1005; 37 M. 565; (1913) M. W. N. 695; 14 M. L. T. 224; 25 M. L. J. 349; 14 Cr. L. J. 525, followed.

Under section 488 of the Criminal Procedure Code a child who has attained majority is not entitled to claim maintenance from his father as he is capable of earning his own livelihood.

Application for revision of an order of the Sub-Divisional Magistrate, Buldhana, dated the 30th September 1921, in Criminal Case No. 3 of 1921.

Mr. *G. G. Hatwalne*, for the Applicant.

Mr. *K. A. Potey*, for the Non-Applicant.

ORDER.—In these cases the word "child" in section 488 of the Code of Criminal Procedure means a person who has not attained the age of majority: see *Krishnasamy Iyer* v. *Chandravadhana* (1). Despite the entry in the school certificate which is founded on a statement made by Vishnusa's brother, there is no reasonable doubt that Vishnusa is over 18 years of age. The vital statistics book of Mehkar from 1902 to 1905, where Vishnusa was born, was in Court and the register shows that a son was born to Gangaramsa on the 13th March 1903, Janki Bai, the wife of Gangaramsa, dying on the 15th October 1904. Vishnusa is admittedly the last son of Gangaramsa and there is nothing on the record to show that this entry of the 13th March 1903 can refer to anybody but Vishnusa. This being so, I am of opinion that the Magistrate was wrong in granting him maintenance because the boy is of age and, therefore, capable of earning his own livelihood. It would be, of course, better for him if he studied for the next few years but that question has nothing to do with the one

(1) 20 Ind. Cas. 1005; 37 M. 565; (1913) M. W. N. 695; 14 M. L. T. 224; 25 M. L. J. 349; 14 Cr. L. J. 525.

before me which is, can Vishnusa legally demand maintenance from his father? I find he cannot. I allow the application and set aside the order of the Magistrate granting maintenance.

G. R. D.

Application allowed.

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 81 OF 1921.

November 18, 1921.

Present:—Mr. Justice Abdul Qadir.

SIRI KISHEN AND OTHERS—ACCUSED—PETITIONERS

versus

GOKAL CHAND—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Opinion expressed by Magistrate.

Where in framing charges against the accused the Magistrate uses the expression "*Jurm sabit hai*" (the offence is established), it is sufficient to entitle the accused to get the case transferred to some other Magistrate.

Rajani Kanta Dutta v. *Emperor*, 3 Ind. Cas. 88; 36 C. 904; 10 Cr. L. J. 244, distinguished.

Petition, under section 526, Criminal Procedure Code, for transfer of the case from the Court of the Magistrate, First Class, Hoshiarpur, to some other competent Court.

Mr. *Abdul Aziz*, for the Petitioner.

Lala *Jagan Nath*, for the Respondent.

ORDER.—This is an application under section 526, Criminal Procedure Code, for the transfer of a criminal complaint, Gokal Chand *v.* Siri Kishen, etc., pending for decision in the Court of *Nawabzada* Izaz ud-Din Ahmad, Magistrate, First Class, Hoshiarpur, to any other Court in the same place. As mentioned in the note dated the 12th July 1921 admitting this application, there is no allegation that the learned Magistrate has any bias in favour or against any party in this case but the ground on which the transfer is sought is that the learned Magistrate had two cross complaints before him in this very case and, instead of deciding both of them together, he has dismissed the complaint lodged by the petitioner against Gokal Chand and has framed charges against the petitioner in the cross-case. It is urged that he has used the expression "*jurm sabit hai*," while framing the charges and has thus made up his mind against the petitioner or has at least expressed his opinion. Mr. Jagan Nath appears for the respondent and contends that this application should not be granted as the word *sabit* (*i. e.* proved) has been inadvertently used and should be taken to stand for the opinion that there is a *prima facie* case against the persons accused by Gokal Chand. He relies on *Rajani Kanta Dutta* v. *Emperor* (1) as showing that an expression of opinion by a Magistrate against the accused "in another case and on other evidence" is not by itself a sufficient ground for transferring a case from his Court. The view of the law taken in the above ruling is, no doubt, correct but the present case is somewhat different. The opinion expressed here was not in another case nor on other evidence, and I think the petitioner can reasonably ask in this case that a transfer to another Court would be in the interests of justice. Counsel for the petitioner undertakes that no further delay in the disposal of this case, which is an old one, will be caused by the order of transfer being passed as his client does not want *de novo* proceedings before the Court to which the case may be transferred. I, therefore, grant this application and direct that this case may be transferred from the Court of *Nawabzada* Izaz ud-Din Ahmad to that of any other Magistrate of competent jurisdiction in Hoshiarpur to whom the case may be sent for disposal by the District Magistrate.

Z. K. *Application granted.*

(1) 3 Ind. Cas. 88; 36 C. 904; 10 Cr. L. J. 244.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 262 OF 1921.

November 2, 1921.

Present :—Sir Norman Macleod, Kt, Chief Justice, and Mr. Justice Shah.

J. D. SHERSTON-BAKER—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Motor Vehicles Act (VIII of 1914), ss. 10, 11 (2) (a) —*Bombay Motor Vehicle Rules*, 1915, *r.* 6, *Sch. D*—*Registration of motor vehicles—Time-limit, fixing of*—Ultra vires.

Section 11 (2) (*a*) of the Motor Vehicles Act does not empower a Local Government to prescribe by rule the duration of time during which a certificate of registration shall be valid. [p. 634, col. 2.]

Criminal application for revision from conviction and sentence passed by the Acting Third Presidency Magistrate, Bombay.

Mr. *O'Gorman* (with him, Messrs. *Little & Co.*), for the Applicant.

Mr. *Bahadurji*, Acting Advocate-General, (with him Mr. *J. C. Bowen*, Public Prosecutor), for the Crown.

JUDGMENT.

MACLEOD, C. J.—The applicant in this case was charged with having caused his motor car to be driven along the Queen's Road on the 27th May 1921, without having re registered the same for the year 1921, in contravention of rule 6 (1) (*b*) of the Bombay Motor Vehicle Rules, 1915, as amended by the Rules published on the 18th December 1918. The applicant contended that the said rule, as amended, was and is *ultra vires* of the powers conferred on the Local Government by sections 10 and 11 of the Indian Motor Vehicles Act, 1914, and that the same was invalid and of no effect. The Third Presidency Magistrate, however, convicted the applicant under the said amended rule and sentenced him to pay a fine of one rupee. The applicant has applied to us under our revisional powers to set aside the conviction and sentence. The learned Magistrate has given no reasons for his decision.

Section 10 of the Act provides that (1) the owner of every motor vehicle shall cause it to be registered in the prescribed manner, and (2) that such registration shall be valid in such area as may be specified in the certificate of registration; and by section 11, the Local Government, subject to the condition of previous publication, shall make rules for the purpose of carrying into effect the provisions of the Act and of regulating, in the whole or any part of the territories under its administration, the use of motor vehicles or any class of motor vehicles in public places. By sub-section (2) in particular, and without prejudice to the generality of the foregoing powers, the Local Government may make rules for all or any of the following purposes, which are detailed in the headings (*a*) to (*i*). Under (*a*) rules may be made providing for the registration of motor vehicles, and the conditions subject to which such vehicles may be registered, the fees payable in respect of and incidental to registration, the issue of certificates of registration, the notification of any changes of ownership, and (subject to the provisions of section 10) the area in which certificates of registration shall be valid.

Rule 6 of the Bombay Motor Vehicles Rules, 1915, framed by the Local Government under its powers given by section 11 of the Act, provided that subject to the provisions contained in sub-rule (2) of rule 13, no motor vehicle should be used unless it had been first registered by the registering authority, and any motor vehicle which had already been registered under the Act did not need to be re registered.

Rule 73 provided that every registration certificate granted under section 10 of the Act should be in the form of Schedule D and should be available for the whole of British India.

It will be noted that the rule did not provide for any limit of time during which the certificate should be valid.

On the 18th December 1918, the Local Government published amendments to the Bombay Motor Vehicles Rules, 1915.

The following rule was substituted for the existing rule 6:—

(1) No motor vehicle shall be used (save in accordance with rule 14 or for the purpose of procuring registration)—

(*a*) unless it has been registered by the registering authority, and

(*b*) unless the registration certificate granted in respect of it is in force.

(2) Registration certificates granted in accordance with rule 73 and Schedule D shall expire on the 31st December in the year in which they are granted but shall be renewable

(3) Registration certificates granted before the 18th December 1918, shall expire on the 28th February 1919.

(4) Notwithstanding anything in this rule any registration certificate granted under any enactment for the time being in force in any part of British India other than the Presidency of Bombay or in any State in India included in Schedule N shall be valid in the Presidency of Bombay until the date of its expiry.

Then, in rule 7 for the word "provided" the following was substituted:—

"Provided that no fee shall be charged for the renewal of a registration certificate in any case where the application for renewal is made before the expiry of the certificate."

Various changes were made in Schedule D, the important one for the purpose of this case being that immediately below "Registration Certificate" the words "Valid for the year ending the 31st December 19" were to be inserted.

The result of the amendment of the rules was, that owners of motor vehicles who had registration certificates granted before the 18th December 1918 had to renew their certificates before the 28th February 1919, and that every certificate granted after the 18th December 1918 was only valid up to the 31st December 1919. If, then, an owner neglected to renew his certificate before the expiry of the period for which it was valid, he was treated by the authorities as a person who had not caused his motor vehicle to be registered in the prescribed manner, and in order to come within the provisions of section 10 of the Act he was liable to be charged with a fresh fee before he could get his certificate renewed.

Now, it is contended by the applicant that the amendment of the rules by the Local Government limiting the duration of time for which a certificate was to be valid was *ultra vires* as no power was given by section 11 to make rules for that purpose. Special reference was made to heading (*d*) of section 11, sub-section (2), which enabled the Local Government to make rules prescribing the authority by which, and the conditions subject to which, drivers of motor vehicles or any class of such drivers might be licensed, the fees payable in respect of such licenses, and (subject to the provisions of section 9) the area within which, and the duration for which, licenses should be valid. Where it was intended to give the power to make rules prescribing a time limit it was expressly given to that effect, and, in our opinion, heading (*a*) of section 11, sub-section (2), does not by implication give a power to the Local Government to prescribe by rule the duration of time during which a certificate of registration shall be valid.

It has been contended that the Local Government could make rules providing for the conditions subject to which the motor vehicles might be registered, and the duration of time was one of the conditions of registration. But we do not think there is any force in that argument, as, although the same words appear in heading (*d*), it was expressly provided that the duration of time during which licenses should be valid should be prescribed by rule.

Lastly, it was argued that the rule was made under the general powers given by sub-section (1), but such a provision must be strictly construed and when the rules which can be made relating to the registration of motor vehicles are defined by section (2) (*a*) it is clear that the Legislature intended that any rules relating to registration must come within that definition.

We think, therefore, that the contention of the applicant must prevail, and that the amendment of the rules which were made on the 18th December 1918, so far as they provided that registration certificates should expire on the 31st December in the year in which they were granted, was *ultra vires* of the Local Government. It would also follow that the corresponding amendment of the form in Schedule D was *ultra vires*, and that the certificates of registration granted according to the amended form should be considered as if the words "valid for the year ending the 31st December 19 " were not added. Therefore, as the applicant had a certificate, he had complied with the provisions of section 10 of the Act and the conviction under sec-

tion 16 of the Act must be set aside and the fine, if paid, refunded.

SHAH, J.—I agree.

J. P.

Rule made absolute.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1308 OF 1921.

January 31, 1922.

Present:—Justice Sir William Chevis, KT.

Haji MUHAMMAD BAKHSH AND ANOTHER —CONVICTS—PETITIONERS;

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 504—Insult—"Kirar", *whether abuse.*

Aroras are *Kirars*, though they may not be pleased to be called so. [p. 636, col. 1.]

The word *kirar* may sometimes have a somewhat contemptuous signification [p. 636, col. 1.]

Where an Arora is called a "*kirar*" on provocation, the incident is of too trivial a nature to be brought before a Court, and no offence under section 504 of the Penal Code is committed. [p. 636, col. 2.]

Case reported by the Sessions Judge, Ferozepur, with his No. 90 of 1921.

FACTS.—On 5th March 1921 Punjab Mal filed a complaint under section 504 of the Indian Penal Code against Muhammad Bakhsh and Fateh Din. It was alleged that the parties were before the Assistant Manager of the Jalalabad Estate and Punjab Mal alluded to Fateh Din as Fatta or Fatti. This annoyed the accused who thereupon, according to the Assistant Manager, said: "*O kirar* you were our weighman only yesterday, to-day you do not call him even by his full name which is Fateh Din." It was alleged in the complaint that other offensive and insulting expressions were used. The complainant produced four witnesses and the accused produced two witnesses in their defence. The Magistrate convicted the accused under section 504, Indian Penal Code, and sentenced each of the accused to 15 days' rigorous imprisonment.

GROUNDS.—Haji Muhammad Bakhsh and his son, Fateh Din, have been convicted of defaming Punjab Mal, Arora, under section 504, Indian Penal Code, and sentenced to 15 days' rigorous imprisonment each by Faqir Sayad Said-ud-Din, exercising the powers of a Magistrate of the First Class in the Ferozepore District. The Magistrate has found that the accused defamed the complainant by calling him a *kirar*. The parties were before the Assistant Manager of the Jalalabad Estate and Punjab Mal alluded to Fateh Din as "Fattu or Fatti." This annoyed the accused, who thereupon, according to the Assistant Manager, said: "*O kirar* you were our weighman only yesterday, to-day you do not call him even by his full name which is Fateh Din." This is the defamation upon which the Magistrate has founded his conviction of the accused. It is, indeed, alleged that other offensive and insulting expressions were used but the Magistrate does not appear to have found (nor, I think, would he have been justified in finding) that the use of such expressions was proved. It is remarkable that both the accused appear to have been convicted of uttering exactly the same words to the complainant. Apart from the question whether there was sufficient justification for the accused retaliating upon the complainant, I am of opinion that the use of the word *kirar* by itself in the circumstances could not reasonably be held to constitute defamation. In some parts of the Province certainly an Arora might be slightingly addressed as a *kirar* and this would not be looked upon as a serious insult. In the Punjabi Dictionary, prepared by *Munshi* Gulab Singh and Sons, compiled and edited by *Bhai* Maya Singh, a member of the Khalsa College Council, and revised by Dr. H. M. Clarke of Amritsar in behalf of the Punjab Text Book Committee, the word "*kirar*" or *kirari* is defined on page 616, but in that definition there is no mention of any insulting connotation. On the other hand, on page 557 of the same work, the word *kirar* is defined as the name of the Arora caste and it is added that the word is used contemptuously. The Counsel for Punjab Mal has stated that *kirar* is a term of great abuse and he connects it with the word *kira* meaning a worm, or, as he translates it, "vermin." He can produce no authority for this proposition and it would seem to be

etymologically incorrect, the "*r*" occurring in *kira* being a different one to the middle '*r*' in *kirar*, I consider that, in these circumstances, the Court was wrong in registering a conviction, but in any case I am quite clear upon one point, and that is that the sentences passed were inappropriate in the case of persons of the status and position of the accused. In respect to this point I have given fuller reasons in my order passed in the revision case of *Muhammad Bakhsh* v. *Emperor* (1). A sentence of fine would have amply met the case, and I recommend that, even if the convictions be upheld, the sentences of imprisonment be quashed and sentence of fine substituted. *Chet Singh* v. *Emperor* (2).

Messrs. *O. Bevan Petman* and *Zafrullah Khan*, for the Petitioners.

The Additional Government Advocate, for the Crown.

Mr. *B. N. Kapur*, for Punjab Mal, Complainant-Respondent.

ORDER.—Haji Muhammad Bakhsh and his son Fateh Din have been convicted in this case under section 504, Indian Penal Code, and sentenced to 15 days' rigorous imprisonment. The case has been reported by the learned Sessions Judge.

The facts are, that Punjab Mal, Octroi contractor in the Mamdot State, had complained to Ezad Bakhsh, the Assistant Manager of the State, that Haji Muhammad Bakhsh had not paid Octroi. The Assistant Manager sent for the parties, when Haji Muhammad Bakhsh stated the Punjab Mal had refused to receive the Octroi. Punjab Mal then made some angry reply speaking of Fateh Din as Fatti or Fattu. Haji Muhammad Bakhsh and his son then replied angrily, saying, "Oh, *kirar*, only yesterday you were our weighman and now you cannot call Fateh Din by his full name." Some witnesses state that further abuse was uttered but the Assistant Manager, who is apparently the most reliable and disinterested of the witnesses, states positively that nothing more was said on either side. The word *kirar* may sometimes no doubt have a somewhat contemptuous signification. Aroras are *kirars*, though no doubt they may not be pleased to be called so, but the provocation was first given by Punjab Mal who spoke of Fateh Din without giving him his full name. The whole affair is a most trivial one and should never have been brought before the Court.

I set aside the conviction and sentence and acquit the petitioners.

In conclusion, I note that both in this and in the connected case Criminal Revision No. 1307 of 1921 [*Muhammad Bakhsh* v. *Emperor* (1) in which Haji Muhammad Bakhsh and two of his sons were convicted by the same Magistrate of an offence under section 447, Indian Penal Code, the circumstances are such that even if offences were held to have been committed, sentences of fine would have amply met the cases, and to sentence a man of wealth and position and his son to undergo rigorous imprisonment was utterly uncalled for.

Further, as pointed out in the order of reference in the section 447 case, when evidence and arguments were completed on Wednesday, 10th August 1921, the delaying of judgment till 4 o'clock on the afternoon of Saturday the 13th August 1921, is certainly a matter which suggests that the Magistrate had in view the fact that the convicts would find difficulty in applying promptly for bail—the 14th, 15th and 16th August being holidays. Copy of this judgment will be sent to the District Magistrate who should ask the Magistrate to report whether there is any explanation forthcoming for the delay in pronouncing judgment in these two petty cases from the 10th till the 13th August. I would also call the attention of the District Magistrate to the fact that the Crown was represented at the hearing of the two cases in this Court, though they certainly were not cases in which the Crown should have been represented and I feel sure that it could not have been the intention of the District Magistrate that the Crown should be represented.

Z. K.

Conviction set aside.

(1) 65 Ind. Cas. 618; 23 Cr. L. J. 154.
(2) 11 Ind. Cas. 619; 21 P. W. R. 1911 Cr.; 12 Cr. L. J. 425.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 318 OF 1921.

October 27, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Kanga.

RAMRATAN CHUNILAL—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 409—Criminal breach of trust—Venue of trial—Criminal Procedure Code (Act V of 1898), s. 179.

A., a commission agent doing business at Bombay, received from *B*, at Ahmednagar, a consignment of cotton for sale at Bombay The cotton was sold, but *A* failed to remit the sale-proceeds to *B* at Ahmednagar, whereupon *B.* filed a complaint, under section 409 of the Penal Code, against *A.* in the Court of the Sub-Divisional Magistrate at Ahmedanagar, *A.* took the objection that the Ahmedangar Court had no jurisdiction to try the case:

Held, that, as the complainant was entitled to have the proceeds of the cotton, sent to Bombay, paid to him in Ahmednagar, and as the proceeds were not so paid, loss occurred to him at Ahamednagar, and that, therefore, under section 179 of the Criminal Procedure Code, the Ahmednagar Court had jurisdiction to try the case. [p. 638, col. 2.]

Queen-Empress v. *O'Brien*, 19 A. 411: A. W. N. (1896) 191; 9 Ind. Dec. (N. s.) 72 and *George Langridge* v. *Grace Atkins*, 17 Ind. Cas 792; 35 A. 28; 13 Cr. L. J. 858; 10 A. L. J. 431, followed.

Simhachulam v. *Rati Kanta Laha (Emperor)*, 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762 and *Rambilas, In re*, 26 Ind. Cas. 136; 38 M. 639 at p 641; 16 M. L. T. 505; (1914) M. W. N. 894; 15 Cr. L. J. 688; 29 M. L. J. 175, referred to.

Criminal application for revision from an order passed by the First Class Magistrate, at Ahmednagar.

Mr. *Patvardhan* (with him, Mr. *P. S. Bakhle*), for the Applicant.

JUDGMENT.

MACLEOD, C. J.—The complainant in this case charged the accused with the commission of the offense of criminal breach of trust punishable under section 409 of the Indian Penal Code. The complaint was lodged in the Court of the Sub-Divisional Magistrate, First Class, Ahmednagar. After a charge had been framed and after the accused had re-called some of the prosecution witnesses for cross-examination and cited witnesses in his own defense, an objection was taken that the Court had no jurisdiction to try the case. The Magistrate held that the objection could not be sustained, as section 179 of the Criminal Procedure Code applied. The accused has applied to this Court in revision to set aside this order of the Magistrate. Section 179 says :—

"When a person is accused of the commission of any offense by reason of anything which has been done, and of any consequence which has ensued, such offense may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

In this case the complainant had sent cotton from Ahmednagar to Bombay to the accused for sale as his commission agent. The charge that has been framed against him is under section 409 of the Indian Penal Code which deals with criminal breach of trust by a public servant or by a banker, merchant or agent. Now, it seems clear that one of the consequences of criminal breach of trust, if committed by an agent, would be loss to the person to whom the property entrusted to the agent belonged, and, therefore, as the complainant would be entitled to get the proceeds of the cotton sent to Bombay paid to him in Ahmednagar, if the proceeds were not paid to him, loss would be incurred at Ahmednagarand, therefore, the Court at Ahmednagar would have jurisdiction. Reliance is placed on section 181 (2) of the Criminal Procedure Code, but that section in no way restricts the provisions of section 179, since it merely provides that—

"The offense of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offense was received or retained by the accused person, or the offense was committed."

There is nothing, therefore, in that section which prevents a Court, within whose local limits any consequence of an offense has ensued, having jurisdiction to try the offense.

Counsel for the accused relied on the case of *Simhachalam* v. *Rati Kanta Laha (Emperor)* (1). The important paragraph of the judgment in that case is at the bottom of page 915* :—

"Now, for the application of section 179 it is essential that the offense should depend on an act done and on a consequence

(1) 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762.

*Page of 44 C.—[*Ed.*]

which has ensued. But loss to one person, though a normal result of an act of misappopriation by another, is not an essential ingredient of the offense of criminal misappropriation. The offense is complete if the conversion is done with the intention of causing wrongful gain to the offender irrespective of any loss which may ensue to any other person. The offence does not depend on the consequense which has ensued but only on the act which has been done. Section 179, therefore, does not in terms apply."

In *Rambilas, In re* (2) the learned Judges said :—

"The offense of criminal breach of trust is completed (assuming a preliminary trust) by the misappropriation or conversion of the property (in this case the cash proceeds of the *hundis*) dishonestly, *i. e.*, with the intention of causing wrongful gain or wrongful loss. It is only the *intention* which is essential. Whether wrongful gain or loss actually results is immaterial, it is a consequense, but no essential part of the offence and a person is not accused of the offence by reason of it."

A contrary view was taken in *Queen-Empress* v. *O'Brien* (3). Edge, C. J. said :—

"The case against the applicant is one of an offence alleged to have been committed by him under section 403 of the Indian Penal Code. The contention on his behalf is that, if he committed any offence, it was committed in Lower Bengal and not within the Magistrate's jurisdiction at Cawnpore. Of course, I express no opinion whatever as to whether the applicant committed an offence at all. That matter has yet to be decided. If, however, he parted with goods of his employers in Lower Bengal and did not remit the price of those goods, as he was bound to do, to his employers in Cawnpore, it appears to me that the case comes within section 179 of the Code of Criminal Procedure ; that the consequense of the applicant having made away with, for his own purposes, goods of his employers in Lower Bengal, or the price of them, if he did so, was that a loss of the value of those goods ensued to his employers in Cawnpore. It might be very difficult to prove where the actual offence of breach of trust was committed. Of course, the applicant denies he has committed any. At one time he said the goods were on their way to Cawnpore. Another time he said the goods were at Lucknow. The goods have disappeared. The applicant went to Cawnpore and failed to account. The matter can be inquired into at Cawnpore, and the Magistrate at Cawnpore has jurisdiction in the case."

In my opinion, the argument of the learned Chief Justice should be preferred to the arguments of the learned Judges in *Simhachalam* v. *Rati Kanta Laha* (*Emperor*) (1) and *Rambilas, In re* (2). The decision in *Queen-Empress* v. *O'Brien* (3) was followed by the Allahabad High Court in *George Langridge* v. *Grace Atkins* (4). The whole question seems to me to depend on whether we must give to the word "consequense" in section 179 its ordinary grammatical meaning or whether we are bound to restrict it to meaning a consequence which is a necessary ingredient of the offence. I see no justification for holding that the ordinary meaning should not be given to the word "consequense" in section 179, and the argument in *Queen-Empress* v. *O'Brien* (3) seems clearly pertinent in reference to this point. For instance, an agent might be given goods by his employer to sell at various places, and if he performed the trust imposed upon him he would be bound to pay the proceeds of the goods which had been sold to his employer. If he did not, and if his employer charged him with criminal misappropriation, it would be exceedingly difficult to prove at what place he had sold any part of the goods and misappropriated the proceeds. It seems to me that section 179 was intended to apply to such cases so as to enable an employer to file his complaint in the Court within whose jurisdiction the loss was alleged to have been incurred. In my opinion, therefore, the decisions of the Allahabad High Court should be followed and there is no reason to admit this application for revision of the Sub-Divisional Magistrate's order.

KANGA, J.—I agree.

W. C. A. *Application rejected.*

(2) 26 Ind. Cas. 136; 38 M. 639 at p. 641; 16 M. L. T. 505; (1914) M. W. N. 894; 15 Cr. L. J. 628; 29 M. L. J. 175.

(3) 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. s.) 72.

(4) 17 Ind. Cas. 792; 35 A. 29; 13 Cr. L. J. 856; 10 A. L. J. 431.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 374 OF 1921.
CASE REFERRED No. 43 OF 1921.
September 28, 1921.

Present :—Mr. Justice Kumaraswami Sastri.

KUPPAMMAL AND OTHERS—ACCUSED

versus

EMPEROR—PROSECUTOR.

Madras City Police Act (III of 1888), s. 71 (xi), scope of—Applicability of section to obstruction caused otherwise than by vehicles and animals—Intention, proof of, when necessary.

Clause (*xi*) of section 71 of the Madras City Police Act covers a case of obstructing a thoroughfare in any manner and is not limited to obstruction caused by vehicles and animals. In the case of obstruction by vehicles and animals there is no question of intention. The act and obstruction caused by the act are sufficient. In other cases intention is necessary to be proved in addition to the obstruction.

Case referred for the orders of the High Court, under section 432, Criminal Procedure Code, by the President of the Honorary Magistrate's Court, Egmore, Madras, in his order, dated 16th June 1921.

Mr. *K. P. M. Menon*, Crown Prosecutor, for the Crown.

ORDER.—I think clause *xi* of section 71 of the City Police Act covers a case of obstructing a thoroughfare in any manner and is not limited to obstruction caused by vehicles and animals. There is no reason to suppose that the Legislature intended to permit all other kinds of obstructions and punish only obstruction by vehicles or animals. There is a semi-colon before the sentence "or in any way wilfully obstructs, etc." In the case of obstruction by vehicles and animals there is no question of intention —the act and the obstruction caused by the act are sufficient. In other cases intention is necessary to be proved in addition to the obstruction. These are questions of fact to be determined by the Magistrate. The fact that Act III of 1889 contains clause (6) to section 3 which deals with exposing goods for sale so as to cause obstruction which follows clause (5) which is similar in terms to clause *xi* of the City Police Act affords no guide to the interpretation of the City Police Act. Probably, the Legislature intended to place the matter beyond all doubt.

I am of opinion that the accused will be guilty of an offence under clause *xi* of section 71 of the City Police Act if the requisite intention and the fact of obstructions are proved.

M. C. P.
J. P.

Reference answered.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 592 OF 1921.
November 25, 1921.

Present :—Mr. Justice Chevis.

KARAM AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—Security to keep peace—Accused willing to give security—Sufficient ground.

The mere statement of a person that he is willing to give security is not sufficient ground for taking security from him for keeping the peace. [p. 640, col. 1.]

Emperor v. *Sheodan*, 31 Ind. Cas. 384; 24 P. R. 1915 Cr.; 16 Cr. L. J. 784; 44 P. W. R. 1915 Cr. and *Prem Singh* v. *Emperor*, 41 Ind. Cas. 671; 27 P. R. 1917 Cr.; 18 Cr. L. J. 847; 36 P. W. R. 1917 Cr., followed.

Case reported by the District Magistrate, Jhang, with his No. 933 of the 23rd August 1921.

FACTS.—Maula Dad of village Potoki lodged an application under section 145, Criminal Procedure Code, against twenty-five persons. The Magistrate sent it to a Naib-Tahsildar for local investigation who reported that the parties were at quarrel over a piece of land, and that there was a danger of breach of peace by them. The Magistrate issued necessary notices under section 107, Criminal Procedure Code, against all. Karm, Ahmad, etc. twelve in all, (present appellants) did not offer any defence, and were bound over on their own statement. The others defended themselves, out of whom seven were discharged, and six put on security. Karam, etc., apply for revision.

GROUNDS.—There is only one general section in the Criminal Procedure Code under which complaints can be referred to other persons for local enquiry, *i.e.*, 202. But it relates to complaints only. An application under section 145, Criminal Procedure Code, is not a complaint and hence it cannot be sent to another person for local investigation under that section. Section 148 allows it but a First Class Magistrate has no power under it,

DANAPPA NARSAPPA, *In re.*

Hence the Magistrate's order for local investigation was without authority and consequently irregular.

Moreover, the appellants' statements on which they have been bound over runs as follows:—"There is no danger of breach of peace by me, nor do I create disturbance. I am ready to furnish security for satisfaction of the Court. I offer no defence." This surely does not amount to an admission that the accused was likely to commit a breach of the peace, and there is no other proof against them. They could not be legally put on security, *Emperor* v. *Sheolan* (1) and *Prem Singh* v. *Emperor* (2) are rulings on the point. The Magistrate's order being irregular, I submit the case to the High Court for its cancellation, and order a fresh enquiry in accordance with law.

Mr. *B D. Qureshi*, for the Petitioners.

ORDER.—The rulings quoted by the learned District Magistrate, who has referred this case, *viz.*, *Emperor* v. *Sheodan* (1) and *Prem Singh* v. *Emperor* (2), are clear authorities that the mere statement of a person that he is willing to give security is not sufficient ground for taking security from him for keeping the peace

I, therefore, cancel the order of the Magistrate calling on the twelve persons concerned to give security. The District Magistrate recommends "a fresh enquiry in accordance with law." I need only remark that the period for which the petitioners were ordered to give security has already expired. If now or at any future time it should be shown that there is still reason to apprehend a breach of the peace fresh proceedings can, of course, be started.

Z. K. *Security order cancelled.*

(1) 31 Ind. Cas. 384; 24 P. R. 1915 Cr.; 16 Cr. L. J. 784; 44 P. W. R. 1915 Cr.

(2) 41 Ind. Cas. 671; 27 P. R. 1917 Cr.; 18 Cr. L. J. 847; 36 P. W. R. 1917 Cr.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 487 OF 1921.

November 3, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

In re DANAPPA NARSAPPA —ACCUSED—APPELLANT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute, when to be given—Chance of conviction—Penal Code (Act XLV of 1860), s. 193—Actual statements alleged to be false, mention of, in sanction order.

Sanction to prosecute ought not to be given unless the Court giving sanction has satisfied itself that there are very favourable chances of obtaining a conviction

When sanction is given to prosecute a witness for giving false evidence, the actual statements which are alleged to be false should be mentioned in the sanction.

Criminal appeal from an order passed by the Sessions Judge, Bijapur.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—The two applicants gave evidence in the case in which the opponents were charged with murder and were acquitted. The opponents then asked the Court to sanction the prosecution of the applicants for giving false evidence. Notice to show cause why sanction should not be given was issued on the applicants, but for some reason or other they did not appear. The Sessions Judge gave sanction to prosecute without giving any reasons. It may be that the evidence given by the applicants was false, or it may be that the Trying Judge was justified in merely holding that he did not believe it. But sanction ought not to be given unless the Court giving sanction has satisfied itself that there are very favourable chances of obtaining a conviction. Having considered the evidence given by the applicants, we do not consider it by any means certain that the prosecution could prove that the applicants had given false evidence under the provisions of section 193, Indian Penal Code. In these circumstances, it is not advisable that sanction should be given. It may be noted that it is not the Government which are asking for sanction, but the accused in the case, who were acquitted, and who were thus influenced by embittered feelings against these witnesses for the prosecution Therefore, the sanction given to prosecute the applicants will be set aside. It is desirable to add that when sanction is given to prosecute for giving false evidence, the actual statements which are alleged to be false should be mentioned in the sanction.

J. P. *Sanction set aside.*

ABDUL RAHMAM v. RIFAQATULNISSA.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 268 OF 1919.

January 13, 1922.

Present :—Mr. Justice Rafique and Mr. Justice Piggott.

ABDUL RAHMAN—PLAINTIFF—APPELLANT

versus

Musammat RIFAQTULNISSA AND ANOTHER —DEFENDANTS—RESPONDENTS.

Muhammadan Law—Pre-emption—Demands, when to be made.

Under the Muhammadan Law of pre-emption, it is necessary that the demands should be made immediately after the pre-emptor knows of the sale. Where it is in evidence that the plaintiff knew of the transfer two or three months before the demands were made, the demands were not made as required by law and he could not claim pre-emption.

First appeal from a decision of the Subordinate Judge, Moradabad, dated the 8th May 1919.

Messrs. *O'Conor* and *M. Ishaq Khan*, for the Appellant.

Dr. *S. M. Sulaiman* and Mr. *Abu Ali*, for the Respondents.

JUDGMENT.—The parties to this appeal are related to each other. The plaintiff-appellant, Abdul Rahman, is the uncle of Abdul Hai, defendant respondent No. 2. *Musammat* Rifaqtulnissa, respondent No. 1, is the wife of Abdul Hai. It appears that before the ceremony of marriage took place between the defendants-respondents, one of the conditions of the marriage was that Abdul Hai should transfer a portion of his property of the value of Rs. 15,000 to his fiancé. Accordingly, on the 5th of January 1918, Abdul Hai executed a sale deed in favour of *Musammat* Rifaqtulnissa in respect of property the value of which was mentioned in the deed to be Rs. 15,000. The deed was registered on the 8th of January 1918. On the same day Abdul Hai was married to Rifaqtulnissa. On the 7th of January 1919 Abdul Rahman, the plaintiff, brought the suit out of which this appeal has arisen for possession of the property conveyed by the deed of the 5th of January 1918 on the ground of pre-emption. He stated in his plaint that he was unaware of the transfer by Abdul Hai to defendant-respondent No. 1 until three or four months prior to his giving evidence in the Court below. As soon as he heard of the sale he made the first demand at his own house where the news was received, and the second demand at a field called "Anrwala" which is part of the property sought to be pre empted. He also went to Moradabad to the residence of the father of *Musammat* Rifaqtulnissa and made a demand as a pre-emptor at her father's house. Finding that his demands were not complied with he filed the present suit.

For the defence the claim was resisted on various grounds. It was urged on behalf of the respondents that the demands were not made by the plaintiff according to law and within time nor did they satisfy the formalities laid down by the Muhammadan Law. Moreover, the transfer in favour of Rifaqtulnissa was in lieu of her prompt dower and such a transfer was not, under the Muhammadan Law, liable to pre-emption. Both parties gave evidence and the learned Subordinate Judge, after carefully considering the evidence in the case, found against the plaintiff and dismissed his claim. We have heard the learned Counsel in support of the appeal and we have examined the evidence on the record. We are of opinion that the appeal must fail. It is in evidence on behalf of the plaintiff that he knew of the transfer of the 5th of January 1918, three months at least prior to his having made his demand according to Muhammadan Law. One of his witnesses is Bunyad Beg, and the latter says that for two or three months before the demands were made the plaintiff had an intention of bringing a suit for pre-emption in respect of the sale-deed. He made up his mind to bring a suit when he claimed pre emption. He said so also when he fulfilled the conditions of pre emption. From the statement of Bunyad Beg it is obvious that the demands required by the Muhammadan Law were not made immediately after learning of the sale in question by the plaintiff. He, therefore, cannot succeed in his present claim. It would serve no useful purpose to discuss and dispose of other points raised in the appeal. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

N. H.

Appeal dismissed.

NATHWA v. KANHIYA.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 516 OF 1918.

May 12, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Wilberforce.

NATHWA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KANHIYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage, usufructuary—Subsequent mortgage—Stipulation that second mortgage to be redeemed along with first—Redemption—Amount payable—Limitation.

Certain property was mortgaged to the defendant with possession and the agreement was that the mortgage should be redeemable on payment of the principal amount, the profits of the land being set off against the interest Subsequently, a further charge was created on the same land in favour of the defendant. In this second mortgage-deed it was stipulated that the monies due thereunder would be paid at the time of the redemption of the first mortgage. More than twelve years after this mortgage the plaintiff sued for redemption:

Held, that the plaintiff was entitled to redeem the land only on payment of the amount due under both the mortgages.

Kesar Kunwar v. *Kashi Ram*, 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 889, dissented from.

Appeal from an order of the District Judge, at Karnal, dated the 29th October 1917, confirming that of the Senior Sub-Judge, Rohtak.

Dr. *Nand Lal*, for the Appellants.

JUDGMENT.—In this suit the plaintiffs sought to obtain possession of 6 *bighas* 15 *biswas* of land from the defendants. As originally framed, the suit was for possession without the payment of any monies but subsequently the claim was altered into one for redemption of a mortgage on payment of Rs. 1,125, the mort gage deed being dated the 23rd January 1892. The property was in the possession of the defendants as mortgagees under this mortgage, the same being redeemable on payment of the principal amount, the profits of the land being set off against the interest. Subsequent to this mortgage, a further charge was created on the same land under a mortgage deed dated the 7th November 1896. The sum due under this mortgage was Rs. 200 together with compound interest at 2 per cent. In this second mortgage-deed it was stipulated that the monies due thereunder would be paid at the time of the redemption of the first mortgage. The Courts below have granted the plaintiffs a decree for redemption on the payment of Rs. 1,12[illegible], the monies due under the second mortgage being disallowed on the authority of *Kesar Kunwar* v. *Kashi Ram* (1). The Trial Court held, on apparently very insufficient grounds, that the second mortgage had been executed under undue influence. The Appellate Court, however, bases its decision solely on the Allahabad authority referred to above.

The mortgagees have preferred this second appeal through Dr. Nand Lal and in it they take exception to the rejection of the charge created by the second mortgage. Dr. Nand Lal has contended that the law propounded in *Kesar Kunwar* v. *Kashi Ram* (1) is not correct, and has also endeavoured to distinguish that authority from the present case. In the Allahabad case, as in the present one, there was an original mortgage followed by a second mortgage. There, however, in the second mortgage which was for a sum of Rs. 95, it was stipulated that the second mortgage was to be first paid off and after that the original mortgage was to be redeemed. The mortgagor sued to redeem the original mortgage and the mortgagee pleaded the stipulation contained in the second mortgage alleging that the second mortgage had not been paid off. The learned Judges of the Allahabad High Court considered that on the date on which this plea was raised any remedy the mortgagee might have had under the second mortgage was barred, and on that ground decreed the mortgagor's claim to redeem his mortgage without payment of the amount due under the second deed. With all deference to their Lordships, we are unable to accept the proposition of law enunciated by them. The mortgagee was in possession and time could not run against him as a defendant in a redemption suit though it might have run against him had he brought a suit for foreclosure on the second mortgage. The *right* subsisted although the *remedy* may have come to an end. We are supported in this view by the authorities cited by Rustomjee in his Law of Limitation at page 20 and Starling on Limitation, page 144.

The present case is also distinguishable from the Allahabad case in that the second mort-

(1) 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 889.

gage was redeemable at the same time as the original mortgage, a circumstance that the Courts below appear to have lost sight of. In the Allahabad case a suit by the mortgagees on their second mortgage was maintainable at any time within the period of limitation whereas in the present case no suit by the mortgagee on the second mortgage could be maintained until the first mortgage had been paid off.

In these circumstances, we allow this appeal and modify the decree by directing that the mortgagors shall pay a further sum of Rs. 200 before the land can be redeemed.

We may note that the appellants originally claimed a very large sum by way of interest on the second mortgage but they have confined their appeal to this Court to the principal amount, *i. e.*, Rs. 200.

The appellants will get his costs throughout.

Z. K. & N. H.

Appeal allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 61 OF 1920.

January 20, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

RAMESHWAR DAYAL—PLAINTIFF—APPELLANT

versus

B. MAHARAJ CHARAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 43—Permanent change—Additional burden on servient tenement—Easement, extinction of.

A owned two houses, one a bigger one and the other a smaller one. He had the prescriptive right to flow the dirty water of the drain of the smaller house on to the house of the defendant. He, however, constructed a privy on his bigger house and connected its drain with the older drain of the smaller house and began to flow the water of both on to the defendant's house. The defendant blocked up the drain completely, thus stopping the flow of water of both houses. *A* sued to have the drain opened:

Held, that the plaintiff did not lose his entire right under section 43 of the Easements Act, as the additional burden could easily be reduced to its original limits by cutting up or blocking the connection between the new privy and the earlier drain, and that, therefore, he was entitled to a decree conditional on his severing the connection between them [p. 644, col. 1]

Harris v. Flower & Son, (1904) 91 L. T. 816; 74 L. J. Ch. 127; 21 T. L. R. 13, referred to.

Letters Patent Appeal against a decree of Mr. Justice Walsh, dated the 5th August 1920.

The Hon'ble Syed *Raza Ali*, for the Appellant.

Mr *Harnandan Prasad*, for the Respondents.

JUDGMENT.—We are of opinion that the decree of the lower Appellate Court must be affirmed, because we are unable to see upon what principle it has been decided that the statutory right which the plaintiff has as owner of house No. 2 to discharge his water into the drain of the defendant's house No. 3 has been extinguished. It is true that the plaintiff was a wrong-doer when, having built on house No. 2, a new privy he connected that up with the drain which had hitherto carried water from one privy alone in house No. 2 to house No. 3. The method by which he connected up the new privy with the old drain was in one sense permanent and in another sense not permanent, because it was capable of being blocked or cut away in a very short time. It is clear law that if a man has, for instance, a right to walk across a certain field, he does not lose that right of walking across that field merely because he commences to drive across it in a carriage, that is, he is not penalised and deprived of his right of using the land by walking over it because he has asserted and wrongfully exercised the right to pass over it in a carriage.

The remedy open to the owner of the servient tenement is to proceed against the person who claims the wrongful enlarged user and on his refusal to desist from his conduct to take proceedings for an injunction. At one time it was thought that the right to ancient light could be lost by pulling down a building which had acquired a right to lights and that the newly erected building did not have the privilege attaching to the ancient lights in the previous building. That, however, is not law to day, and indeed on this question of abandonment of ancient rights there have been several recent cases

mainly relating to light and air. The case of *Harris* v. *Flower & Son* (1) is a case in point on the question of abandonment.

Reliance has been placed upon section 43 of the Indian Easements Act, but we question whether the permanent change referred to in this section does not mean such a change as, for instance, the construction of a building with 12 or 14 large windows in place of three or four smaller ones. That is a permanent change in the dominant heritage and the owner of the servient tenement cannot reduce the burden without interfering with what undoubtedly was prior rights of the owner of the building, namely, to have light and air to the smaller number of buildings. If, therefore, whatever steps the servient tenement can take must necessarily interfere with the lawful enjoyment of the original arrangement and the additional burden cannot be reduced, then his easement is extinguished. Here, however, the burden can be reduced without difficulty to its original limits. The connection between the new privy and the drain from No. 2 that passes into No. 3 can be blocked up or cut away and the parties will, in all respects, be reverted to their original position as it was before the plaintiff wrongfully connected up the new privy with the old drain. We, therefore, think that the decree made by the Court of first instance which was affirmed by the lower Appellate Court was a proper decree and this appeal must be allowed. We accordingly set aside the decree of the learned Judge of this Court and restore that of the lower Appellate Court. We direct the parties to bear their own costs.

N. H.

Decree set aside.

(1) (1904) 91 L. T. 816; 74 L. J. Ch. 127; 21 T. L. R. 13.

PATNA HIGH COURT.
CIVIL REVISION No. 63 OF 1921.
May 26, 1921.
Present:—Mr. Justice Ross.
BAUL DAS MISRA—PLAINTIFF—PETITIONER
versus
DIGAMBAR KURI—DEFENDANT—OPPOSITE PARTY.

Cause of action—Admission of defendant, effect of—Plaintiff entitled to decree on admission.

Where the plaint discloses a cause of action and there is an admission on the part of the defendant, and there is nothing to show that there is no cause of action, the plaintiff is entitled to a decree.

Messrs. *Sunil Madhab Mullick* and *Narendra Nath Sen*, for the Petitioner.

Mr. *Abani Bhusan Mukherji*, for the Opposite Party.

JUDGMENT.—The plaintiff brought a suit under section 9 of the Specific Relief Act for recovery of possession of a plot of land on the allegation that it belonged to him and one Haladhar, his uncle; but that he alone had been in possession thereof and that he had been dispossessed by the defendant.

The defense was that Haladhar's half of the land had been given by him to his daughter under whom the defendant holds. The Munsif dismissed the suit.

It is clear on the admission of the defense that the plaintiff is entitled to possession of the eastern portion of the land in suit. It is objected that no decree can be given for recovery of possession because on the admission of the defendant there is no cause of action. The question whether there is a cause of action or not does not depend on the admission of the defendant The plaint discloses a cause of action and there is no finding that there is no cause of action.

Another objection taken is, that difficulties will arise in executing the decree. These difficulties may be left to be encountered when they do arise; but on the pleadings of the plaintiff and on the admission of the defendant it is clear that the plaintiff is entitled to a decree for recovery of possession of the eastern portion of the land in suit as admitted by the defense. The possession of the defendant over the western half of the land will be maintained. This application is, therefore, allowed with costs, the decree of the Munsif is set aside and a decree in the above form is passed. Hearing fee one gold *mohur*. There will be no costs of the original Court.

N. H.

Application allowed.

HARNAM DAS v. FAIYAZI BEGAM.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 276 OF 1920.

January 24, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Gokal Prasad.

Rai Bahadur Lala HARNAM DAS—PLAINTIFF—APPELLANT

versus

Musammat FAIYAZI BEGAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pensions Act (XXIII of 1871), ss. 11, 12—"Pension", meaning of—Pension given in recognition of past services, whether transferable.

The word "pension" in section 11 of the Pensions Act is used in the sense of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits or as compensation to dethroned princes, their families and dependents. [p. 645, col. 2.]

Secretary of State v. *Khemchand Jeychand*, 4 B. 432; 2 Ind Dec. (N. S) 794, followed.

An endowment consisting of the revenue of a number of villages was made by Emperor Akbar for the preservation of the tomb of a saint, Salim Chisti at Fatehpur Sikri, for the maintenance of certain religious services and for the allowance of the descendants of the said saint. In 1846 the Government took over the revenue of the villages and made arrangements for the preservation of the tomb and the performance of the religious ceremonies and set aside a specified sum to be applied in the maintenance of the saint's descendants who were declared to be pensioners of the Government entitled to draw their pensions in perpetuity from the Treasury:

Held, that inasmuch as the grant was made either in recognition of the past services of the saint or in acknowledgment of his particular merits the continuance of the pensions to the descendants was based on political considerations and as such any assignment of this pension was null and void as provided by section 12 of the Act. [p. 646, col. 2.]

Second appeal from a decision of the District Judge, Agra, dated the 25th February 1920.

Dr. *Surendra Nath Sen* and Mr. *Narain Prasad Asthana*, for the Appellant.

The Hon'ble Syed *Raza Ali*, for the Respondents.

JUDGMENT.—The question we have to decide in this second appeal is, whether an allowance of Rs. 60 payable every six months to the first defendant-respondent *Musammat* Faiyazi Begam is capable of assignment.

The allowance has been hypothecated twice to the plaintiff appellant, Harnam Das, under two deeds of the 18th June 1906 and the 23rd April 1907, respectively. The first of these deeds was executed by the lady alone; the second by herself, her husband and her son.

The claim was for Rs. 1,418-5-0 and the plaintiff mortgagee asked for a decree enabling him to recover the debt by sale of the hypothecated property. Admittedly, the question before us has to be decided with reference to the language of sections 11 and 12 of the Pensions Act (Act XXIII of 1871).

Section 11 lays down that no pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance is liable to seizure, attachment, or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court. And section 12 enacts that assignment of pensions mentioned in section 11 are null and void.

The allowance in dispute is obviously a "pension" in the sense that it respresents money payable periodically otherwise than in respect of a right, privilege, perquisite or office. The history of the fund out of which this allowance is paid and to which we shall presently refer makes this quite clear.

But the question remains whether it is a pension of any of the kinds mentioned in section 11 of the Act.

The Courts below have differed on this point, the First Court holding that the allowance did not fall within the scope of section 11, the lower Appellate Court being of opinion that it did. In the well-known case of *Secretary of State* v. *Khemchand Jeychand* (1) the Bombay High Court gave a definition of the pensions described in section 11 which has been accepted by other High Courts including our own. The case is reported in *Secretary of State* v. *Khem-Chand Jeychand* (1) and at page 436 the learned Judges say as follows:—

"In our opinion, the word 'pension' in section 11 is used in its ordinary and well-known sense *viz.*, that of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits or as compensation to dethroned princes, their families and dependants". The history

(1) 4 B. 432; 2 Ind. Dec. (N. S.) 794.

of the grant in this case is that it was made by the Emperor Akbar for the support of the descendants of Sheikh (or Shah) Salim Chishti, the famous saint whose mausoleum at Fatehpur Sikri is one of the most renowned buildings in Northern India. It appears that in the year 1569 Akbar visited the saint who was then living at the place called Sikri. It is said that Akbar, who was childless at the time, besought the prayers of the saint and in consequence of a suggestion made by the latter, sent his wife to reside at Sikri wherein the following year she gave birth to a son Salim, who was afterwards known as the Emperor Jahangir.

This event led Akbar to found a new city on the spot, Fatehpur Sikri, where he resided for a considerable period. It was here that Akbar, after the death of Salim Chishti, caused the famous cenotaph to be erected and in order to provide for its maintenance he made an endowment consisting of the revenue of a number of villages. This fund was to be devoted not only to the preservation of the tomb but also to the maintenance of certain religious services and the provision of an allowance for the saint's descendants of whom the defendant, Faiyazi Begam, is admittedly one.

In the year 1846 the British Government of the day passed certain orders regarding the manner in which the endowment fund should be administered ; these are contained in a letter from the Secretary to Government, N. W. P., to the Officiating Secretary to the Sadr Board of Revenue, No. 3246 of 1846, dated the 14th August 1846, a copy of which is on the record. From this it would appear that prior to that date the persons charged with the administration of the fund had been exercising a right of management over the villages the revenue of which had been assigned for the endowment.

It was decided that this arrangement should not continue as settlement had been made by the Government with the proprietors and it was directed that in future the revenue should be paid into the Government Treasury and the fund applied under the supervision of the Collector in accordance with the instructions contained in the letter. In this letter it was declared that the tomb of the Saint was a national architectural monument which it was the duty of the Government to keep in repair, and a portion of the fund was definitely allotted for that purpose.

Instructions were next given for the disbursement of a definite portion of the fund to meet the cost of the religious ceremonies for which the Emperor had provided.

And, lastly, a specified amount was set aside to be applied in the maintenance of the saint's descendants regarding whom it was declared that they were pensioners of the Government entitled to draw their pensions in perpetuity from the Treasury. It was laid down that they were to be registered and treated as such, and we understand that this arrangement continues to the present day and that the pension to which Faiyazi Begam is entitled, as one of Salim Chishti's descendants, is paid out as directed in the letter to which we have just referred.

On this statement of the facts it is not to be doubted that the Government in 1846 came to the decision that it was just and politic to continue the grant of the land revenue which Akbar had assigned for the purposes indicated above, and we agree with the learned District Judge that the continuance of the pensions to the descendants of the saints was based upon what may fairly be called political considerations. This being so, the pension now in dispute is one of those mentioned in section 11, and is clearly within the definition laid down by the Bombay High Court for the grant was, without doubt, originally made either in recognition of the past services of Sheikh Salim Chishti or in acknowledgment of his particular merits.

It follows, therefore, that the assignments of the pension to the plaintiff-appellant upon which he founds his claim in the present suit are null and void as provided by section 12 of the Act. The only other plea taken in the memorandum of appeal, *viz.*, that in any case the plaintiff should have been given a simple money-decree is unsustainable. Such a claim is barred by limitation.

We dismiss the appeal with costs to the respondent including fees in this Court on the higher scale.

S. J. P. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1283 OF 1920.

October 26, 1921.

Present:—Mr. Justice Scott-Smith.

JAI GOPAL, ADULT, AND JAI DAYAL, MINOR, THROUGH JAI GOPAL—DEFENDANTS—RESPONDENTS

versus

MUHAMMAD BAKHSH AND OTHERS—PLAINTIFFS—MAULA BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Wakf—*Alienation—Suit for declaration—Cause of action—Appeal, second—Finding of fact.*

Certain land which formed part of a graveyard was brought under cultivation from time to time, and eventually defendants purchased certain portions of it. In 1915 the defendants prevented certain masons who wanted to repair some old tombs standing on the land from going on to the land. In 1919, the plaintiffs, on behalf of the Muhammadan community, brought a suit for a declaration that the land was *wakf* and also prayed for an injunction prohibiting the defendants from interfering with the plaintiffs' user of the land as a graveyard. It was contended that the suit was barred by time:

Held, that, in spite of the fact, that portions of the land in dispute had been brought under cultivation there had been no active interference with the plaintiffs' user of the land till 1915, and that, therefore, the suit was within time.

A finding that certain land is a graveyard is one of fact, and cannot be challenged in second appeal.

Second appeal from a decree of the District Judge, Jhang at Sargodha, dated the 29th March 1920, affirming that of the Munsif, First class, Chiniot, District Jhang, dated the 29th November 1919.

Pandit *Sheo Narain*, R B, for the Appellants.

Messrs. *Aziz Ahmad*, *Zafarulla Khan*, and *Nice Ali*, for the Respondents.

JUDGMENT.—The lower Courts have given plaintiffs a decree declaring that the land in suit, 33 *kanals*, 2 *marlas* in area, is a graveyard and *wakf*. They also directed that a perpetual injunction should issue against defendants Nos. 1 and 2 that they should not interfere with the plaintiffs' user of the land in suit as a graveyard. From this decree defendants Nos. 1 and 2 have filed a second appeal to this Court.

Pandit Sheo Narain, on behalf of defendants Nos. 1 and 2, has addressed elaborate arguments to the Court with the object of showing that the lower Courts finding that the land in dispute is a graveyard is erroneous, He has referred in detail to the entries in various settlements regarding the land and has pointed out that on one occasion the whole of it was entered as a graveyard and on another only 8 *kanals*, 7 *marlas*, the rest of the land being shown as *banjar kadim*. Subsequently, 8 *kanals*, 7 *marlas* were shown as a graveyard, part of the remaining land as *banjar* and a small area of 5 *kanals*, 7 *marlas* as under cultivation. It is clear that the land has been differently described at different Settlements as also in the *jamabandis*; but these entries have been taken into consideration by the lower Courts. There was also a local enquiry and human bones were dug up from various places in the land in dispute, and there are admittedly three old tombs standing. Considering the entries in the papers and the presence of human bones and of tombs in the land as well as the oral evidence, the lower Courts have concurred in holding that the whole of the land in dispute is a graveyard. The finding is one of fact, and, however erroneous or perverse this finding may be, this Court cannot interfere on second appeal. I, therefore, hold that the finding that the land in dispute is a graveyard is conclusive.

The only other point argued by Pandit Sheo Narain was, that the suit was barred by time. He expressly gave up the argument that it was barred by the rule of *res judicata*. His contention that the suit is barred by time is based upon the facts that portions of the land have, from time to time, been under cultivation and that in the Settlement of 1904-05 no part of the land is shown as a graveyard, 6 *kanals*, 18 *marlas* being entered as cultivated and the remainder 26 *kanals*, 4 *marlas* as *banjar kadim*. He says that the cultivation of part of the land in this way was an infringement of the plaintiffs' right and that time began to run against them at all events at the Settlement. Now, there can be no doubt that the whole of the land has not in recent years or for many years past been used as a graveyard. It is also clear that parts have from time to time been cultivated. The plaintiffs might very well have disregarded the fact that parts of the land were cultivated so long as their rights were not actively interfered with. There was an active interference in 1915 when it appears from the judgment of the lower Appellate Court that certain masons entered upon

the land in order to repair the old tombs and were interfered with by the defendants. This was an overt act which interfered with the plaintiffs' right of user, but there is no evidence to show that their rights were actively interfered with before that occasion. In my opinion time did not begin to run against the plaintiffs until 1915, and the action of the defendants in that year or in the following year, when the previous suit was compromised, gave them a cause of action to bring the present suit. I hold accordingly that the present suit is not barred by time and dismiss the appeal with costs.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 166 OF 1919.
(CONNECTED WITH FIRST APPEAL No. 177 OF 1919).

January 24, 1922.

Present :—Mr. Justice Rafique and Mr. Justice Lindsay,

Lala RAM CHANDRA SARUP —DEFENDANT—APPELLANT

versus

Srimati KIRPA DEVI—PLAINTIFF —RESPONDENT.

Agra Tenancy Act (II of 1901), s. 161—Suit for profits—Lambardar—Negligence — Non-realization of decree, effect of—Interest, proper rate.

Where a Lambardar makes collections to the extent of 76 per cent. of the gross rental, and for the rest brings suits and obtains decrees against defaulting tenants, he acts like a prudent Lambardar, and the mere fact that some of the decrees cannot be realised, cannot constitute negligence on his part, and in such a case the co-sharers are entitled to their shares on the basis of actual collections. [p. 649, col. 1.]

In a suit for profits interest at 12 per cent. is a proper rate to be allowed and it should run up to the date of realisation. [p. 649, cols. 1 & 2.]

First appeal from a decree of the Assistant Collector, First Class, Meerut, dated the 10th of January 1919.

Mr. *Nihal Chand* and Dr. *Kailash Nath Katju*, for the Appellant.

Dr. *Surendra Nath Sen* and Mr. *Kailash Chandra Mital*, for the Respondent.

JUDGMENT.—The two Appeals Nos. 166 and 172 of 1919 are connected and arise out of a suit brought by *Musammat* Srimati Kirpa Devi against Lala Ramchandra Sarup for the recovery of her share of the profits for the years 1320 to 1322 Fasli. The suit was instituted in the Court of the Assistant Collector of Meerut on the 31st July 1916 and it was alleged by her that the defendant Ramchandra Sarup was the Lambardar of the village Khadela and had been negligent in collecting the rents and, therefore, she was entitled to recover her share of the profits on the gross rental and not on actual realisation. She claimed Rs. 7,146.0.4 which sum included interest also. The claim was resisted on various pleas. It was urged on behalf of the defence that there was a written agreement executed between the parties on the 31st December 1914 under which all disputes outstanding between them were to be decided by one Babu Madusudan Dayal, and that as the greater portion of the claim relates to a period antecedent to the 31st December 1914 the claim of the plaintiff fails. It was further urged that, as a matter of fact, Ramchandra Sarup had referred not only the question of the amount of the share of profits due to the plaintiff, but other matters outstanding between her and himself to the arbitrator, who was considering the points in dispute when the plaintiff rushed into Court with the present suit. The defendant claimed a large amount on account of village expenses and stated that, under the agreement of the 31st December 1914, no interest was to be charged by either party on any account. The learned Assistant Collector, accepting the plea of the defence based upon the agreement of the 31st December 1914, referred the dispute to Babu Madusudan Dayal. For some reason the arbitrator did not decide the case and sent back the file to the Court. The case was tried and evidence was recorded. The lower Court passed a decree in favour of Kirpa Devi for Rs. 5,018-13-9, allowing her interest at the rate of 12 per cent. per mensem up to the date of the institution of the suit and 6 per cent. per annum *pendente lite* and after the decree until such time as the decree was realised.

Both parties have come up in appeal before us. The appeal of Ramchandra Sarup is No. 166 of 1919 and that of Kirpa Devi

No. 177 of 1919. We shall dispose of both the appeals by this judgment.

It is contended on behalf of Ramchandra Sarup that the lower Court was in error in decreeing the claim of the plaintiff on gross rental and not on actual collections. It appears from the evidence on the record that Ramchandra Sarup made all attempts that a careful Lambardar could make to realise rents. The amount of the actual collections shows that he realised 76 per cent. With regard to the rest he brought suits and obtained decrees against defaulting tenants.

It is urged on behalf of Kirpa Devi that the suits were brought too late and that hardly anything or nothing at all has been realised on the decrees.

We have examined some of the decrees on the record and we find that the charge of delay against Ramchandra Sarup is without any foundation. As to the realisation of the decrees, we find from the report of the *kurk Amin* that he once proceeded to execute the decrees but found several judgment-debtors absent, and in some cases there was nothing to attach. The fact that some of the decree cannot be realised is no fault of the Lambardar nor can it be said to constitute negligence. We are, therefore, of opinion that no negligence of the Lambardar in the collection of rents has been proved by Kirpa Devi and that the decree in her favour should proceed on the basis of actual collections.

The next point urged by the learned Counsel for Ramchandra Sarup is, that his client was not a Lambardar for 1320 *Fasli* and that he collected rents of that year to the extent of his share only. He should not, therefore, be made to pay anything on account of the share of Kirpa Devi. There is no force in this argument as his own principal witness, Phundan Lal, deposes that Ramchandra Sarup made collections in the entire village for the year 1320 *Fasli*.

The next objection to the decree of the Court below is directed to interest. The objection is taken on the basis of the agreement of the 31st December 1914. There is no force in the objection. That agreement is no more in force between the parties.

There is also an objection with regard to interest on behalf of Kirpa Devi in her Appeal No. 177 of 1919. She contends that 12 per cent. per annum should have been allowed to her till the date of the realisation of the decretal amount. We find that that is the proper rate in a case like the present and that her objection must prevail.

For Ramchandra Sarup it is further contended that he should have been allowed costs of the repairs of a well and of a *haveli* and other items of village expenses detailed by him in his written statement. We find that the items in question have not been proved by any reliable evidence. In our opinion he should be allowed Lambardari dues and 5 per cent. on the actual collections for village expenses.

There is one more objection to be noticed and that is on behalf of Kirpa Devi in her appeal. She says that her share of the profits for 1317-1319 *Fasli* should also be decreed to her on the ground that it was collected in 1320 *Fasli*. As we are going to decree her claim on the basis of actual collections, this objection has no force.

The result of our findings is that the plaintiff, *Musammat* Kirpa Devi, should get a decree for her share of profits on the basis of actual collections for the years in suit together with 12 per cent. per annum interest from the date that each instalment fell due to her up to the date of the realisation of the amount. The defendant, Ramchandra Sarup, will get Lambardari dues and 5 per cent. for village expenses on the actual collections. The account, therefore, stands thus. We take the statement prepared by the *patwari* as the basis of actual collections. Taking that paper as our basis, we find that the following sums are due to Kirpa Davi, namely,

for 1320 *Fasli*	...	Rs. 1,292-3-10
„ 1321 *Fasli*	...	„ 578-8-0
„ 1322 *Fasli*	...	„ 1,370-0-0

There are the net amounts. We have deducted the Lambardari dues and the village expenses. The total of these amounts comes to Rs. 3,240-11-10. We, therefore, modify the decree of the Court below and decree the claim for the plaintiff, Kirpa Devi, for Rs. 3,240 11 10 with interest at 2 per cent. per annum from the date of each *kist* up to the date of the realisation of the amount.

Costs are allowed to parties of both the Courts in proportion to failure and success including fees in this Court on the higher scale.

N. H.

Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 217 OF 1919.

July 15, 1921.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

RAM KANAI PAL AND OTHERS—PETITIONERS—APPELLANTS

versus

PURNA CHANDRA *alias* JONESWAR PODDAR AND OTHERS—DEFENDANTS—OPPOSITE PARTIES—RESPONDENTS.

Attachment of decree before formally drawn up, validity of—Date of decree—Civil Procedure Code (Act V of 908), O XX, r. 7, O. XXI, r. 53.

When a decree is signed it relates back to the date of the judgment. It is in existence on the date of the judgment except for certain purposes (such as the computation of the period of limitation prescribed for an appeal). [p. 652, cols. 1 & 2.]

Mungniram Marwari v. *Gursahai Nand*, 17 C. 347; 16 I. A. 195; 13 Ind Jur. 449; 5 Sar. P. C. J. 463; 8 Ind Dec. (N' s.) 770 (P. C.), referred to.

Under a judgment passed in a suit for partition, one *M.* obtained certain immoveable properties in his share and was held entitled to certain sums of money (as owelty money from certain persons. Before the decree was drawn up and signed a creditor of *M.* applied for attachment of the money portion of the decree, and on the day following the Court sent the notice of attachment attaching the decree. Objection was made (1) that there was no decree which could have been attached and (2) that at any rate the attachment being of the decree (*i.e.*, the whole decree) was bad as the decree related in part to immoveable property, the procedure prescribed for attachment of which had not been followed:

Held, (1) that there was a decree in favour of *M.* in the ordering portion of the judgment though the formal decree was not drawn up and signed; and [p. 652, col. 2.]

(2) that the notice, in so far as it directed the attachment of the other portion of the decree no doubt must be treated as ineffectual, but that did not affect the attachment of the decree in so far as it awarded a certain sum of money. [p. 652, col. 2.]

Appeal against an order of the Officiating Subordinate Judge, Second Court, Dacca, dated the 12th May 1919.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him, Babu *Debendra Chandra Pal*), for the Appellants—The facts of the case shortly are these. One Mathuranath Poddar brought a suit for partition against his co-sharers and obtained certain immoveable properties and sums of money which fell in his share and for which a preliminary decree was passed. The judgment in the suit was passed on the 18th December 1917 and the decree was drawn up on the 9th December 1918. After judgment was passed, the respondents sought to attach the money decreed in Mathuranath's favour. The notice of attachment was issued on 2nd October 1918 but it was returned as the decree was not yet drawn up. They again applied for attachment of the decree on 25th November 1918 and the notice was kept filed in Court. On 27th November 1918 Mathuranath assigned all his interest in the subject-matter of the suit to the present appellants. We then applied for substitution The respondents also applied for being substituted as attaching creditors and claimed preference over us. They also questioned the *bona fides* of the assignment in our favour. Their application has been granted and their objections have also been upheld by the Court below. We then appealed to this Court and the case was remanded. It has been found by the Court below on remand that our assignment was valid and *bona fide*. My submission is, that at the time of the assignment in our favour by Mathuranath there was no subsisting decree. The decree was passed on 9th December 1918. The assignment was effected on 27th November 1918. There was no decree at that time. There was only the judgment in the suit and so long as the decree is not drawn up nothing could be attached. Refers to section 60, and Order XXI, rule 53 of the Code of Civil Procedure. My next contention is, that there was no proper attachment at all. The decree obtained by our assignor was for immoveable properties as well as for certain sums of money. They sought to attach the entire decree. I submit that is bad in law because the procedure for attachment of the decree other than for money or a mortgage-decree is different and was not followed in this case. Therefore, the notice, in so far as it directed the attachment of the other portion of the decree excepting the money, is ineffectual and, therefore, the notice was not legal and there could be no lawful attachment under the same. Under the circumstances, there having been no decree at all at the time of the assignment and the attachment not having been obtained according to the procedure prescribed by law, I submit the respondents cannot have the properties which have been found to have been assigned *bona fide* and validly to us.

Babu *Gunada Charan Sen* (with him Babu

Sarat Chandra Dutt), for the Respondents.—As regards the first question raised as to whether there was a decree at the time of the assignment I submit there was a decree. The final judgment was passed on 19th December 1917. In accordance with that judgment Mathura Nath became entitled to certain properties and certain sums of money. A decree is nothing but the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all matters in controversy in the suit. Refers to the definition of "decree," section 2 (2) of the Code of Civil Procedure. Therefore, I submit the decree was there in the judgment though not in a formal way. Refers to *Mungniram Marwari* v. *Gursahai Nand* (1). Order XX, rule 7, Civil Procedure Code. As regards the second point, I submit the notice, in so far as it relates to attachment of the money, is perfectly legal and effective. I submit the Court below was right in the judgment he has arrived at.

Dr. *Sarat Chandra Basak*, replied briefly.

JUDGMENT.—This appeal is against an order directing the respondents to be substituted as attaching decree-holders under the following circumtances.

It appears that one Mathura Nath Poddar obtained a preliminary decree in a suit brought by him for partition against his co-sharers. Under the judgment in that case, the plaintiff, Mothura Nath, obtained certain immoveable properties in his share, and was held entitled to certain sums of money (as owelty money) from five persons. This judgment was passed on the 18th December 1917. There was considerable delay in drawing up the decree. As a matter of fact, the decree was not drawn up and signed until the 9th December 1918. After the judgment had been delivered, the respondents applied for attachment of the money portion of the decree, and notice of attachment was issued on the 2nd October 1918. It was returned on the ground that the decree had not been prepared at that time. An application was made again on the 25th November 1918 by the respondents for attachment of the decree. On the next day, the 26th November, the Court sent the notice of attachment and this time the notice was kept on the file in order that the decree might be attached after it was made. On the next day, 27th November, the judgment-debtor, Mathura Nath, assigned all his interest in the subject-matter of the suit, including the moneys which Mathura Nath was to get from his five co-sharers, to Ram Kanai Pal and others, the appellants before us. The decree was not prepared and signed until the 9th December 1918.

The assignees, Ram Kanai Pal and others, applied for being substituted in the place of Mathura Nath. The respondents, Sananda Chandra Pal and others, also applied for being substituted as attaching creditors and they contended that, as attaching creditors, they were entitled to have preference over the assignees. They also impugned the assignment itself as not being *bona fide*.

The Court below held that the attachment was valid and directed the respondents to be substituted as attaching decree-holders. The assignees appealed to this Court, and the case was remanded to the Court below for a finding as to the *bona fides* of the assignment in favour of Ram Kanai Pal and others. The Court below has come to the finding that the assignment was a *bona fide* one.

The first question for consideration, therefore, is, whether there was a valid attachment of the decree prior to the assignment in favour of Ram Kanai Pal and others. It is contended on behalf of the appellant that, under section 60 of the Civil Procedure Code, it is only saleable *property* (with certain exceptions) which can be attached, that Order XXI, rule 53 says that where the *property* to be attached is a *decree*, it shall be attached in a particular manner, that the ordering portion of a judgment merely states the conclusion at which the Court arrives and is not a decree, and that so long as the decree is not drawn up and signed there is no decree which can be attached. But the final judgment in the partition suit was passed on the 18th December 1917, under that judgment Mathura Nath became entitled to certain properties and to certain sums of money (as owelty money) from the defendants; the judgment not only gave the conclusions arrived at by the

(1) 17 C. 847; 16 I. A. 195; 13 Ind. Jur 449; 5 Sar. P. C. J. 468; 8 Ind. Dec. (N. S.) 770 (P. C.).

Court, but also gave directions. He, therefore, obtained the decree on that day though the formal decree was drawn up and signed later on.

In the case of *Mungniram Marwari* v. *Gursahai Nand* (1) certain proceedings taken by the guardian of a minor were sought to be set aside on the ground that the minor had not been properly represented by the guardian as the certificate of guardianship had not been issued to him though the Court had appointed him guardian. The Judicial Committee observed (See pages 356. 357) "their Lordships are of opinion that when the Court makes that inquiry, and comes to a decision that the application should be allowed, that is doing all that is substantially necessary in the matter; and when the order is made that the applicant shall have his certificate, the applicant really then obtains his certificate. All is done at that time which is necessary to show that he is the person who should have the certificate. He, then, by getting that order, substantially obtains the certificate, although the officer of the Court, whose duty it would be to draw up the certificate, and prepare it for the signature of the Judge, or the seal of the Court to be attached to it, may not do that for some time afterwards, on account of the course of business or the party not applying to him for it. When a man obtains an order for a certificate he does in substance comply with the terms of this Act, in the same way as when a person has the judgment of the Court that he shall have a decree in his suit it may be said that he then obtains his decree. The decree, when it is drawn up afterwards, relates back to that time; and so would the certificate in this case relate back; and the terms of the Act that he shall have obtained such certificate are complied with." We think the observations may be applied to this case.

Under Order XX, rule 7 of the Civil Procedure Code the decree is to bear the date of judgment, though the decree may be signed subsequently. It is true that the decree-holder has to pay stamp duty under the Stamp Act before the decree can be drawn up But upon the payment of the stamp the decree is drawn up and signed. When it is signed it relates back to the date of the judgment. The decree, therefore, is in existence on the date of the judgment except for certain purposes (such as the computation of the period of limitation prescribed for an appeal which is to be computed from the date on which the decree is signed). We think, therefore, that there was a decree in favour of Mathura Nath in the ordering portion of the judgment though the formal decree was not drawn up and signed until the 9th December 1918 after the necessary stamp-duty was paid. It may be mentioned here that the conveyance obtained by the assignees themselves professed to transfer the *decree*, and the rights and interest of the judgment-debtor in the partition suit.

It is next contended on behalf of the appellants that the decree obtained by Mathura Nath was for immoveable properties as well as for certain sums of money, and the notice having directed attachment of the decree (*i. e.*, the whole decree) and the attachment having been made accordingly, was bad because the procedure for attachment of a decree other than a decree for money or a mortgage decree, is different and was not followed. But the decree-holders applied for attachment only of the money portion of the decree, and they do not claim any right on the basis of attachment of any other portion of the decree. The notice, in so far as it directed the attachment of the other portion of the decree no doubt must be treated as ineffectual, but that does not affect the attachment of the decree in so far as it awarded certain sums of money to Mathura Nath.

The attaching decree-holders, however claimed the monies payable to Mathura Nath by three only out of the five judgment-debtors. The Court below was, therefore, wrong in directing the attaching decree-holders to be substituted in respect of the decree which directed the payment of monies by the judgment-debtors (meaning thereby *all* the judgment-debtors) to Mathura Nath. The order of the Court below will, therefore, be varied by ordering that the attaching decree-holders will be substituted in respect of the decree in so far as it directs payment of the sums by Gopal Chandra Poddar, Rai Mohan Poddar, and Kali Kumar Poddar, (now represented by Kamini Kumar Poddar

and Akshoy Kumar Poddar) to Mathura Nath and that the assignees Ram Kanai Pal and others will be entitled to be substituted in respect of the rest of the decree. In other respects, the order of the Court below will be confirmed. No order as to costs.

N. H. *Decree varied.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 873 OF 1920.

January 17, 1922.

Present:—Mr. Justice Stuart.

ABHEY SINGH—PLAINTIFF—APPELLANT

versus

HIMTA—DEFENDANT—RESPONDENT.

Hindu Law—Gift—"Bahamah wajah," *meaning of*—*Absolute estate.*

A Hindu, who had only a widowed daughter-in-law and a widow of his deceased grandson, gifted his whole property to two persons *A.* and *H.* On his death *A.* and *H.* gifted a portion of the gifted property in favour of the daughter-in-law saying that they gave her the property "*bahamah wajah*":

Held, that the gift to the daughter-in-law was a gift of full proprietary rights and that the words "*bahamah wajah*" meant with all rights.

Second appeal from a decision of the District Judge, Meerut, dated 18th May 1920.

Mr. *Mohanlal Sandal*, for the Appellant.

Mr. *Harnandan Parsad*, for the Respondent.

JUDGMENT.—Jawahra Gujar executed, on the 29th of May 1911, a deed of gift of his whole property in favour of Abhey Singh and Hardeo. Jawahra's son Nadar was dead. His grandson Munshi was dead. Nadar's widow, *Musammat* Mahro, and Munshi's widow, *Musammat* Hosheyari, were alive. Jawahra had no direct heirs. His property was property which he could transfer in his life-time as he wished. Mahro and Hosheyari could not prevent his transferring this property. Abhey Singh and Hardeo obtained complete proprietary title under the deed of gift, but after some protestations from Mahro they executed a deed of gift of 9/28ths of the property in her favour. They gave her this property "*bahamah wajah*", words which mean, literally, "with all causes," but which can only be taken to mean "with all rights". She obtained complete partition of her share. The question in appeal is, whether Mahro had absolute proprietary title in the 9/28ths or only a life interest. The learned District Judge has found that she had complete proprietary title. Little is to be gained by examining what was decided in other cases of grants to women. The parties are Gujars. Their views as to the proper nature of a woman's title in land are not necessarily the same as the views of other castes. As I read the deed of gift of the 29th of July 1911, the interpretation can only be that the gift to Mahro was a gift of full proprietary rights. The words mean nothing else. It is to be noted that Mahro had no claim for maintenance against Abhey Singh and Hardeo and, further, that Mahro was in no position to contest the transfer by Jawahra to Abhey Singh and Hardeo. As she had no claim on her donors for maintenance and as she could not successfully assail their title, there was no reason for them to provide her with maintenance or to give her anything. For reasons which have not been established, they evidently desired to make a settlement upon her. It is to be noted they made no settlement upon Hosheyari. They were clearly acting under no compulsion and not because they were under an obligation to maintain Mahro. In these circumstances, I see no reason why the deed which effected the transfer should not be interpreted according to its literal meaning, and, when it says that they give property, why the words should not be taken to mean that they give full proprietary rights in the property. Taking this view, I dismiss this appeal with costs.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 321 OF 1921.
February 20, 1922.
Present:—Mr. Batten, J. C.
PUNA—PLAINTIFF—APPELLANT
versus
LAXMANPRASAD—DEFENDANT—RESPONDENT.

Mortgage—Simple mortgage—Mortgagee given possession subsequently to pay himself principal and interest out of usufruct—Original contract, whether changed—Right of redemption, whether lost.

In the case of a simple mortgage in which the mortgagee has a right to bring the property to sale and the mortgagor has a right to redeem, the mortgagor does not lose his right to redeem by the fact that the mortgagee is given additional security for his money by taking possession of land and pay himself the principal and interest out of the usufruct, as the original relations of a simple mortgagee and a simple mortgagor subsist.

Lingam Krishna Bhupati v. *Manya Sultan* [*Maharaja of Vizianagram*], 10 Ind. Cas. 272; 15 C. W. N. 441; 9 M. L. T. 445; 8 A. L. J. 594; 13 C. L. J. 584; 13 Bom. L. R. 447; (1911) 1 M. W. N. 429; 21 M. L. J. 1147 (P. C.), referred to.

Appeal against a decree of the District Judge, dated 29th April 1921, in Civil Appeal No. 26 of 1921.

Messrs *R. Furanik* and *Fida Hussein*, for the Appellant.

Mr. *G L. Subhedar*, for the Respondent.

JUDGMENT.—The lower Appellate Court has decided that this mortgage cannot be redeemed since, at the present date, it is purely a usufructuary mortgage. The terms of the mortgage were that the mortgage-money including interest should be paid in two instalments. This was a covenant to pay. Failing the payment of any one instalment, the mortgagee was entitled to take possession of the property and pay himself the principal and interest out of the usufruct. The lower Appellate Court has held that whatever the mortgage may originally have been, it is now purely a usufructuary mortgage since by a suit the mortgagee has got possession of the land.

I have not been able to find a case exactly on all fours with the present. The nearest one I can find is that reported as *Lingam Krishna Bhupati* v. *Manya Sultan* [*Maharaja of Vizianagram*] (1) but the terms in that case were not identical with the terms here. After a careful consideration, I am of opinion that the mortgage undoubtedly started as a simple mortgage in which the mortgagee had a right to bring the property to sale and the mortgagor had a right to bring a suit for redemption. The mortgagee was not put in possession and there is a covenant to pay. I do not find that the mortgagor has lost his right of redemption by the fact that the mortgagee was given an additional security for his money by taking possession of the land; the original relations of a simple mortgagee and a simple mortgagor, I am of opinion, are still subsisting. For this reason, I am of opinion that the appellant mortgagor has a right to bring a suit for redemption. This is not a suit brought under section 62 of the Transfer of Property Act since the mortgagor admits that the money is still due. The suit should be treated as one for redemption and the appellant may redeem.

Other grounds of appeal were raised by the mortgagee in his appeal to the lower Appellate Court which have not been disposed of by the lower Appellate Court. I, therefore, remand the appeal for further trial, it being decided that the mortgagor is entitled to redeem. Costs will be costs in the suit. There will be a refund certificate.

G. R. D.

Appeal remanded.

(1) 10 Ind. Cas. 272; 15 C. W. N. 441; 9 M. L. T. 445; 8 A. L. J. 594; 13 C. L. J. 584; 13 Bom. L. R. 447; (1911) 1 M. W. N. 429; 21 M. L. J. 1147 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 624 OF 1920.
January 25, 1922.
Present:—Mr. Justice Gokul Prasad and Mr. Justice Stuart.
Musammat RAMPIA—DEFENDANT—APPELLANT
versus
HAZARI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Suit for sale—First suit brought and decreed but proved infructuous—Second suit not barred—Res judicata—*Redemption, right of.*

RAMPIA v. HAZARI LAL.

A. made a mortgage in favour of *B.* *A.*'s rights were sold and purchased by *J.*, a son of *A.* *J.* entered into possession and sold the property to *M.* *M.* sold it to *R.* *B.* sued *J.* to enforce his mortgage but did not implead *M.* or *R.* He got a decree and purchased the property but was resisted by *R.* in obtaining possession. He then brought a suit against *R.* for sale of the property on the mortgage:

Held, that the second suit was not barred as *R.* was not entitled to any other right except to an opportunity to redeem which had been given him.

Second appeal from a decision of the Second Additional District Judge, Aligarh, dated 25th of February 1920.

Mr. *Pearylal Banerji*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT —The facts which have given rise to this second appeal are as follows:— On the 17th of August 1900 one Debi Das made a mortgage of his property to one Dao Karan Das. Debi Das' rights were sold at auction in execution of a simple money decree and purchased by Jwala Prasad, a son of the mortgagor. On the 30th of March 1911 Jwala Prasad got possession. On the 5th of May 1912 Jwala Prasad sold the property to his brother, Mathura Prasad, who had been adopted by an uncle of his. On the 25th of July 1912 Mathura Prasad sold the property to his wife, *Musammat* Rampia. The plaintiff is the son of the original mortgagee, Dao Karan Das. During his minority a suit was brought by his next friend and uncle, Chiranji Lal, on the 21st of September 1912 to enforce the above mortgage. To this suit neither Mathura Prasad nor *Musammat* Rampia, the transferees of the property, were impleaded. The then plaintiff got a decree for sale, put the property to sale and purchased it himself on the 2nd of June 1917. When he went to take possession of the property he was resisted by *Musammat* Rampia, defendant No. 1, who took an objection saying that she was the owner of the property and that she not having been a party to the decree was not bound by it. That objection was allowed and the plaintiff failed to obtain possession of the property. The plaintiff has now brought this suit for setting aside the order of the Execution Court passed on the 23rd of April 1918 disallowing his application for being put into possession and in the alternative he sues for sale on the mortgage. The amount which he claims is the amount mentioned in the final decree for sale. Several defences were taken to this suit. The one which has been pressed before us is that a second suit did not lie on the mortgage. The Trial Court repelled this contention and gave the defendant an opportunity to redeem on payment of the amount due under the mortgage. The lower Appellate Court has confirmed that decision. The defendant comes here in second appeal. We think the Courts below have come to a correct conclusion in holding that, in the circumstances, the second suit lay on the mortgage. We are of opinion that there is no force in the grounds of appeal objecting to the present suit on the ground that a second suit on the mortgage did not lie. The result of the plaintiff not impleading the present defendant in the previous suit was that she was not given an opportunity which she ought to have been given of redeeming the plaintiff's mortgage That opportunity was the only right which she could claim. The mere fact that she purchased the property would not do away with the mortgage. The opportunity has been given to her by the Courts below and in our opinion she is not entitled to any further right. There is no force in this appeal and we dismiss it with costs including in this Court fees on the higher scale.

There is one point on which we wish to amend the decree of the First Court confirmed by the Second Court and it is this, that the plaintiff will be entitled to a decree for sale of the property in case the defendant does not pay the amount due to him within six months from this date. In case of the defendant's failure to do so, the property will be sold by auction. As the mortgage on which the suit was brought was a simple mortgage no decree for foreclosure could be passed. The decree will be prepared under Order XXXIV, rule 4. The plaintiff-respondent is entitled to his costs of this appeal including in this Court fees on the higher scale.

N. H. *Decree amended.*

ISHAN CHANDRA DIASI v. RAM PROSAD AICH.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 215 TO 219 OF 1921.

July 18, 1921.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Richardson.

ISHAN CHANDRA DIASI AND OTHERS—DEFENDANTS—PETITIONERS

versus

RAM PROSAD AICH AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Landlord and tenant—Bengal Tenancy Act (VIII of 1885), ss. 35, 105—Settlement of fair rent—Enhancement of rent, when inequitable.

Section 35 of the Bengal Tenancy Act means, that the Court, when considering an application for the settlement of fair rents under section 105 of the Act, has to take into consideration all the facts of the particular case and has to take into consideration the rules which are set out in the Act relating to the particular application, and then, before it allows an enhancement, the Court must be satisfied that, under the circumstances of the case, the enhancement is fair and equitable.

Guru Charan Nandi v. *Sarab Ali*, 52 Ind. Cas. 79; 30 C. L. J. 9; 23 C. W. N. 1041, explained.

The effect of section 35 of the Bengal Tenancy Act is not that a Court is bound to allow some enhancement of rent even though it finds that the lands are periodically flooded by water and that the rents are already too high.

Rule against an order of the Second Additional Special Judge, Midnapur.

FACTS appear from the judgment.

Babu *Nagendra Nath Ghose*, for the Petitioners.—The defendants are the petitioners. These applications arise out of proceedings under section 105 of the Bengal Tenancy Act for settlement of fair rents. The Revenue Officer found that the defendants were occupancy *raiyats* but refused to enhance the rents inasmuch as that the existing rents were already high and that the defendants suffer damages of crops on account of inundations of the river Cossaye. On appeal the Special Judge, however, allowed enhancement at the rate of one anna in the rupee. I submit the learned Judge has taken a wrong view of the law as laid down in seciton 35 of the Bengal Tenancy Act. Reads section 35, Bengal Tenancy Act. The case of *Guru Charan Nandi* v. *Sarab Ali* (1) is distinguishable. The learned Judge has found in our favour as to the facts that we suffer damages from inundation and that the existing rate of rents is high but he seems to labour under the erroneous impression that he is bound to enhance the rent under section 35 of the Bengal Tenancy Act. I submit that is clearly against the intention of the Legislature. The case in *Guru Charan Nandi* v. *Sarab Ali* (1) has been misapplied.

Babu *Monmatha Nath Ray* (with him Babu *Sitaram Banerjee*), for the Opposite Parties.—I submit the learned Judge has taken a correct view of the law. Refers to sections 30—35 of the Bengal Tenancy Act. Section 35 is a gerenal section. In the present case the learned Judge has taken into consideration all the facts and circumstances and was satisfied that the enhancement allowed by him was reasonable and fair. The enhancement allowed by the law is 4 annas in the rupee but in the present case the learned Judge, after carefully considering the facts of the case, has enhanced at the rate of one anna in the rupee. Under the circumstances, I think, the other side has not made out any case for your interference.

Babu *Nagendra Nath Ghose* replied in brief.

JUDGMENT.

SANDERSON, C. J.—This is a Rule calling upon the opposite party to show cause why the judgment and decree of the Special Judge of Midnapore complained of should not be set aside, or why such other or further order should not be made as to this Court might seem fit and proper.

The matter arose in respect of certain applications which were made by the landlords for the settlement of fair rents under section 105 of the Bengal Tenancy Act.

The Revenue Officer found that the defendants in these cases were ordinary occupancy *raiyats*. He also found on a comparison of the prices of staple food crops that the maximum enhancement under section 32 (*b*) was 4 annas in the rupee. He, however, refused to allow the landlords any enchancement on the ground that the lands were subject to inundation as there was no embankment on the river Cossaye and that the crops were damaged and the rents were already high.

The Special Judge who heard the appeal, after reciting what the Revenue Officer had

(1) 52 Ind. Cas. 79; 30 C. L. J. 9; 23 C. W. N. 1041.

found went on to say this: "There are, however, no grounds for refusing to allow the enhancement wholly, in view of section 35, Bengal Tenancy Act, and the decision in the case of *Guru Charan Nandi* v. *Sarab Ali* (1), and the appellants are entitled to some enhancement. In the circumstances, I allow enhancement at one anna in the rupee."

The learned Vakil who supported this Rule, has urged that the learned Special Judge has put a wrong interpretation upon section 35 of the Bengal Tenancy Act and the case to which the learned Judge referred: and he has asked this Court to interpret the Special Judge's judgment as meaning that, although the Revenue Officer had come to the conclusion that the landlords were entitled to no enhancement by reason of the lands being inundated and rents bei g already high, he, the Special Judge, was bound to allow some enhancement by reason of section 35 and the decision of this Court in *Guru Charan Nandi* v. *Sarab Ali* (1). In my judgment, that is not the proper interpretation to put upon the learned Judge's judgment. In fact, in my judgment, it is impossible for him to have meant that; in the first place, when one looks at the words of the section it is quite clear what section 35 means. The section is as follows: "Notwithstanding anything in the foregoing sections, the Court shall not in any case decree any enhancement which is under the circumstances of the case unfair or inequitable." The 'foregoing sections' which are referred to in section 35 obviously are, amongst others, section 30 which sets out the conditions under which the landlord may ask for enhancement of rent. The conditions are set out in the headings (*a*), (*b*), (*c*) and (*d*); (*b*) is the one which applies to this case, "that there has been a rise in the average local prices of staple food crops during the currency of the present rent." Then, section 31 deals with the rules as to enhancement on the ground of the prevailing rate. Sections 31A and 31B deal with the same matter. Then we come to section 32 which sets out the rule as to enhancement on the ground of the rise in prices. Section 33 sets out the rules as to enhancement on the ground of the landlord's improvement. Section 34 sets out the rules as to enhancement on the ground of increase in productive powers due to fluvial action. Those sections deal with the four sets of conditions which are enumerated in section 30 and, then comes section 35, which I have already read, which is a section of a general nature and the meaning of which, to my mind, is plain. It means, that the learned Special Judge when considering these cases has to take into consideration all the facts of the particular case and has to take into consideration the rules which are set out in the Bengal Tenancy Act relating to the particular application, and then, before he allows an enhancement, he must be satisfied that, under the circumstances of the case, the enhancement is fair and equitable. The provision, no doubt, is inserted for the protection of the tenant, because it says: "notwithstanding anything in the foregoing sections, the Court shall not in any case decree any enhancement which is under the circumstances of the case unfair or inequitable." In the face of such a provision, it seems to me impossible that the learned Special Judge has interepreted the decision to which he has referred as meaning that, in spite of the findings of the Revenue Officer with regard to the flooding and the rents being high already, he must allow some enhancement of rent. The passage which is referred to is in the case of *Guru Charan Nandi* v. *Sarab Ali* (1), and the passage is at page 13* *viz*, "Much stress was laid by the learned Pleader for the respondent on the concluding portion of the judgment of the learned Subordinate Judge where he says that the plaintiffs are not entitled equitably to enchancement of rent. The only ground upon which the learned Subordinate Judge so held is the position of the land by the side of a river and there being no crops grown on it. We do not think that that is what is contemplated by section 35 of the Bengal Tenancy Act. That section, we think, relates to the amount of assessment and does not refer to the grounds upon which a Court has to determine whether enhancement should be allowed or not." I confess I am not quite clear what the learned Judges had in their minds when they said what I have just read in their judgment, but I am quite clear that they did not decide that the effect of section 35 was that the learned Special Judge was bound to allow some enhancement of rent even though the Revenue Officer had found that the lands were flooded by the water

*Page of 30 C. L. J.—[*Ed.*]

from the river periodically and that the rents were already high. In my judgment, the question which the learned Special Judge had to decide was one of fact. As I read his judgment, he decided that question of fact after taking into consideration the findings at which the First Court had arrived and the rules which are laid down in the Bengal Tenancy Act for enhancement of rent in this particular case. I understand the learned Judge to have decided that, although the enhancement would ordinarily be 4 annas in the rupee yet, having regard to the other facts in the case, namely, that the lands were subject to inundation and that the present rents were already high, taking all these facts into consideration, in his judgment, it would not be fair or equitable to allow an enhancement to the extent of 4 annas. Consequently, taking all the facts of the case into consideration, the learned Judge came to the conclusion that it would be fair and equitable to allow an enchancement at one anna in the rupee: and that was the result of his judgment.

For these reasons, in my judgment, this Rule must be discharged. We make no order as to costs.

This judgment will apply to the other Rules which are accordingly discharged without costs.

RICHARDSON, J.—I agree.

B. N.

Rules discharged.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 32 OF 1921.

November 3, 1921.

Present:—Mr. Dhobley, A. J. C.

JAIRAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VENKATRAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by manager—Right to challenge—Heritability by surviving members—Subsequent born son, right of—Creditor—Legal necessity—Burden of proof—Mortgage—Attestation—Evidence interested—Presumption.

Those who deal with a person who has only a limited interest in property and who professes to dispose of a larger interest, are *prima facie* bound to make out the facts which authorise such an alienation. [p. 659, col. 2; p. 660, col. 1]

The right of challenging an alienation made by the family manager of a joint Hindu family is personal and is not inherited by the surviving members. [p. 660, col. 1.]

Moti v. *Kanhya*, 4 Ind. Cas. 797; 5 N. L. R. 181 at p. 188, followed.

A son born subsequent to an alienation by a Hindu father cannot impeach that alienation, as he takes the family property as it exists at his birth, nor can he inherit the right of his brother in existence at the time of the alienation but subsequently dead to challenge the said alienation. [p. 660, col. 2.]

A plaintiff is entitled to the amount paid by him for conducting the case on behalf of a minor defendant when the defence of the minor fails. [p. 660, col. 2.]

In a suit on a mortgage by a mortgagee it lies upon the latter to prove the valid attestation of the mortgage, but where the attesting witnesses, being defendant's relations, turn hostile and do not state the truth and the other witnesses are interested in one party or another, the principle "*omnia præsumuntur rite et solenniter esse acta donec*" applies, and it must be presumed that everything was rightly and duly performed. [p. 659, col. 1.]

Appeal against a decree of the Subordinate Judge, Betul, dated the 18th January 1921, in Civil Suit No. 23 of 1919.

Messrs. *M. R. Dixit* and *Atmaram Bhagwant*, for the Appellants.

Sir *Bepin Krishna Bose* and Mr. *K. K. Gandhe*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on a mortgage, dated 14th June 1902, executed in favour of the plaintiffs' father, Punjaji, by the defendant No. 1, Venkat Rao, for himself and as guardian of his younger minor brother, Narayan Rao, the defendant No. 2. The consideration for the mortgage was Rs. 500 advanced in cash and it was to carry compound interest at the rate of 12 per cent. per annum. The plaintiffs claimed foreclosure of the mortgaged property in lieu of Rs. 6,122 6-0 said to be due on the mortgage.

2. One of the points taken in defence, and which proved successful in the lower Court, was that the mortgage-deed in suit was not validly attested. It is urged for the appellants that the evidence adduced in the case was not properly appreciated. The writer of the mortgage deed is dead and the two attesting witnesses who were examined as plaintiffs' witnesses Nos. 2 and

3 denied that they had actually seen the executant execute and sign the mortgage deed in suit and said that they signed it as attesting witnesses after it had already been executed. The other witnesses examined on the point were the plaintiff, Jairam, and the defendant No. 1, Venkat Rao. The latter who had himself raised the plea of the want of a valid attestation was not expected to state that it was validly attested and that the two attesting witnesses had witnessed the actual execution of the deed by the executant. On the other hand, the plaintiff, Jairam, was interested in supporting his own claim and to show the valid attestation of the mortgage. Under these circumstances, the evidence of the two attesting witnesses would have undoubtedly carried a great deal of weight, had they been independent and disinterested persons. They are both relations of the defendants and have a strong motive in supporting the defence. Vithal Rao (P. W. No. 3) had an additional motive to depose against the plaintiffs and to see their suit dismissed. The plaintiffs' father, Panjaji, had brought a suit against the sons of this witness and in that case both this witness and the defendant No. 1, Venkat Rao, had appeared as witnesses for them. Saya Bai (P.W. No. 2) was another attesting witness. She has proved herself totally unreliable, as she denied that she had identified the executant at the time of the registration, though the Registrar's endorsement is to the contrary effect. This will show that the evidence of the two attesting witnesses cannot at all be believed. I am satisfied that they told deliberate lies in order to help the defendants. I, therefore, do not attach any weight to their evidence. It no doubt lay upon the plaintiffs to prove the valid attestation of the mortgage, but in the present case the attesting witnesses, who were the defendants' relations, turned hostile and did not state the truth. The other witnesses, the plaintiff No. 1 and the defendant No. 1, were equally interested in supporting their respective cases. In this state of evidence the maxim '*omnia præsumuntur rite et solenniter esse acta donec*,' would have an application. The evidence on both the sides is equally interested and it must, therefore, be presumed that everything was rightly and duly performed. There was no inherent improbability in the account given by the plaintiff, Jairam (P. W. No. 1). There was nothing improbable in his being present, when the mortgage-deed was executed and registered. I have, therefore, to differ from the lower Court and to hold that the valid attestation of the mortgage-deed in suit should, in the present case, be accepted.

3. The next point taken in defence was, that there was no legal necessity for the mortgage in suit and that it was not, therefore, binding on the defendant No. 2 and on his share in the mortgage property. It was the plaintiffs' case that the money was borrowed in order to pay off Saya Bai on account of arrears of a certain annual allowance which the family had to pay to her. The defendants' case was, that the money was advanced to Saya Bai in order to enable her to pay off her debts. In this connection, it is important to note that the mortgage-deed does not make any mention of arrears of allowance payable to Saya Bai. On the other hand, the recitals support the defendants' version. That the money borrowed under the mortgage was paid to Saya Bai towards the arrears of her allowance is deposed to only by the plaintiff, Jairam, examined as P. W. No. 1. The lower Court rightly declined to accept his uncorroborated evidence. If the amount was really paid to Saya Bai for the arrears of the allowance, we should have expected a mention being made of it in the mortgage. It recites that the money was required for paying off the debts due by Saya Bai to certain creditors. This would show that the amount was advanced to Saya Bai as a loan. This was not certainly a legal necessity, nor was it for the benefit of the minor brother of the executant. It could not, therefore, be binding on the share of the defendant No. 2 in the mortgage property. I agree with the lower Court in its finding that the money borrowed was not required for any legal necessity and that the loan did not in any way benefit either the family or the minor. The share of the defendant No. 2 in the mortgage property shall have, therefore, to be excluded. Those who deal with a person who has only a

limited interest in property and who professes to dispose of a larger interest are *prima facie* bound to make out the facts which authorise such an alienation. That proof is in the present case wanting.

4. The defendants Nos. 3, 4 and 5 are the sons of the defendant No. 1 and were born after the mortgage in suit was executed. Their father could, therefore, validly transfer the family estate and their subsequent birth did not operate retrospectively. They took the family property as it existed at their birth, and they cannot impeach any previous alienation. The defendant No. 1 had, however, a son, by name Gajanan, who was born before the mortgage and was living at that time. He has recently died. It is, therefore, contended for the defendants Nos. 3 to 5 that as the mortgage in suit could be challenged by Gajanan, they have, as his representatives, got the same right of challenging it after his death. Their reasoning is something like this. The mortgage was not for legal nesessity and could not, therefore, bind Gajanan's share which at that time amounted to one-fourth of the property covered by mortgage By his death that share of his has gone to his father and to his three brothers. Thus, the mortgage would be binding only to the extent of five annas share and would not be binding on the remaining three annas. In this connection, it is necessary to observe that this right of challenging an alienation made by the family manager is personal and is not inherited by the surviving members. In the case of *Moti* v. *Kanhya* (1) the following observations occur:—

"For, when this mortgage was created, they were not in existence and their father could, therefore, validly transfer the entire family estate, so far as they are concerned. Their subsequent birth does not operate retrospectively so as to give them a right to question its validity. It seems there were then in existence two other sons, both of whom have since died. But their right to challenge the transaction has not passed to the plaintiffs. It died with them."

The surviving brothers could not be Gajanan's legal representatives. So far as they were concerned, Gajanan simply passed out of the family and the only effect of his death was, that their shares in the family property were proportionately increased. The right which Gajanan possessed of challenging the alienation made by his father died with him and was not inherited by his brothers. Thus, the validity of the mortgage in suit cannot be questioned by the defendants Nos. 3 to 5. When they were born, the family estate was already subject to the mortgage and they got it as it then existed.

5. The other grounds taken in defence were decided by the lower Court against the defendants and it is, therefore, unnecessary to refer to them here. The agreements set up by the defendants were held as not established and I hold that the findings of the lower Court are quite correct. For the purposes of this mortgage in suit it is, therefore, unnecessary to go into any village accounts.

6. The last ground is that the lower Court was wrong in assessing the Pleader's fees separately for the defendant No. 1 and for the defendants Nos. 2 to 5. The defence of these two sets of defendants was different and separate Pleader's fees for them were, therefore, rightly assessed. Rupees 100 were, under the orders of the lower Court, paid by the plaintiffs for conducting the case on behalf of the minor defendants. The plaintiffs' complaint that this amount has not been allowed to him is reasonable. This amount was spent for the defence of the minor defendants and their defence failed. They are, therefore, bound to re pay it to the plaintiffs.

7. The result is, that the appeal is partially allowed and it is declared that the plaintiffs are entitled to get a preliminary foreclosure decree to the extent of one-half of the property covered by the mortgage. To the amount claimed shall be added interest from the date of the suit to 30th April 1922, which I fix for the payment of the mortgage-money. Interest on Rs. 6,122-6-0 from 9th May 1919 to 30th April 1922 comes to Rs. 2,142-10-0 the total being Rs. 8,265. To this shall be added the plaintiffs' costs of both the Courts. The plaintiffs shall pay the costs of the defendant No. 2 in both the Courts. The defendant No. 1 shall bear his own costs. The defendants Nos. 3 to 5 shall pay

(1) 4 Ind. Cas. 797; 5 N. L. R. 181 at p. 188.

to the plaintiffs Rs. 100 paid by them for their defence.

J. P. & N. H.

Appeal partially allowed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 963 OF 1921.

November 28, 1921.

Present:—Mr. Justice Broadway.

RAM NATH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Pandit PARABHU DYAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XI, rr. 14, 15, 21—Production and inspection of documents—General description in order for inspection, whether sufficient—Penalty for non-compliance.

In an order for the production or for the inspection of books and documents a general description would be sufficient so long as that description would suffice for the identification of the document or book sought to be produced or inspected. [p. 664, col. 2.]

The penalty provided in rule 21 of Order XI of the Civil Procedure Code should only be imposed in extremo cases and as a last resort. [p. 664, col. 1.]

Hans Raj v. *Jhanda Mal*, 59 P. R. 1892, *Jaisukh* v. *Dina Nath*, 58 P. R. 1893, *Shim Kishore Mundle* v. *Shoshibhoosun Biswas*, 5 C. 707; 5 C. L. R. 509; 2 Ind. Dec (N. s) 1057, *Khajah Assenoollah Joo* v. *Khajah Abdool Aziz*, 9 C. 924; 8 Ind. Jur 84; 4 Ind. Dec. (N. s) 1263, *Kishan Lal* v. *Sultan Singh*, 30 Ind. Cas 525; 38 A. 5; 18 A. L. J. 831, *Rameshwar Narayan Singh* v. *Rikhanath Koeri*, 58 Ind. Cas. 281; 5 P. L. J. 650; 1 P. L. T. 668, *Dhapi* v. *Ram Pershad*, 14 C. 768; 12 Ind. Jur. 97; 7 Ind. Dec. (N. s.) 509, *Jwala Pershad Sahu* v. *Bigalram Mandwari*, 28 Ind. Cas. 905, *Banshi Singh* v. *Palit Singh*, 7 C. L. J. 295 and *Haigh* v. *Haigh*, (1886) 31 Ch. D. 478; 55 L. J. Ch. 190; 53 L. T. 863; 34 W. R. 120, referred to.

When books relating to a partnership, the business of which is carried on at several places, are ordered to be produced, it is an extreme measure to penalise the failure of the defendant to produce one out of many books by striking his defence out. [p. 664, col 1.]

The provisions of rule 21, Order XI, Civil Procedure Code, are applicable to the case of an omission to produce any document under rule 14 of Order XI of the said Code.

Semble:—The omission of the word "production" which appears in rule 14 in rule 21 of Order XI of the Civil Procedure Code, is due to the fact that it is redundant there.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Ferozepore, dated the 9th April 1921.

Lala *Moti Sagar*, R. S., and *Bawa Kahan Singh*, for the Appellants.

Kanwar *Dalip Singh*, Bakhshi *Tek Chand* and Mr. *Sant Lal*, for the Respondent.

JUDGMENT.—On the 17th of November 1919 one Parabhu Dayal instituted a suit against Ram Nath and Gopi Nath, proprietors of the firm of Kidari Parshad-Chhedi Lal. He alleged that he had entered into a partnership with the defendants and, claiming rendition of accounts, prayed for a decree for such sum as may be found due to him after the accounts had been rendered. He claimed to be interested in the partnership to the extent of 1/8th share. On the same date he filed an application under Order XI, rule 14, asking the Court to order the production by the defendants, upon oath, of certain account books, *kachi rokars*, *pakki rokars* and *khatas* from 1913 to 1919 relating to the matter in question in the suit. On the 18th of November 1919 notice was ordered to issue as prayed. This notice was addressed to Ram Nath and called upon him to show cause against the production and filing of all the documents referred to reference being made to rule 14 of Order XI. The reason given by the plaintiff for the adoption of this course was that the defendants had made false and fictitious entries in their *bahis* and that there was a danger of further alterations being made as soon as they discovered that the suit had been filed. The 21st November 1919 was fixed for compliance with the order and on that date Ram Nath appeared with his Counsel and filed objections to the production of the *bahis*. At the same time, he filed a list of certain account-books accompanied by an affidavit, saying that these were all he had with him and that those that were at Allahabad would be produced as soon as possible. It was also stated that some account-books had been lost or stolen from him about a fortnight or so previously while travelling by train from Allahabad to Ferozepore. It was pointed

out by the defendants that the action of the plaintiff amounted to a "sort of fishing enquiry" without his having established any right to the production of the books called for. Ram Nath was given till the 27th of November 1919 for production of the other books and on that date he produced 11 more which he filed with an affidavit, at the same time, saying that he had up to then been unable to procure three others. On the 16th of January 1920 the plaintiff again applied to the Court pointing out that the defendants had not yet produced the remainder of the books. Notice was accordingly issued to Ram Nath for their production and he produced them on the 27th of January 1920. It should be noted that the Court below appears to be wrong in saying that on the 27th of January 1920 Ram Nath stated that he had no other books in his possession. This is how the matter stands so far as rule 14 of Order XI is concerned.

On the 6th of January 1920 the plaintiff took action under rule 15 of Order XI and asked for an order for inspection of all the account-books, etc., mentioned in the affidavits of the 21st and 27th of November 1919 and all the *bahis* which refer to the partnership from the 8th of December 1913 to June 1919. A notice was issued accordingly directing the defendants to allow inspection of all the books and documents referred to in their written statement of the 2nd of January 1920 and the affidavits of the 21st and 27th of November 1919. In this notice there were 19 entries, Nos. 1—18 specified account-books that had actually been produced. Entry No. 19 was couched in general terms and under it inspection was directed to be given of all the documents generally, from the 8th of December 1913 to June 1919, which related to the partnership dealings. On the 28th of January 1920 the plaintiff applied for the production and inspection of vouchers, invoices, etc., and the defendants were directed to give inspection thereof. The order allowing inspection, however, was not passed till the 19th of March 1920 and is couched in the following terms:—

"I, therefore, direct that the defendants allow the plaintiff or his Counsel to inspect the *bahis* and documents called for. Notice to issue accordingly. The inspection should take place in Court."

On the 20th of March 1920 the 22nd of March was fixed for the purpose of inspection. Inspection took place accordingly and on the 25th of March 1920 the plaintiff filed a receipt or statement in which he detailed the documents he had inspected.

On the 10th of April 1920 the plaintiff filed an application in Court, in which he alleged that his examination of the account-books had disclosed that the documents shown by the defendants were fictitious and forged ones; further, that all the vouchers had not been given inspection of. It was prayed that as the defendants had disobeyed the orders of the Court directing the inspection action should be taken under rule 21, Order XI, and the defendant's defence struck out and proceedings against them taken *ex parte*. Notice was issued to Ram Nath to appear on the 19th of April 1920 in answer to this application. On the 19th of April 1920 Ram Nath did not appear in person, and the case was adjourned to the 14th of May 1920, as the learned Subordinate Judge considered it desirable to examine Ram Nath on oath. On the 14th of May 1920 Ram Nath appeared and his statement was recorded in brief, as was that of Parabh Dayal. The Court then settled certain issues as to the proceedings under Order XI, rule 21, and the case was adjourned to the 27th of July 1920, on which date certain witnesses for the plaintiff were examined and the case taken up on the 28th, when further witnesses for the plaintiff were examined and the case adjourned to the 25th/26th October 1920 for the completion of the plaintiffs' evidence. On that date nothing was done and the case was adjourned to the 25th of November 1920. On the 25th of November 1920 the record shows that the defendant produced a *bahi*, which he called "a *kachi rokar*." Plaintiffs' Counsel objected to the production of this *bahi* at that stage and the Court signed the first page of the account-book and placed it on the record. The matter then proceeded and, finally, on the 9th of April 1921 the Court passed an order under rule 21, Order XI, Civil Procedure Code, striking out the defence of the defendants and directing that the suit should proceed *ex parte*. Against this order an appeal has been filed to this Court under Order XLIII, rule 1, clause (*f*), Civil Procedure Code, by the defendants and I have heard Mr. Moti Sagar on their behalf

while Mr. Tek Chand has addressed me on behalf of the plaintiff respondent.

For the appellant it has been urged that rule 21 no longer applied to a breach of an order passed under rule 14, inasmuch as the words "or production" which appeared under the former section 136 have now been omitted. It was also urged that the proper procedure for the plaintiff was to have first called for an affidavit of documents under rule 12, and then apply for inspection or for an order under rule 14 if the conduct of the defendants justified such a proceeding. On the other hand, Mr. Tek Chand urged that the omission of the words "or production" in rule 21 was due to the fact that they were redundant. The direction to a party to allow inspection included an order for production. It was also urged that as the plaintiff was aware that the defendants were in possession of all the documents that he desired to inspect, the application under rule 14 was in order. Before proceeding further, it is necessary to point out that action has been taken under rule 21, Order XI, as the Court had found that a *kachi rokar* relating to the business of the partnership beginning from the 18th of November 1918 to June 1919 had been contumaciously withheld by the defendants. This *kachi rokar* relates to the Allahabad branch of the business and was produced by the defendants in a criminal case brought against the plaintiff by one Mohar Singh under section 406, Indian Penal Code, in Calcutta. This account-book appears to have been produced in the Calcutta Court some time in July 1920. I may say at once that the allegations made by the plaintiff in his application of the 10th of April 1920 would scarcely have warranted an order under rule 21 such as has been passed, and this appears to be the view taken by the learned Counsel for the respondent, who has confined himself to the non-production of this particular *kachi rokar*. Now, as to this, Mr. Moti Sagar contended that it was the current *kachi rokar* and only contained six months or so of the accounts towards the end of the partnership operations, that as it was a current account, and as the book was in daily use, the defendants forgot that it contained any account relating to the partnership, and that the failure to produce this book was, therefore, purely accidental, and in no way contumacious or wilful. He urged that the mere fact that this account-book was produced in Calcutta in a proceeding against the plaintiff himself evidenced the good faith of his clients, for at that time proceedings under rule 2 were actually pending at Ferozepore, and if the account-book had been deliberately kept back for some sinister purpose the defendants would scarcely have filed it in the Calcutta Court in a proceeding to which the plaintiff was a party. Mr. Tek Chand, on the other hand, contended that the case in Calcutta had been instigated by the defendants themselves, and that they were forced to produce this account book as an act of desperation, hoping thereby to secure the conviction of the plaintiff, and thus bring pressure to bear on him to drop the civil proceedings at Ferozepore. I must confess that it seems to me a little improbable that the defendants would have produced this book in Calcutta, had they intentionally withheld it when ordered to produce all the account-books by the Ferozepore Court, for it has to be borne in mind that the proceedings under rule 21 were then pending, and they must have been well aware that the plaintiff was straining every nerve to prove that they had disobeyed the orders of the Court which rendered them liable to the penalty of having their defence struck out.

Again, Mr. Moti Sagar contended that, as a matter of fact, this particular account-book had never been called for under rule 14 nor included in the order for inspection. In this connection, he referred me to the application and notice of the 17th of November 1919, and the order and notice of the 19th of March 1920 for inspection, and contended that nowhere is this account-book specifically referred to. He further pointed out that neither in the receipt filed on the 25th of March 1920 by the plaintiff showing what documents they had inspected, nor in the application of the 10th of April 1920 was this account-book particularly referred to. Mr. Tek Chand urged that the general description given was sufficient to cover this account-book, and further that it had been specifically asked for as included in item No. 19 of the notice directing inspection, which called for all the account-books from the 8th of December 1913 to June 1919. He explained that this book

was not specifically referred to in the receipt of the 25th of March 1920, or in the application of the 10th of April 1920, because the plaintiff thought that it had been lost. This question is not free from difficulty, for it seems to me that the general order for the production of all documents relating to the partnership of the business could be held to include the book in question. At the same time, where books relating to a partnership, the business of which was carried on in four different places, namely, Ferozepore, Allahabad, Naroval, and Meerut, are ordered to be produced, to penalize the failure for non-production of one out of many books by striking the defence out, as has been done in this case, seems somewhat an extreme measure. Moti Sagar drew my attention to *Hans Raj* v. *Jhanda Mal* (1), *Jaisukh* v. *Dina Nath* (2), *Sham Kishore Mundle* v. *Shoshibhooshun Biswas* (3), *Khajah Assenoollah Joo* v. *Khajah Abdool Aziz* (4), *Kishan Lal* v. *Sultan Singh* (5), *Rameshwar Narayan Singh* v. *Rikhanath Koeri* (6), *Dhapi* v. *Ram Pershad* (7), *Jwala Pershad Sahu* v. *Bigalram Mandwari* (8). These authorities do not afford any assistance in the decision of the actual facts in this case, but in all of them it has been laid down that the penalty provided in rule 21 should only be imposed in extreme cases and as a last resort. *Banshi Singh* v. *Palit Singh* (9) and *Haigh* v. *Haigh* (10), relied on by Mr. Tek Chand are to the same effect. I have given very careful consideration to this matter, and have come to the conclusion that the present is not a case in which this penalty should be enforced, I am inclined to the view that the omission of the words "or production" in rule 21 is due to the fact that they are redundant, although there is something to be said for the opposite view. It seems to me also that, in an order for the production or for the inspection of books and documents, a general description would be sufficient so long as that description would suffice for the identification of the document or book sought to be produced or inspected. In the present case it seems to me that the general description given in the order and notices relating to the production and inspection of the documents required by the plaintiff would be sufficient to include this *kachi rokar*. At the same time, I find it difficult to believe that the conduct of the defendants was deliberately and intentionally contumacious, they produced a large number of books, and the explanation given by Mr. Moti Sagar for the failure to produce this particular book does not seem to me at all far-fetched. The defendants' plea in the case was that a settlement had been arrived at between them and the plaintiff after an examination and statement of accounts. It is not only possible but quite probable that when they were called upon to produce all the account books relating to the partnership dealings they overlooked this particular account-book which was in daily use and which contained accounts relating to the partnership for a period of about six months. It seems to me that they did not wilfully withhold this book, and I would, therefore, accept this appeal and set aside the order of the Court below.

I would note that Mr. Moti Sagar contended that notice to Ram Nath was not notice to the defendants. The defendants, however, were sued as a firm and notice to Ram Nath, therefore, would be sufficient [*Haji Jakaria* v. *Hari Qasim* (11)]. I, therefore, accept this appeal and setting aside the order striking out the defendants' defence return the case to the Trial Court for completion of the trial of the case itself. In the circumstances, I pass no orders as to costs.

I have not discussed the circumstances in which certain account books are said to have been lost by theft, as I am un-

(1) 59 P. R. 1892.
(2) 58 P. R. 1898.
(3) 5 C. 707; 5 C. L. R. 509; 2 Ind. Dec. (N. S.) 1057.
(4) 9 C. 923; 8 Ind. Jur. 84; 4 Ind. Dec. (N. S.) 1266.
(5) 30 Ind. Cas. 525; 38 A. 5; 13 A. L. J. 831.
(6) 58 Ind. Cas. 281; 5 P. L. J. 550; 1 P. L. T. 668.
(7) 14 C. 768; 12 Ind. Jur. 97; 7 Ind. Dec. (N. S.) 509.
(8) 28 Ind. Cas. 905.
(9) 7 C. L. J. 295.
(10) (1893) 31 Ch. D. 478; 55 L. J. Ch. 190; 53 L. T. 863; 34 W. R. 120.
(11) 1 B. 496; 1 Ind. Jur. 517; 1 Ind. Dec. (N. S.) 327.

able to see that they have any direct bearing on the point before me though they may have an important bearing on the merits of the case itself.

S. K. & N. H.

Appeal accepted,

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 296 B OF 1919.

August 19, 1921.

Present:—Mr. Kotval, A. J. C.

SURAJMAL GANESHDAS MARWADI —DEFENDANT—APPELLANT

versus

PRALHAD—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts 29, 36 —Standing crops — Immoveable property — Illegal attachment—Suit for compensation—Limitation.

Standing crops are, for the purposes of the Limitation Act, immoveable property and an illegal attachment of such crops amounts to a trespass on immoveable property. [p. 665, col 2.]

A suit for compensation for illegal attachment of standing crops is governed by Article 29 of the Limitation Act, which specially provides for suits for compensation for such trespass, and not by Article 36 which provides for suits for compensation for torts not provided for elsewhere. [p. 665, col. 1.]

Hari Charan Fadikar v. *Hari Kar*, 32 C. 459; 9 C. W. N. 376 and *Nagoba* v. *Madholala Kalar*, 4 N. L. R. 49 at p. 54, referred to.

Jadu Nath Dandput v. *Hari Kar*, 1 Ind. Cas. 783; 36 C. 141; 12 C. W. N. 1030; 9 C. L. J. 109, distinguished.

Kotagiri Venkataramanujam v. *Patibanda Basavayya*, 21 Ind. Cas. 213; 25 M. L. J. 447; 14 M. L. T. 225; (1913) M. W. N. 869, followed.

Appeal against a decree of the First Additional District Judge, Akola, decided on 12th July 1919, in Civil Appeal No. 94 of 1919.

Mr. *G. G. Hatwalne*, for the Appellant.

Mr. *G. L. Subhedar*, for the Respondent.

JUDGMENT.—The plaintiff respondent sued for damages for the wrongful attachment of his share of the standing crops by the defendant-appellant in execution of a decree for money against his *bataidar*. The attachment was made on the 12th December 1915. The plaintiff's objection was allowed on the 12th July 1916. By that time the crops which were still ungathered were spoiled by the rains and had become valueless. The suit was filed on the 10th December 1918. The plaintiff's claim was decreed by the first Court and the lower Appellate Court has confirmed the decree. The defendant appeals. The first point urged on his behalf is that the plaintiff's suit was barred under Article 36, 1st Schedule, Limitation Act.

Standing crops are, for the purposes of the Limitation Act, immoveable property. The illegal attachment of the standing crops was a trespass on immoveable property. Article 29 specially provides for suits for compensation for such trespass and Article 36 which provides for suits for compensation for torts not provided for elsewhere cannot, therefore, be regarded as applicable: *Nagoba* v. *Madholala Kalar* (1).

The defendant relies on *Hari Charan Fadikar* v. *Hari Kar* (2) and *Jadu Nath Dandput* v. *Hari Kar* (3). In *Hari Charan Fadikar* v. *Hari Kar* (2) the lower Court had applied Article 29 and it was held that that Article had no application as standing crops were immoveable property. It was, no doubt, held that Article 36 applied but the question whether Article 36 applied or Article 39 did not specifically arise in that case. As Jenkins, C. J., observed in *Jadu Nath Dandupat* v. *Hari Kar* (4) it was enough for the purpose of that case to apply Article 36 because that afforded an answer to the plea of limitation.

Jadu Nath Dandput v. *Hari Kar* (3) was a case of illegal distress and cutting and taking away of crops. Rampini, C. J., held that Article 36 was applicable while Dose, J., was of opinion that, so far as the trespass was concerned, Article 39 applied and, so far as the conversion was concerned, Article 49 applied. It seems to me that, even according to Rampini, C. J.'s view, Article 39 would apply because the present case is one for compensation for trespass only and not for trespass and conversion.

(1) 4 N. L. R. 49 at p. 54.
(2) 32 C. 459; 9 C. W. N. 376.
(3) 1 Ind. Cas. 783; 36 C. 141; 12 C. W. N. 1030; 9 C. L. J. 109.
(4) 18 Ind. Cas. 253; 17 C. W. N. 303; 17 C. L. J. 208.

The view that I have taken above finds support in *Kotagiri Venkataramanujam* v. *Patibanda Basavayya* (5).

It is next urged that the lower Courts should have determined the value of the crops which were still standing and available to the plaintiff after the objection was decided in his favour and given him a decree for the amount of the value of the total crops less the value of the crops still standing. No pleas were raised on this point. The plaintiff claimed on the basis that the crops standing in July 1915 were of no value. The defendant alleged that the crops were not damaged at all. The First Court found in favour of the plaintiff, and the ground now urged was not taken in the lower Appellate Court; under these circumstances, it cannot be maintained in this Court.

A new plea is now sought to be urged to the effect that the plaintiff contributed to the loss by his conduct in not applying to the Court to have proper care taken of the crops. No such plea was raised in the pleadings and it is too late now to urge it. The appeal fails and is dismissed with costs.

G. R. D.

Appeal dismissed.

(5) 21 Ind. Cas. 213; 25 M. L. J. 447; 14 M. L. T. 225; (1913) M. W. N. 869.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1030 OF 1920

January 23, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Ross.

JAG SAHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RAM SAKHI KUER AND OTHERS—DEFENDANTS—RESPONDENTS.

***Mortgage**, usufructuary—Date of payment fixed—Construction—Anomalous mortgage—Suit for sale of mortgaged property maintainable—Tender—Mortgagor, duty of—Appeal, second—Questions not to be allowed to be raised.*

Where in a usufructuary mortgage a due date for payment has been fixed, the document is not purely a usufructuary mortgage and the mortgagee is entitled to sue for sale of the mortgaged property immediately after the due date is passed even though he still remains in possession of the property. [p. 667, col. 2.]

Pargan Pandey v. *Mahtam Mahto*, 6 C. L. J. 143, *Pitambar Parkait* v. *Madhu Sudan Mandal*, 6 Ind. Cas. 153 and *Dattambhat Rambhat* v. *Krishnabhat*, 7 Ind. Cas. 446; 34 B. 462; 12 Bom. L. R. 491, relied on.

The question of sufficiency or insufficiency of an amount tendered for the redemption of a mortgage cannot for the first time be gone into in a second appeal when it cannot be decided without going into evidence. [p. 667, col 2.]

A mortgagor should, after tender, keep the money ready for payment but the question whether the money was kept ready or not involves a consideration of the evidence and cannot be allowed to be raised for the first time in a second appeal. [p. 667, col. 2.]

Second appeal from a decision of the District Judge, Saran, dated the 31st March 1920, modifying that of the Subordinate Judge, Saran, dated the 6th February 1919.

Messrs. *K. P. Jayaswal* and *Sundar Lal*, for the Appellants.

Messrs. *Ram Prasad*, *Harnarain Prasad*, *Shiveshvar Dayal* and *Jadubans Sahay*, for the Respondents.

JUDGMENT.

COUTTS, J.—This is an appeal against a decision of the District Judge of Saran dismissing an appeal against the order of the Subordinate Judge of Saran partially decreeing a suit which was brought on a *zarpeshgi* deed and a simple mortgage-bond. The so-called *zarpeshgi* deed is dated the 21st of September 1905 and was for a sum of Rs. 1,850. The simple mortgage-bond is dated the 7th of June 1911 and was for a sum of Rs. 400 advanced on a security of the same property as was mortgaged by the previous deed of the 21st of September 1905. The deeds were both executed by one Kanehan Singh, the husband of the defendant No. 1, *Musammat* Ram Sakhi Kuer, in favour of the plaintiff No. 1, Jag Sah, and Ram Sahai Sah, ancestor of the other plaintiffs. The defendants Nos. 2, 3 and 4 purchased the mortgaged property from the defendant No. 1 on the 7th of November 1914, the arrangement being that out of the consideration money the sum of Rs. 652 was to be kept for payment of the mortgage-debt due on the bond of the 7th of June 1911 and the sum of Rs. 1,850 for the payment of the debt due on the deed of the 21st September 1905. The defendants' case was that at the time they

purchased the mortgaged property they tendered the sum of Rs. 652 to the plaintiff No. 1 in payment of the mortgage-debt, but the plaintiff refused to accept the money and claimed a right of pre emption in the property. The defendants then waited for a year until a suit for pre emption would be barred and deposited the amount in Court. On these allegations the defendants contended that the plaintiffs' mortgage-debt had been satisfied by the amount Rs. 652 which was deposited by them and they further contended that as the plaintiffs were in possession of the property mortgaged by the deed of the 21st of September 1905, they were not entitled to sue for sale of the property as they had done in this suit.

In the Court of first instance it was decided that the plaintiffs, on the allegations of the defendants which were accepted, could claim no interest beyond what was included in the Rs. 652, and with regard to the claim to sell the property to satisfy the debt of Rs. 1,850 a curious order was passed by which the suit was decreed in the plaintiffs' favour, "only so far as, if he has been really dispossessed, he can take possession." What this may mean I do not know. On appeal to the District Judge the decision of the first Court in regard to interest was upheld and in regard to the claim on the deed of the 21st of September 1905 for sale of the mortgaged property, the learned District Judge held that as the plaintiffs had not been dispossessed they were not entitled to sue for sale of the mortgaged property. In the result, the whole suit was dismissed. The plaintiffs have appealed to this Court.

Three points are urged before us. The first is, that the tender of Rs. 652 was less than the total amount due and that, consequently, it was not a valid tender and the plaintiffs were (not?) bound to accept it. The second point urged is that assuming that a valid tender had been made still the defendants must establish that the amount tendered had been kept always available for payment and they not having established this the tender was not a valid tender. The third point urged is, that the so-called *sarpeshgi* deed of the 21st of September 1905 was not a pure usufructuary mortgage inasmuch as a due date for payment had been fixed in the bond, it was an anomalous mortgage and that in such a case the plaintiffs were entitled to sue for sale of the mortgaged property.

With regard to the first of these points, it was never suggested either in the Court of first instance or before the lower Appellate Court that the sum tendered, Rs. 652, was insufficient at the time of tender and it is impossible at this stage, without going into the evidence, to say whether the amount was sufficient or not. This is a second appeal and the question of sufficiency or insufficiency cannot be gone into at this stage. With regard to the second point urged, here again the contention must fail because it was never suggested that the money was not kept available by the defendants although it is necessary that a mortgagor should after tender keep the money ready for payment. It is a matter which involves a consideration of the evidence whether in fact the money was kept ready or not and both the Courts below, having assumed that all the provisions of the law in respect of the tender had been complied with, we cannot allow this point to be taken at this stage. The third point urged is, that a due date having been fixed for payment of the mortgage money under the deed of the 21st of September 1905, the mortgage was not a pure usufructuary mortgage and, therefore, the plaintiffs were entitled to sell immediately after the due date was passed even though he still remained in possession of the property. In support of this proposition the decisions in *Pargan Pandey* v. *Mahtam Mahto* (1), *Pitambar Parkait* v. *Madhu Sudan Mandal* (2) and *Dattambhat Rambhat* v. *Krishnabhat* (3) are relied on and it seems to me that this is the correct view of the law. The question was very fully discussed in *Pitambar Parkait* v. *Madhu Sudan Mandal* (2) in which the mortgage was one in exactly the same terms as the mortgage in the case with which we are at present concerned, and in that case the learned Judges said: "It is well settled that when an instrument of mortgage gives a right to possession and also contains a covenant

(1) 6 C. L. J. 143.
(2) 6 Ind. Cas. 153.
(3) 7 Ind. Cas. 446; 34 B. 462; 12 Bom. L. R. 491.

to pay, thus presenting a combination of a usufructuary and a simple mortgage, the two rights are independent and the mortgagee may sue for sale although he may have given up possession" and the right accrues immediately after the due date is passed. The same view was taken in the other cases to which I have already referred and, as I have already said, this, in my opinion, is the correct view of the law.

In the result, then, I would modify the decree of the lower Appellate Court. The parties are agreed that the sum due is Rs. 1,675. I would accordingly direct that the plaintiffs be allowed to sell the mortgaged property for this sum, the defendants being allowed six months' time to pay the amount. Costs in proportion to the success of the parties.

ROSS, J.—I agree.

J. P. & N. H.

Decree modified.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 16-B OF 1920.

December 13, 1921.

Present:—Mr. Kotval, A. J. C., and Mr. Prideaux, A. J. C.

NIMBAJI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KISANLAL—PLAINTIFF—RESPONDENT.

Hindu Law — Manager — Debts incurred by manager in defending himself against criminal charge—Wealthy and important family—Amount of debts—Lender's duty.

Debts incurred by the manager of a joint Hindu family in defending himself against a criminal charge are payable by the family. [p. 669, col. 1.]

Beni Ram v. *Man Singh*, 11 Ind. Cas. 663; 34 A. 4; 8 A. L. J. 1015 and *Hanumat Mahton* v. *Sonadhari Singh*, 52 Ind. Cas. 734; 4 P. L. J. 653; (1920) Pat. 13; 1 P. L. T. 133, relied upon.

It is not the business of the lender to determine the amount which the manager should expend in his defence. If the family is a wealthy and important one, it is not too much for the manager to raise a loan of Rs. 32,000 in order to defend himself. [p. 669, col. 1.]

Appeal against a decree of the Additional District Judge, Akola, in Civil Suit No. 9 of 1919, dated the 20th January 1920.

Mr. *M. R. Dixit*, for the Appellants.

Mr. *G. L. Subhedar*, for the Respondent.

JUDGMENT.—Plaintiff sued to recover Rs. 38,153-7-6 from defendants Nos. 1 to 4 on account of advances made to a trading firm of which defendants are the owners. The claim includes interest. A sum of Rs. 32,000 out of the debt was advanced to enable the first defendant to engage Counsel to defend himself against a murder charge, a case in which he was subsequently convicted and sentenced to transportation for life; Rs. 3,750 was the amount claimed as an advance for the purchase of war bonds; the balance represents money advances made, it is said, for business purposes to this trading family.

The case was proceeded *ex parte* against the first defendant; defendants Nos. 2 to 4, his brothers, represented by their maternal uncle, Mahadeo Bajirao, denied all knowledge of the debts in suit, and it was further denied that these sums were borrowed for family purposes or for the benefit of the family.

The case went to trial on the following issues:—

"(1) Whether the debt in suit was incurred by the defendant No. 1, and was it for the purposes mentioned by the plaintiff?

(2) Whether defendants Nos. 2 to 4 are liable for the debt incurred?

(3) Whether the plaintiff is entitled to claim interest, and, if so, at what rate?

(4) To what relief is the plaintiff entitled and against which of the defendants?"

The lower Court finds that the sum of Rs. 32,000 was advanced to meet the expenses of defending the first defendant at the murder trial and that such an advance was a pressing necessity. Defendants Nos. 2 to 4 were also found liable to pay the amount advanced for war bonds and for family purposes.

It is not here denied that the sums claimed were advanced and, in view of the decisions in *Beni Ram* v. *Man Singh* (1),

(1) 11 Ind. Cas. 663; 34 A. 4; 8 A. L. J. 1015.

and *Hanumat Mahton* v. *Sonadhari Singh* (2), we have no hesitation in finding that debts incurred by the manager in defending himself against a criminal charge are payable by the family. It is established that defendant No. 1, until his arrest, was the *karta* or the manager of the family; but it is argued that it lay on the plaintiff to show that such a large sum as Rs. 32,000 was required for the defence of Dhanraj. The payments of Rs. 24,470 to Mr. Das, Bar-at-Law, Calcutta, Rs. 500 to Mr. Hosali, Bar-at-Law, Rs. 500 to Mr. Malak Khan, Pleader, Rs. 1,500 to Mr. Khaparde, and Rs. 1,000 to Mr. Nargundkar, are proved from defendants' account-books. These account for no less than Rs. 27,970. It is established that Mr. Das was engaged in the Magistrate's Court and that Mr. Khaparde appeared for Dhanraj in this Court. The expenses in the Committing Magistrate's Court and the High Court easily account for the balance. We do not think it was the plaintiff's business to determine the amount Dhanraj chose to expend in his defence. The family is a wealthy one and are said to pay Rs. 10,000 to Rs. 12,000 a year as Government land revenue and to have dealings of one or two lakhs annually. The engagement of Mr. Das and other Counsel was thus justified by the importance of the family and as it is not denied that the sum of Rs. 32,000 was received in order to defend Dhanraj, we think plaintiff has been rightly given a decree as regards this amount.

It is equally clear that money was advanced for the purchase of war bonds to the defendants' family; these war bonds belong to defendants' family. Some patriotic people purchased these bonds when they could ill afford them. But defendants were assuring themselves of a fixed income by buying these bonds and the purchase can, therefore, be said to be for the family benefit.

The other items claimed are unquestionably on account of business purposes, debts incurred by the trading family, and we think that the decree as regards this portion of the claim is correct.

We note that the appeal is very generally worded. It is not denied that the money claimed reached the family and the law governing the re-payment of debts incurred for Dhanraj's defence is not challenged. We are of opinion that the case has been correctly decided. We, therefore, dismiss this appeal with costs. The appellants will pay respondent's costs.

S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 915, 916 TO 927 OF 1919.

November 23, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

PALAN MEAH, TAHSILDAR—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 104H, 111A —Claim under s. 104H barred by limitation—Suit under s. 111A, maintainability of.

A plaintiff is entitled to maintain a suit coming under section 111A of the Bengal Tenancy Act although his claim under section 104H of the Act may be barred by limitation. [p. 670, col. 2.]

Appeals against decrees of the District Judge of Noakhali, dated the 29th of January 1919, affirming those of the Additional Subordinate Judge of that District, dated the 17th of June 1917.

FACTS appear from the judgment.

Babu *Jatindra Kumar Sen Gupta*, for the Appellants.—The thirteen appeals arise out of as many suits which have all been dismissed on a preliminary point. No evidence has been gone into. The lands are *khas mahal* lands. The Record of Rights were finally published on 27th March 1910. The present suits were brought on 27th March 1916. The lands are included within my *zote*. They have been wrongly recorded as being within the defendant's

(2) 52 Ind. Cas. 784; 4 P. L. J. 653; (1920) Pat. 13; 1 P. L. T. 132.

jote. Hence my suits. On 29th November 1916 the Secretary of State appeared. In the meantime, on 29th September 1916, the original plaintiff died and the present plaintiffs were substituted on 25th February 1917. On 18th June 1917 I applied for issue of a commission for local inspection. The Court thereafter took up preliminary issues for trial on that date. The Secretary of State then objected to the maintainability of the suit under section 104, Bengal Tenancy Act. On 19th June 1917 I prayed that the prayer of my plaint objected to might be expunged. My prayer was not granted and the suit was dismissed. On appeal that order was affirmed. I claimed two reliefs, one under section 104-H, and the other under section 111A. of the Bengal Tenancy Act. I may give up one of my claims. The defendant cannot be in any way prejudiced by that. I submit the learned Judge erred in dismissing the whole suit. Refers to *Rajani Kanta Mookerjee* v. *Secretary of State for India* (1). My next contention is that my application for amendment ought to have been granted as it could not have possibly prejudiced the Secretary of State. Refers to *Promoda Nath Roy* v. *Asir-ud-din Mandal* (2), *Jogendra Nath Singh* v. *Secretary of State for India in Council* (3).

Babu *Surendranath Guha*, (Junior) Government Pleader, for the Secretary of State.—The amendments cannot be allowed as the suits will fail for want of notice to the Secretary of State under section 18, Civil Procedure Code. Refers to *Prasanna Kumar Adhikary* v. *Rachimuddin Howladar* (4).

Babu *Jatindra Kumar Sen Gupta* replied in brief.

Babu *Kam Ch. Mitter*, for the Respondents.

JUDGMENT.

In S. A. No. 815 of 1919.

The suit, in so far as the prayer *kha* is concerned, is barred by the provisions of section 104H of the Bengal Tenancy Act, inasmuch as it relates to an entry of rent settled under sections 104A to 104F. But the plaintiff applied for amendment of the plaint in the Court of first instance by striking out the prayer *kha*. The plaintiff also wanted to strike out the prayer for a declaration that the record in the names of defendants Nos. 2 to 5 in respect of the land of schedule (*ka*) was unjust and illegal. If these amendments were allowed, the only prayer left would be a declaration that the defendants Nos. 2 to 5 had no right to the land and that the land was included in the plaintiff's *ryoti*: that would be a suit within the purview of section 111A and we do not see why the plaintiff should not be allowed to proceed with the suit so framed. In the case of *Rajani Kanta Mooker ee* v. *Secretary of State for India* (1) it was held that the plaintiff is entitled to maintain a suit coming under section 111A although the claim under section 104H may be barred by limitation.

In the present case, the plaintiff expressly prayed for the amendments as stated above. We think that the reasons given by the Court below for refusing the amendment are not sound, and that the amendments may be allowed.

The Secretary of State will not be a necessary party to the suit so amended. But the plaintiff wants that the question of title as between the plaintiff and defendants Nos. 2 to 5 should be decided in the presence of the Secretary of State who may be kept on the record as a *pro forma* defendant.

We accordingly direct that the case be remitted to the Court of first instance in order that the amendments may be made and the suit tried according to law. The Secretary of State will be kept on the record as a *pro forma* defendant.

The plaintiff must pay full costs of the Secretary of State in the Court of first instance and half the costs in the lower Appellate Court, as only one half of the costs was allowed in that Court to the Secretary of State. The order as to costs in favour of the other defendants both in the Court of first instance and in the lower Appellate Court will be set aside. No order as to costs in this Court.

This judgment will govern the other appeals Nos. 915 to 927 of 1919.

B. N.

Case remitted.

(1) 47 Ind. Cas. 820; 45 C. 645 at p. 651.
(2) 11 Ind. Cas. 262; 15 C. W. N. 896.
(3) 17 Ind. Cas. 921; 16 C. L. J. 385; 17 C. W. N. 835.
(4) 15 Ind. Cas. 327; 17 C. W. N. 153.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 157 B OF 1920.

October 24, 1921.

Present:—Mr. Prideaux, A. J. C.

GOVINDA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat DOOMI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—Berar—Inheritance—Non-technical stridhan—*Preferential heir between son and daughter.*

The *lex loci* of Berar is the Mitakshara as interpreted by the Mayukha [p. 671, col. 2.]

Chandrabhaga v. *Vishwanath*, 20 Ind. Cas. 557; 9 N. L. R. 102, referred to.

In Maharashtra and Berar where the Mitakshara is a paramount authority and the Mayukha a secondary one the property taken by a daughter from her father is her *stridhan* and devolves on her own heirs in the following order :—(1) unmarried daughter, (2) married daughter who is unprovided for, (3) married daughter who is provided for, (4) daughter's daughter, (5) daughter's son, (6) son, (7) son's son. [p. 672, col. 2.]

Jankibai v. *Sundra*, 14 B. 612; 7 Ind. Dec. (N. S.) 875, *Gulappa Domingappa* v. *Tayawa*, 31 B. 453; 9 Bom. L. R. 834, *Bhaskar Trimbak Acharya* v. *Mahadev Ramji*, 6 B. H. C. R. 1, *Bulakhidas* v. *Keshavlal*, 6 B. 85; 6 Ind. Jur. 260; 3 Ind. Dec. (N. S.) 514 and *Manilal Rewadat* v. *Bai Rewa*, 17 B. 758; 9 Ind. Dec. (N. S.) 498, *Dowlatrao* v. *Govindrao*, 1 Ind. Cas. 243; 5 N. L. R. 13, followed.

Sheo Shankar Lal v. *Debi Sahai*, 25 A. 468 at p. 472; 5 Bom. L. R. 828; 23 M. L. J. 380; 7 C. W. N. 831; 30 I. A. 202; 8 Sar. P. C. J. 465 (P. C.), distinguished.

Appeal against a decree of the Second Additional District Judge, Akola, dated the 23rd April 1920, in Civil Appeal No. 138 of 1919.

Mr. *D. W. Kathalay*, for the Appellants.

Mr. *A. V. Khare*, for the Respondents.

JUDGMENT.—The following genealogical tree helps to explain the case:—

Pandu (died 1909)-wife Tapi Bai

- Jhumki (husband Sakharam)
  - Ramkrishna.
  - Doomi.
  - Sarji.
- Chinki.
- Mukti.

Doomi and Sarji sue to get possession of two fields and a house sold by Ramkrishna, their brother, to the defendants under two sale-deeds contending that they as the preferential heirs of Jhumki are entitled to the property and that Ramkrishna did not own the property and could not sell it. The defendants pleaded *inter alia* that they are Rewa Kunbis who migrated to Berar from Guzerath bringing their customary law, the Mayukha, with them and under that law the son would have a preferential claim. It was further contended that among this caste there is a custom by which the son succeeds in preference to the daughters. It was further pleaded that the plaintiffs' claim was time-barred and that there was a misjoinder of parties.

The first Court found that the parties were governed by the Mitakshara Law as prevailed in Berar and that the alleged custom had not been established : there was no misjoinder of parties or causes of action and that the plaintiffs' claim was not time-barred. In the lower Appellate Court these findings were confirmed.

There is no force in the first and second grounds of the memorandum of appeal to this Court and the contentions contained therein have not been pressed.

It has been found that the family of the parties migrated to Berar from Guzerath some five hundred years ago and as Nilkantha, the author of the Mayukha School of Law, did not come into existence until about 1700, the family could have hardly brought that law into this Province with them. There is a concurrent finding of fact that the custom set up has not been established and that concludes that matter. The fourth ground of appeal which deals with the question of adverse possession has not been argued and arguments in this Court have been confined to the question whether Ramkishna or his two sisters are the preferential heirs to the mother, Jhumki. It is admitted by both sides in this Court that Jhumki took an absolute estate. It is not contended that her sisters have or had any right to the estate now in suit.

On the findings come to it must be held that the parties are governed by the *lex loci* of Berar, namely, the Mitakshara as interpreted by the Mayukha : see *Chandrabhaga* v. *Vishwanath* (1). It is settled law

(1) 20 Ind. Cas. 557; 9 N. L. R. 102,

that in Berar a Hindu daughter inheriting from her father takes an absolute estate: *Dowlatrao* v. *Govindrao* (2), and it has been held in Bombay, and the Maharashtra Law is followed in Bombay, that a daughter inheriting from a mother or a father takes an absolute estate which passes on her death to her own heirs and not to those of the preceding owner: *Bhagirathibai* v. *Kahnujirav* (3), but it is argued for the appellants that as it is under the Mayukha that the property reached the daughter, its further descent is governed by that Law and the son under it inherits in preference to his sisters. In support of this argument I am referred to paragraph 26, section, 10 of the Vyavahara Mayukha, which runs: "However the text of Yajnavalkya, 'Let sons divide equally both the effects and the debts after the death of their two parents,' relates to what is acquired by the act of partition and the like with the exception of that declared in the above texts as woman's property. From this it is clear that if there be daughters, the sons, or other heirs even succeed to the mother's estate other than that before described." I am also referred to page 446 of Bannerjee's "Marriage and Stridhan." The property is, it is argued, non-technical *stridhan*, and not being one of those kinds of *stridhana* for which express texts prescribe exceptional modes of descent would under the Mayukha go on the woman's death to her sons as if she were a male, and this notwithstanding her having daughters: paragraph 618 of Mayne's Hindu Law and Usage, and Trevelyan's Hindu Law, page 452.

The question before me is, whether property taken by a daughter from her father devolves on the son to the exclusion of the daughters or *vice versa*. The authorities quoted doubtless show that under the Mayukha in this case the son would succeed, but in Berar the Mayukha is not paramount, the *lex loci* being as already stated the Mitakshara interpreted by the Mayukha, and it is to this law, paramount also in the Mahratta country, the southern Konkan and northern Konkan, that we must turn for a solution. There is ample authority to show that under this law the property descends to the daughters to the exclusion of the sons. In Maharashtra and Berar where the Mitakshara is paramount and the Mayukha a secondary authority, the inheritance of this non-technical *stridhan* would devolve on

(1) Unmarried daughter,
(2) Married daughter who is "unprovided for."
(3) Married daughter who is "provided for."
(4) Daughter's daughter.
(5) Daughter's son,
(6) Son.
(7) Son's son.

Authority for the decision of the lower Appellate Court can be found: *Jankibai* v. *Sundra* (4), *Gulappa Dominggappa* v. *Tayawa* (5), *Bhaskar Trimbak Acharya* v. *Mahadev Ramji* (6), *Bulakhidas* v. *Keshavlal* (7) and *Manilal Rewadat* v. *Bai Rewa* (8). I am aware of the decision of their Lordships of the Privy Council in *Sheo Shankar Lal* v. *Debi Sahai* (9) but that was a case under the Benares Law. The law as now settled in the Madras, Mithila and Bengal Schools, is that property inherited by a woman whether from a man or a woman does not constitute her *stridhan* but according to the Bombay School, which is followed in Berar, it does, except where the property is inherited by a female who enters the family of the deceased by marriage. As stated, there is ample authority for the proposition that in this case governed by the Mitakshara as interpreted in the Bombay Presidency the daughters exclude the son, Ramkrishna. The result is that this appeal fails and is dismissed with costs. The appellants will pay respondents' costs.

J. P. & N. H.

Appeal dismissed.

(2) 1 Ind. Cas. 243; 5 N. L. R. 13.
(3) 11 B. 285; 6 Ind. Dec. (N. S.) 187 (F. B.).
(4) 14 B. 612; 7 Ind. Dec. (N. S.) 875.
(5) 31 B 453; 9 Bom. L. R. 834.
(6) 6 B. H. C. R. 1.
(7) 6 B. 85; 6 Ind. Jur. 260; 3 Ind. Dec. (N. S.) 514.
(8) 17 B. 758; 9 Ind. Dec. (N. S.) 498.
(9) 25 A. 465 at p. 472; 5 Bom. L. R. 823; 13 M. L. J. 330; 7 C. W. N. 831; 30 I. A. 202; 8 Sar. P. C. J. 465 (P. C.).

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 72 OF 1919.

February 10, 1922.

Present :—Mr. Justice Das and Mr. Justice Adami.

KRISHNA KISHORE ADHIKARY AND OTHERS—APPELLANTS

versus

THE KUSUNDA NYADI COLLIERIES, LTD.—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—Test to determine whether transaction mortgage—Transaction in which no interest payable, whether mortgage—Royalty, whether immoveable property—Deed, construction of.

A test to apply to determine whether a transaction amounts to a mortgage or not is to see whether any interest is to run upon the sum of money that may be due by one party to another in consideration of which the transaction is entered into. [p. 674, col. 1.]

Where in a transaction no interest is payable by the debtor to the creditor and the document expressly states that the transaction is entered into for the purpose of paying off the sum due by the debtor to the creditor, the transaction is not a mortgage. [p. 674, col. 1.]

Royalty is the price paid for a portion of the soil the payment whereof is distributed over a number of years. Interest in the royalty is not an interest in immoveable property [p. 674, col. 2.]

In order to pay off a certain debt without interest, the borrower executed a *Jat meadi* in respect of a certain commission due to him in respect of a certain coal land of his, and contracted that the lender shall continue to satisfy the sum borrowed by realising the commission every month, from year to year, till that month, of that year until which the entire amount is paid up but that if the income from the commission stopped the lender was to get nothing:

Held, that such a contract did not amount to a mortgage and as such the deed was not one which required attestation in accordance with the provision of section 59 of the Transfer of Property Act. [p 673, col. 2.]

Appeal from a decision of the Subordinate Judge, Manbhum.

Messrs. *N. C. Sinha*, and *N. C. Ghosh*, for the Appellants.

Messrs. *P. C. Manuk*, *S. A. Sami*, *S. M. Mullick*, *S. K. Bhattacharjya*, *S. N. Bose*, for the Respondents.

JUDGMENT.

DAS, J.—On the 6th February 1901 the defendant No. 2 and the predecessors in interest of defendants Nos. 3 6 gave a mining lease in respect of 100 *bighas* of coal land in Kusunda to one Mr. Phillips on certain terms as to payment of minimum royalty and commission which are set out in the document creating the title in favour of Mr. Phillips. Mr. Phillips has subsequently conveyed his interest to the Kusunda Nyadi Collieries Ltd., and the Company is now liable to pay the minimum royalty and commission in respect of the lease to defendants Nos. 2 6. Defendants Nos. 2-6 borrowed various sums of monies from Mr. Smith, who has been cited in the action as defendant No. 7, and on the 4th March 1908 the sum due and owing by defendants Nos. 2 6 to Mr. Smith amounted in all to Rs. 35,000. On the 24th March 1908, defendants Nos. 2-6 executed a document in favour of Mr. Smith which is the subject-matter of the dispute between the parties, The document is as follows:—"This *Jat meadi tamasuk* is executed to the following effect: that we have borrowed already Rs. 30,000 from you, as per items noted herein below, and borrow Rs. 5,000 this day, in all Rs. 35,000. In order to pay off this sum without interest, we executed *Jat meadi* in respect of half of the commission on the underground coal of the 100 *bighas* of land, as described in the boundaries given below, within 12 annas of the entire Mauza Kusunda, appertaining to Parganna Jharia and Katras. * * * * * * You shall continue to satisfy the sum borrowed, by realising the commission every month, from year to year from the ensuing month of April of the current year. You shall continue to realise half of the commission till that month of that year until which the entire amount is paid up, This *Jat meadi* commission shall continue to be realised by us directly from that month and that year on which your money will be paid up. You or your heirs or representatives shall not be competent to raise any claim, plea or objection to the same. If the income from the commission be stopped owing to the exhaustion of coal, or on any other ground, and if the entire amount due to you be not realised therefrom and something is left due, you shall not be competent to realise the same from our persons, or other properties. You shall remain bound to give up the same." The question which we have to determine is, whether this document operated as a mortgage of immovable property. If it did operate as a mortgage of immoveable property, it is unenforceable in law inasmuch

as it was not attested in accordance with section 59 of the Transfer of Property Act. The plaintiff, who took a conveyance of the interest of Mr. Smith on the 28th March 1908, contends that the document operated as an assignment or as a mortgage of moveable property and that, accordingly, it was not necessary to have the document attested in the manner required by section 59 of the Transfer of Property Act.

In my opinion the document did not operate as a mortgage and certainly did not operate as a mortgage of immoveable property. A mortgage implies a debt and I am satisfied that the document extinguished the debt which was due by defendants Nos. 2-6 to Mr. Smith. The document expressly states that the transaction was entered into in order to pay off the sum of Rs. 35,000 due by the defendants Nos. 2-6 in favour of the plaintiff. A very important test to apply, whenever the question is raised whether a transaction amounts to a mortgage or not, is to see whether any interest is to run upon the sum of money that may be due by one party to another in consideration of which the transaction is entered into. If no interest is payable by the debtor to the creditor and if the document expressly states that the transaction is entered into for the purpose of paying off the sum due by the debtor to the creditor, it is difficult to understand how the transaction can be regarded as a mortgage. In the next place, it is important to take note of the condition which expressly provided that even if Mr. Smith failed to realise any commission owing to the exhaustion of coal or on any other ground the defendants Nos. 2-6 would not be liable for any sum of money that might be still due to Mr. Smith. In other words, the execution of this document put an end to the liability of defendants Nos. 2-6 to the plaintiff. No doubt, there are certain expressions used in the document to which the learned Subordinate Judge refers which, if read apart from the context, seem to suggest that the liability still continued, but the document must be read as a whole and, in my opinion, when it is read as a whole, it establishes that the liability of defendants Nos. 2-6 was at an end by the execution of the document.

In the next place, if it was a mortgage at all it was a mortgage of the commission which was due to the defendants Nos. 2-6 from the Company. Now, I cannot regard the interest which the defendants Nos. 2-6 had in the commission as an interest in immoveable property. It has been held in cases too numerous to mention that royalty is in reality the price paid for a portion of the soil the payment whereof is distributed over a number of years. If that be so, then the interest in the royalty cannot constitute an interest in immoveable property. In my opinion, the position is this: defendants Nos. 2-6 had a claim to a beneficial interest in the commission which was not in their possession either actual or constructive. That beneficial interest could not be regarded as an interest in immoveable property. Defendants Nos. 2-6 transferred their claim to that beneficial interest to Mr. Smith and Mr. Smith in his turn transferred it to the plaintiff. In my opinion, the transaction is not one which required attestation in accordance with the provision of section 59 of the Transfer of Property Act.

I would allow the appeal, set aside the judgment of the learned Subordinate Judge, and remand the case to the learned Subordinate Judge for decision according to law. The plaintiffs are entitled to the costs of the appeal. The costs incurred in the Court below will abide the result and will be disposed of by the learned Subordinate Judge.

ADAMI, J.—I agree.

J. P.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 18 OF 1921.

July 29, 1921.

Present:—Mr. Dhobley, A. J. C.

MADHORAO—DEFENDANT—APPLICANT

versus

MANOHARLAL—PLAINTIFF—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 26—Plaint, presentation of, at residence of Judge after Court hours—Jurisdiction to receive.

RAGHUBAR SINGH *v.* JETHU MAHTON.

The presentation of a plaint after the usual Court hours at the residence of the Judge is valid and a Judge has jurisdiction to receive it at his residence even after the Court hours, though he is not bound to do so.

Din Ram v. *Hari Das*, 14 Ind. Cas. 744; 34 A. 482; 9 A. L. J. 743, followed.

Appeal against a decree of the Additional District Judge, Batul, dated the 9th October 1920, in Civil Appeal No. 47 of 1920.

Mr. *Atmaram Bhagwant*, for the Applicant.

ORDER.—The only point urged in this case is, that the presentation of the plaint, which was made after the usual Court hours at the Munsif's residence, was not proper and that the plaint should have been rejected. The day on which the plaint was presented was the last day on which the limitation was to expire and the plaintiff's claim would have been barred by time the next day. This point was not raised in the First Court but was made a ground of appeal in the Court of the Additional District Judge. The case of *Din Ram* v. *Hari Das* (1) is an authority for holding that such a presentation is a valid presentation and that a Judge has jurisdiction to receive the plaint at his residence and after the Court hours, though he is not obliged to do so. The fact that that was a case of petition of appeal not of a plaint does not make any difference. The presentation of the plaint was not, therefore, improper and the plaintiff's claim could not be dismissed as time barred. There is no other ground pressed in this revision which is dismissed without notice to the other side.

G. R. D.

Revision dismissed.

(1) 14 Ind. Cas. 744; 34 A. 482; 9 A. L. J. 743.

PATNA HIGH COURT.

In the matter of LETTERS PATENT APPEAL No. 3 OF 1921.

February 9, 1922.

Present:—Mr. Justice Coutts.

RAGHUBAR SINGH AND OTHERS—APPELLANTS

versus

JETHU MAHTON—RESPONDENT.

Court Fees Act (VII of 1870), s. 4—Letters Patent Appeal—Court-fee, whether leviable.

No Court-fee is leviable on a Letters Patent Appeal under the Court Fees Act.

Mr. *Atul Krishna Roy*, for the Appellants.

ORDER.—The question for decision is, whether Court fee is payable on a memorandum of appeal under section 10 of the Letters Patent. Up to now Court-fees have been levied, but it is contended that the only law under which Court-fees can be levied is section 4 of the Court Fees Act and that this section does not contemplate payment of Court-fee in the case of an appeal from the decision of a Single Judge of the High Court.

Section 4 of the Court Fees Act says: "No document of any of the kinds specified in the First or Second Schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction.....*or in the exercise of its jurisdiction as regards appeals from the judgment of two or more Judges of the said Court, or of a Division Court*..... .....unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

In this High Court, so far as I am aware, no Division Court has ever been constituted; and in any case, in my opinion, a Division Court must, under the law as it stands at present, consist of at least two Judges, for section 108 of the Government of India Act enacts that, "(1) Each High Court may by its own rules provide, as it thinks fit, for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the High Court, of the Original and Appellate Jurisdiction vested

in the Court. (2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several Division Courts."

Section 4 of the Court Fees Act, therefore, does not entitle the High Court to levy Court-fees on Letters Patent Appeals and there being no other law under which they can be levied such appeals must be accepted without Court-fees. I feel convinced, however, that it was never intended that Letters Patent Appeals should be filed without Court-fees and I would suggest that the matter be brought to the attention of the Legislature.

J. P.

Order accordingly.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 82 OF 1920.

February 14, 1921.

Present:—Mr. Justice Odgers.

Sheikh MOHIDIN SAHIB—DEFENDANT—PETITIONER

versus

RAMASWAMI CHETTY—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 15—Arbitration—Arbitrator getting private information but communicating it to other arbitrators—Award, validity of—Revision—High Court, power of.

A High Court will proceed very warily in allowing revision in the case of awards. [p. 676, col. 2.]

Ghulam Khan v. *Muhammad Hassan*, 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.), referred to.

Where in a case referred to arbitration one of the arbitrators gets private information about the case but takes care to communicate it to the other arbitrators in the presence of the parties and they have opportunity of checking the information or of contradicting it, the award is not vitiated. [p. 677, col. 1.]

Kanhaiya Lal v. *Khairati Lal*, 49 Ind. Cas. 308; 9 P. W. R. 1919 and *Daya Kishen* v. *Dharam Das*, 4 A. L. J. 159; A. W. N. (1907) 75, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise a decree of the District Court, South Arcot, dated the 10th February 1918 in Civil Miscellaneous Appeal No. 6 of 1918, preferred against an order of the Additional District Munsif, Villupuram, dated the 30th November 1917, in Original Suit No. 223 of 1917.

FACTS appear from the judgment.

Mr. *V. Viswanatha Sastri*, for the Appellant.—The award is vitiated by an illegality and the decree based on it should be set aside. It was the duty of abitrators to record evidence tendered by the parties and to base their judgment thereon. One of the arbitrators got private information and used his dealings with defendant to unfair advantage. He saw plaintiffs' accounts. The decree is liable to be set aside *Ghulam Khan* v. *Muhammad Hussan* (1), *Kanhaiya Lal* v. *Khairati Lal* (2) and *Daya Kishen* v. *Dharam Das* (3).

Mr. *L. A. Govindaragava Iyer*, for the Respondent—There has been no prejudice to defendant by the action of *panchayatdar*, Annusawmi. He no, doubt, examined defendant's accounts and detected the difference between it and the accounts produced before the *panchayat*. But defendant admitted the false entries. This knowledge obtained by Annusawmi was communicated to the other *panchayatdars*. The cases cited are not on all fours.

JUDGMENT.—The question here is, whether the Court should interfere in revision to set aside a decree passed in accordance with an award on the ground that the arbitration was vitiated by a material irregularity in that one of the arbitrators used knowledge obtained privately in coming to his decision as an arbitrator. *Ghulam Khan* v. *Muhammad Hassan* (1) is authority for saying that in the case of an award revision would be more objectionable than an appeal. It is, therefore, the rule that the Court proceeds very warily in allowing revision in awards. Two cases were referred to by the Vakil for the petitioner, one *Kanhaiya Lal* v. *Khairati Lal* (2) where an arbitrator made private enquiries from a person or persons unknown, behind the back of one of the parties—the plaintiff in the suit. It is there laid down that an arbitrator must come to his decision on evidence taken before both parties or after having given both parties an opportunity of being present at the enquiry and that the making of private enquiries vitiated the award. The other case is *Daya Kishen* v. *Dharam Das* (3) where the arbitrator made

(1) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(2) 49 Ind. Cas. 303; 9 P. W. R. 1919.

(3) 4 A. L. J. 159; A. W. N. (1907) 75.

NIPPON MENKWA KALMSHIKI PORTLOCK.

private and secret enquiries, the result of which was not recorded by him. It was held that it was legal misconduct to make private enquiries and make his award on information which he had privately obtained and which the parties had not got opportunities of checking.

In this case the evidence is that one of the *panchayatdars* used to have dealings with the defendant. He went to his shop and noticed a difference in the accounts of defendant with the plaintiff from the accounts before the *panchayat*. The *panchayatdar* (Annusami Chetty) communicated his knowledge to the other *panchayatdars*, both parties were present and the *panchayat* agreed with the opinion which he placed before them. The defendant actually admitted that some of the entries against plaintiff were false and fraudulent as suspected by Annusawmi Chetty. Farther, the other *panchayatdars* examined the accounts for themselves and there is no reason for thinking that they did not form an independent judgment thereon.

The information of Annusawmi Chetty may have been, in the first instance, privately obtained, but it was communicated to the other *panchayatdars* in the presence of the parties and they had opportunity of checking the information or of contradicting it. So, far from this, the defendant actually admitted the information was correct. This case clearly does not fall within the principles laid down in the authorities cited and the civil revision petition must be dismissed with costs.

M. C. P.
J. P. *Petition dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 513 OF 1921.

July 5, 1921.

Present:—Mr. Justice Pratt.

NIPPON MENKWA KALMSHIKI— PLAINTIFF

versus

F. PORTLOCK—DEFENDANT.

Bombay Rent (War Restrictions) Act (II of 1918), s. 9 (2)—Object of Act—Landlord and tenant—Ejectment—Accommodation for staff of employees of landlord—Sufficient cause.

The object of the Bombay Rent (War Restrictions) Act is not the expropriation of the landlord but the prevention of profiteering. [p. 680, col. 2.]

Under section 9 (2) of the Bombay Rent (War Restrictions) Act the discretion of the Court in determining what is a satisfactory cause is unfettered. [p. 680, col. 3.]

The accommodation of a staff of employees is sufficient cause under section 9 (2) of the Bombay Rent (War Restrictions) Act to eject a tenant. [p. 680, col. 2.]

Stovin v. *Fairbrass*, (1919) W. N. 216; 88 L. J. K. B. 1004; 17 L. G. R 583; 121 L. T. 172; 83 J. P. 241; 35 T. L. R. 659; 63 S. J. 682, not applied.

Dobson v. *Jones*, (1844) 5 Man. & G. 113; 8 Scott (N. R.) 80; 1 Lutw. Reg. Cas. 105; Barr. & Arn. 243; 13 L. J. C. P. 126; 134 E. R. 502, *Bent* v. *Roberts*, (1878) 3 Ex. D. 66; 47 L J. Ex. 112; 37 L. T. 673; 26 W. R. 128, *Martin* v. *Assessment Committee of West Derby*, (1883) 11 Q B D. 45; 52 L. J. M. C. 66; 31 W. R. 489; 47 J. P. 500; *Reg.* v. *Spurrell*, (1865) 1 Q. B. 72 at p. 75; 35 L. J. M. C. 74; 12 Jur. (N. S.) 208; 12 L. T 364; 14 W. R. 81, *Stephens* v. *Tatham*, (1919) W. N. 334, *Beckett* v. *Sutton*, (1882) 51 L. J. Ch. 432; 19 Ch D 646; 46 L. T. 43; 30 W. R. 490, *Duck* v. *Bates*, (1883) 12 Q. B. D 79; 53 L. J. Q. B 97; 49 L. T. 507 affirmed in Appeal 13 Q. B. D. 843; 53 L. J. Q. B. 338 at p. 344; 50 L. T. 778; 32 W. R. 813; 48 J. P. 501, referred to.

The test to determine whether the staff are occupying the premises as servants of the landlord or as their tenants is, whether this occupation is necessary to or ancillary to the performance of the servants' duties. [p. 678, col. 1.]

Where the occupation is by way of remuneration or part payment for services, the servant occupies not as a servant but as a tenant. [p. 679, col. 2.]

Mr. *Campbell*, (with him Mr. *Coltman*), for the Plaintiff.

Mr. *F. S. Taleyarkhan*, for the Defendant.

JUDGMENT.—The plaintiffs in this case, the Japanese Cotton Trading Company, purchased, on the 29th July 1920, the remainder of a sub-lease of Gool Mansion, Mayo Road. The building comprises eight flats, of which one is in the occupation of the defendants as tenants. The plaintiffs purchased the building in order to provide residence for their Japanese staff, and the day after the purchase gave the defendants notice to quit on the 1st of October 1920. The defendants attorned to the plaintiffs and paid rent which was accepted up to the 1st of October, but as they pleaded the Bombay Rent Act and declined to quit, the plaintiffs have filed this suit.

The following issues were raised :—

(1) Whether the purchase of the property in suit by the plaintiffs is not *ultra vires* of the Company, and, if so, whether the plaintiffs are entitled to maintain this suit?

(2) Whether the plaintiffs require the premises in suit reasonably and *bona fide* for their own use and occupation within the meaning of section 9 (2) of the Rent Act?

(3) Whether there is satisfactory cause within the meaning of section 9 (2) of the Rent Act?

I disallowed the first issue, as the defendants having attorned the plaintiffs are estopped from denying the title of their landlord. Further, it can make no difference to them whether the suit is brought by the Company itself or by the purchasing directors.

As to the reasonableness and *bona fides* of plaintiffs' requirements, there can be no doubt. The Japanese staff consists of six married couples, ten children and twenty-nine bachelors. Of these five bachelors are on leave and twelve bachelors, one wife and five children are to arrive in a few months. The remainder of five married couples, five children and thirteen bachelors, are housed in a bungalow at Malabar Hill, a flat at Rafaya Manzil, and two temporarily in a boarding house. The occupants of Rafaya Manzil are under notice to quit. The Company, therefore, propose now to divide their staff between the Malabar Hill bungalow and Gool Mansion. The Managing Director for Bombay with his wife and five children and eight bachelors in the former, and the rest of the staff in the latter. This allotment is fully set out in Exhibit A, and the accommodation thus provided errs, if at all, on the side of economy of space.

It is faintly suggested that the allotment of one room in the flats to an "office" is a contravention of the head-lease from the Improvement Trust forbidding the use of any part of the premises without the consent of the Trust "for any *business*, *trade* or *occupation* or any purpose whatsoever other than a dwelling-house." But the so-called office is merely a room where the Code book is kept, where telegrams are received after office hours and de-coded, and where transactions thus made are recorded. No outsiders visit this room for business, and it is, therefore, no different to the room in a dwelling-house in which a Barrister reads his briefs at night. This use of the room is not inconsistent with its occupation as a dwelling-house, and in any case the only person who can raise the objection is the lessor or the sub-lessor.

The second issue raises the question whether the occupation of the servants of the Company is in law the occupation of the landlord. Under section 9 (2) of the Bombay Rent (War Restrictions) Act the landlord must show that the premises are required reasonably and *bona fide* "for his own occupation." Is the occupation of the Company's staff equivalent in law to the landlord's own occupation?

Now, the section only recognises two grounds founded on the occupation of the premises: (1) for the landlord's *own* occupation, and (2) for the occupation of any person for whose benefit the premises are held. The effect of the word "*own*" is no doubt to emphasize the personality of the subject, as, for instance, the phrase "every man is his own lawyer." Here it emphasizes the personality of the landlord. But I think this emphasis is used merely to contrast the occupation of the landlord with the occupation of the *cestui que* trust or beneficial owner. It is not intended to exclude the rule of law that the occupation of a servant is the occupation of the master. *Optimus interpres rerum usus*, and the section has always been so construed. In deciding on the requirements of landlords, it has always been the practise to consider the space required for the accommodation of servants.

Mr. Taleyarkhan relies upon the words "some other person in his employ" in the corresponding section of the English Act, and argues that their omission in the Indian Act shows that the Indian Legislature declined to recognise the occupation of a servant. But the occupation of a servant may be either *qua* servant that of his master or *qua* tenant of his master. The English section refers to the latter and does not touch the former. It allows the landlord to substitute another tenant if that tenant be in his employ; but it in no way affects the rule that the occupation of the servant *qua* servant is the occupation of the master.

The question then is, whether the staff were occupying the premises as servants of the landlord Company or as their tenants. The test is, whether this occupation is necessary to or ancillary to the performance of the servants' duties. In the case of *Dobson* v. *Jones* (1) a Surgeon who resided in a hospital so that he

(1) (1841) 5 Man. & G. 113; 8 Scott (N. R.) 80; 1 Lutw. Reg. Cas. 105; Barr. & Arn. 243; 13 L. J. C. P. 126; 134 E. R. 502.

might be able more readily to perform the services required of him was held to occupy as a servant. Tindal, C. J., in that case said (page 120) :—

"The coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely whose possession and occupation is strictly and properly that of their masters"

So, also, in the case of *Bent* v. *Roberts* (2), a constable occupying quarters in the Police Station building was held to occupy as a servant.

But where the occupation is by way of remuneration or part payment for services, the servant occupies not as a servant but as a tenant. In *Martin* v. *Assessment Committee of West Derby* (3) a Police Superintendent was held to be a tenant of quarters which were at some distance from the Police Station.

The Company's staff will pay no rent for the premises they occupy, but that will make no difference if their occupation is part of their remuneration and not necessary and subservient to the performance of their services. This is illustrated by the case of *Reg.* v. *Spurrell* (4) where Cockburn, C J., said :—

"It may be that it happens to be convenient both to the master and to the servant, that the servant requiring some place of habitation shall, by agreement with the master, instead of receiving so much for his wages, out of which wages he would have to find himself a separate habitation, inhabit some premises of the master as part of the remuneration for his services; but it is only an equivalent for wages. He would be receiving in the one instance the whole amount of his wages, out of those wages he would have to find himself a habitation, for which he would have to pay rent; in the other he inhabits premises of his master, and instead of paying the master the rent the master deducts it from the wages."

(2) (1878) 3 Ex. D. 66; 47 L. J. Ex. 112; 37 L. T. 673; 26 W. R. 128.

(3) (1883) 11 Q. B. D. 145; 52 L. J. M. C. 66; 31 W. R. 499; 47 J. P. 500.

(4) (1865 1 Q. B. 72 at p. 75; 35 L. J. M. C. 74; 12 Jur. (N. S.) 208; 12 L. T. 364; 14 W. R. 81.

Now, the Company's place of business is not at Mayo Road, and the residence of the staff in this building is not necessary to the performance of their services. Any other residence in Bombay would do equally well. In fact, some of the staff are residing at Malabar Hill. Further, it is clear that their occupation is by way of remuneration. The Company's Director produces the rules of the Company regulating its dealings with the emloyees. It is a compilation as comprehensive and far more lucid than the Civil Service Regulations. Rule 118 is as follows :—

"Persons, who are serving in the branches or agencies abroad, are to be provided with house accommodation and are also payable foreign service allowance within the limit of the following table."

The Japanese staff, when serving out of Japan, are entitled to foreign service allowance and house accommodation as part of their remuneration. Therefore, although they pay no rent, their occupation will be not as servants but as tenants.

I must, therefore, decide the second issue in the negative as the occupation of the staff will not be the occupation of the landlord Company.

But there is another ground on which the plaintiffs rely, and that is the general ground of any cause which may be deemed by the Court to be sufficient. This point arose last year in the case of the *Hongkong & Shanghai Banking Corporation Ltd.*, v. *Boyagis*, Suits No. 582 and 583 of 1920, decided by my brother Marten, J. The case went off on other grounds, but Marten, J., though not called upon to decide it, referred to the recent English cases of *Stovin* v. *Fairbrass* (5) and *Stephens* v. *Tatham* (6). *Stephens* v. *Tatham* (6) merely follows the decision of the Court of Appeal in *Stovin* v. *Fairbrass* (5) and the latter is the only case that requires consideration. It was based upon the corresponding section of the English Act section 1 (3) of the Increase of Rent and Mortgage Interest (War Restrictions Act) 1915 (5 & 6 Geo. V, c. 97). In that section, there are three instances of grounds founded on the land.

(5) (1919) W. N. 216; 88 L. J. K. B 1004; 17 L. G. R 583; 121 L. T. 172; 83 J. P. 241; 35 T. L. R. 659; 63 S. J. 682.

(6) (1919) W. N. 334.

lord's requirements in reference to occupation followed by the general words "some other ground which may be deemed satisfactory to the Court." This part of the section is as follows:—

"Or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ, or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory by the Court making such order."

The three instances founded on the landlord's requirements as to accommodation are (1) occupation by the landlord himself, (2) occupation by the employee, and (3) occupation by the tenants' employee, and then follow the general words as to satisfactory cause.

In *Stovin* v *Fairbrass* (5) the landlord required the premises in order to give vacant possession to his vendee. This was not one of the three specified cases and the Court held that it would not come under the general cause, because the exercise by the Court of its discretion in favour of the occupation of a person not so specified would be inconsistent with the particular specification of three cases of occupation. The Court held in effect that the general words "some other cause" are restricted to cases not *sui generis* with the three causes specified. Scrutton, L. J., differed on this point, and indeed the word "other" is usually construed to be either unrestricted in its generality or limited to cases *sui generis* with the particular words that precede it.

But it is not necessary to consider whether *Stovin* v. *Fairbrass* (5) was correctly decided, for the scheme of the section of the Indian Act is different. For the words "some other ground which may be deemed satisfactory by the Court" the words "any cause which may be deemed satisfactory by the Court" are substituted. The word "any" is as wide as possible: *Beckett* v. *Sutton* (7). The word "any" excludes limitation or qualification: *Duck* v. *Bates* (8). They place no limit on the discretion of the Court, and it seems to me, therefore, that the *ratio decidendi* of *Stovin* v. *Fairbrass* (5) is not applicable to the Indian section. Under the Indian Act the discretion of the Court in determining what is a satisfactory cause is unfetterrd. Then I have to ask myself the question whether the cause shown by the plaintiff Company regarding the accommodation of their staff is satisfactory, Under the English Act this is a specified ground. Does its omission in the Indian Act lead to an inference that it is not so in India? I think not. The particular cases of accommodation of an employee of a landlord or the employee of a tenant are omitted in the Indian Act, merely because they are superfluous in view of the very wide terms of the last clause. I think the accommodation of a staff of employees is sufficient cause under section 9 of the Bombay Rent Act. I am fortified in this opinion by the fact that express provision is made for such a case in the English Act.

The plaintiffs have spent four lacs in the purchase of the leasehold of the property in order to accommodate their staff, and it would be grossest injustice to prevent them from putting it to the use for which they purchased it. This would be tantamount to expropriation, and the object of the Bombay Rent Act is not the expropriation of the landlord but the prevention of profiteering.

Decree, therefore, that the defendants do deliver vacant possession to the plaintiffs on or before the 19th of July 1921, or in case an appeal is filed before that day on or before the 14th of September 1921. Defendants to pay plaintiffs compensation at the rate of Rs. 275 per mensem from 1st October 1920 to the date of delivery of possession and to pay plaintiffs' costs of this suit.

J. P. *Suit decreed.*

(7) (1882) 51 L. J. Ch. 432; 19 Ch. D. 646; 46 L. T. 481; 30 W. R. 490.

(8) (1883) 12 Q. B. D. 79; 53 L. J. Q. B. 97; 49 L. T. 507 affirmed in Appeal 13 Q. B. D. 843; 53 L. J. Q. B. 338 at p. 344; 50 L. T. 778; 32 W. R. 813; 48 J. P. 501.

LACHMAN v. GAHRESHWAR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 221 OF 1920.

August 16, 1921.

Present:—Mr. Hallifax, A. J. C.

LACHMAN AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

GAHRESHWAR AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5):—Application for recording by Court of payment to decree-holder—Step-in-aid of execution.

It is not what the decree-holder does that has to be a step-in-aid of execution but what he asks the Court to do, and the date from which the period of limitation starts is the date on which he asks for the step to be taken, not that on which it is taken. [p. 681, col. 2.]

An application by a decree-holder for recording by the Court of a payment made to him by his judgment-debtor is an application to the Court to take a step-in-aid of execution. [p 682, col. 1.]

Tarini Dass Bandyopadhya v *Bishtoo Lal Mukhopadaya*, 12 C. 608; 6 Ind. Dec. (N. S.) 413, *Sujan Singh* v. *Hira Singh*, 12 A. 399; A. W. N. (1890) 125; 6 Ind. Dec. (N. S.) 1000 (F. B.), *Wasi Imam* v. *Poonit Singh*, 20 C. 696; 10 Ind. Dec. (N. S.) 470, *Gopal Proshad Bhagat* v. *Rajendra Lal Panja*, 34 Ind Cas. 625; 20 C. W. N. 615 and *Chotey Singh* v. *Eshwari*, 5 Ind. Cas. 295; 32 A. 257; 7 A. L. J. 251, followed.

Bhajan Lall v. *Oheda Lall*, 24 Ind. Cas. 215; 12 A. L. J. 825, referred to.

Appeal against a decree of the Additional District Judge, Bilaspur, dated the 7th February 1920, in Civil Appeal No. 196 of 1919.

Mr. *G. L. Subhedar*, for the Appellants.

JUDGMENT.—The matter for decision in this appeal is, whether an application for execution of a decree made on the 14th of October 1919 is within time or not. The next previous application for execution was made on the 16th of September 1916 and on it a house was attached on the 12th of October 1916. On the 22th of that month the decree holder filed a receipt in Court acknowledging the payment of Rs. 100 by the judgment debtor towards satisfaction of the decree, whereupon the execution application was dismissed and the house was released from attachment. It was held in the First Court that the recording of the payment as certified was not a step-in-aid of execution of the decree and that the application to the Court to record it did not, therefore, give a new starting point for limitation under the fifth clause of Article 182 of the First Schedule of the Limitation Act.

2. On appeal the learned District Judge mentioned the *dictum* of Innes, J., in *Kunhi Mannan* v. *Seshagiri Bhakthan* (1), quoted with approval by Ismay, J. C., in *Lachman Jat* v. *Hira Darzi* (2), to the effect that the provisions of the Limitation Act should be construed as far as possible so as to prevent the defeat of *bona fide* endeavours to secure the fruits of a decree once obtained. Relying on these remarks more than on the decision of the case itself, in which the fresh start for limitation arose out of an application for payment to the decree-holder of the proceeds of a sale in execution, the learned Judge held that the recording of a payment as certified is a step in aid of execution, and set aside the order of the First Court dismissing the application as barred by time.

Against this judgment the judgment-debtors have appealed here on the ground that "the mere statement made by the decree-holders on 28th October 1916 that they had already received Rs. 100 out of Court, was not a step-in-aid of execution.' This arises out of a very common misreading of the provision with which we are concerned. It is not what the decree-holder does that has to be a step-in-aid of execution but what he asks the Court to do, and the date from which the period of limitation starts is the date on which he asks for that step to be taken, not that on which it is taken. Here, on the 28th of October 1916, the decree-holders made an application that the Court would record a part-payment of the decree which they certified to it. This recording of the payment was held to be a step in-aid of execution by the Calcutta High Court in *Tarini Dass Bandyopadhya* v. *Bishtoo Lal Mukhopadaya* (3) and the Allahabad High Court in *Sujan Singh* v. *Hira Singh* (4) and these rulings were followed in the former Court in *Wasi Imam* v. *Poonit Singh* (5) and *Gopal Proshad Bhagat* v. *Rajendra*

(1) 5 M. 141; 2 Ind. Dec. (N. S.) 93.
(2) 11 C. P. L. R. 161.
(3) 12 C. 608; 6 Ind. Dec. (N. S.) 413.
(4) 12 A. 399; A. W. N. (1890) 125; 6 Ind. Dec. (N. S.) 1000 (F. B.).
(5) 20 C. 696; 10 Ind. Dec. (N. S.) 470.

Lal Panja (6) and in the latter Court in *Chotey Singh* v. *Eshwari* (7).

The only possible objection to this view is, that a decree-holder might certify a payment in part satisfaction of an already time barred decree as there is no limitation for such certifying, and so get fresh starts for limitation absolutely indefinitely. This is met by the ruling of Piggott, J., in *Bhajan Lall* v. *Ched. Lall* (8) that the Court will refuse to record a payment towards a decree of which execution is already barred by time. It is also met by the practical consideration that, although a decree-holder might be able to certify with truth once or even twice that a payment had been made towards his decree after execution was barred by time, it is highly improbable that he would be in a position to do so a third time and quite certain that he would not be able to go on doing it indefinitely. I hold that the application to record the payment was an application to the Court to take a step in execution of the decree, and dismiss the appeal. As the respondents failed to appear, no order in respect of costs in necessary.

G. K. D.

Appeal dismissed.

(6) 34 Ind. Cas. 625; 20 C. W. N. 615.
(7) 5 Ind. Cas. 295; 32 A. 257; 7 A. L. J. 251.
(8) 24 Ind. Cas. 215; 12 A. L J. 825.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3511 OF 1919.

October 18, 1921.

Present:—Mr. Justice Kincaid.

MANUBHAI PREMANUND—PLAINTIFF

versus

KESHAVJI RAMDAS—DEFENDANT.

Contract—Teji *transaction*—Vaida *transaction*—*Wagering Contract.*

Teji transactions are not wagering contracts unless it is positively proved that the parties agreed neither to ask for nor to give delivery. [p. 686, col. 2.]

Jessiram v. *Tulsidas*, 16 Ind. Cas. 576; 37 B. 261; 14 Bom. L. R. 617, *Universal Stock Exchange* v. *Strachan*, (1896) A. C. 166; 65 L. J. Q. B. 428; 74 L. T. 468; 44 W. R. 497; 60 J. P. 468, *Gieve, In re, Trustee, Ex parte*, (1899) 1 Q. B. 794; 68 L. J. Q. B. 504; 80 L. T 438; 47 W. R. 441; 6 Manson 136; 15 T. L. R. 251, *Tod* v. *Lakhmidas Purshotamdas*, 16 B. 441; 8 Ind. Dec. (N. S.) 773, *Sassoon* v. *Tokersey*, 28 B. 616 at pp. 621, 624; 6 Bom L. R. 521, *Mathuradas* v. *Narbadashankar*, 4 Ind Cas 99; 11 Bom L. R. 997, *Motilal Partabchand* v. *Govindram Jeychand*, 30 B. 83; 7 Bom. L R 385, *Hurmukhrai* v. *Navotamdas*, 9 Bom. L. R. 125 and *Manalal Raghunath* v. *Radhakison Ramjiwan*, 62 Ind. Cas. 361; 22 Bom L. R. 1018; 45 B. 86, referred to

Teji contracts stand on the same footing as *Vaida* contracts. [p. 686, col 2.]

Mr. *Munshi* (with him Mr. *M. V. Desai*), for the Plaintiff.

Mr. *Khan* (with him Mr. *Mirza*), for the Defendant.

JUDGMENT.—The plaintiff has brought the present suit to recover from the defendants, as the result of certain transactions in Japanese camphor, the sum of Rs. 50,751-4 0 together with interest thereon at nine per cent, from 25th April 1919 together with costs and further interest on judgment at six per cent. per annum until payment.

The defendants have not denied the alleged transactions but have pleaded that they were wagering contracts and have asked that the suit be dismissed with costs.

The following issues were framed by Mr. Khan, the defendants' Counsel:—

1. Were the transactions in the suit wagering transactions?

2. Is the plaintiff entitled to any and, if so, what relief?

The facts of this interesting case are a little complicated and I shall go into them as fully as I can in order to help the reader to understand them.

There are three common forms of speculations in Bombay. They are known respectively as *te i-mandi*, *teji*, and *mandi*. The word *teji* means brightness, the word *mandi* means dulness. Thus, *te,i* is used to signify a rise in the market price of goods or stock, and *mandi* to signify a fall. In the *te,i-mandi* transactions, which have been very carefully examined by Beaman, J., in *Jessiram* v. *Tulsidas* (1) one party buys what is known as a double option. For this he pays a certain premium, say Rs. 20 per Rs. 1,000.

(1) 16 Ind. Cas, 576; 37 B. 264; 14 Bom. L. R, 617.

On the settling day the buyer has the right to declare himself either a seller or a buyer. If the market falls, he will declare himself a seller. If it rises, he will declare himself a buyer, *e. g.*, if it be supposed that by the contract price a bar of silver or a bale of goods is worth Rs. 100, *A* buys the double option for Rs. 20. If the goods rise to Rs. 110 he will declare himself a buyer and will lose Rs. 10. If the goods fall to Rs. 90 he will declare himself a seller and will lose Rs. 10. But if the goods rise to Rs. 150 or fall to Rs. 50 he will declare himself a buyer and a seller respectively and in each case will make Rs. 30 profit. In other words, to use Beaman, J.'s phrase, "the party buying the double option (the *te i-mandi*) is backing the fluctuations of the market against its stability." Conversely, the party who sells the double option backs the stability of the market against its fluctuations.

The *teji* transaction is quite a different one. In it the buyer of the *teji* (*lagadanaro* or applier) pays the seller (*khanaro* or eater) a premium or *teji* over and above the contract price of the bar of silver or bale of goods. If the market rises the buyer of the *teji* who is also a buyer of the silver or the goods can ask the seller of the *teji* to give him the goods or their value at the market rate on settling day whatever it be. If the market falls, the buyer of the *teji* merely loses his premium, *e. g.*, *A* buys Rs. 100 worth of bar silver from *B* and also buys *teji* by the payment of Rs. 20 premium. If the market rises to Rs. 150, *A* will make a profit of Rs. 50 *minus* his Rs 20. If the market falls to Rs. 50, *A* will lose his Rs. 20 premium or *teji* only. *A* thus insures himself against a big fall. *B* is not insured against a big rise.

The third kind of transaction is a *mandi*. It is the exact converse of the *teji*. The buyer of the *mandi* or premium is a seller of the goods and the *mandi* is the premium which he pays against a possible rise, *e g*, *A* sells Rs. 100 worth of bar silver to *B* and buys *mandi* by the payment of Rs. 20 premium. If the market falls to Rs. 50 *A* will make a profit of Rs. 50 *minus* his premium. If the market rises to Rs. 150 *A* will lose his Rs. 20 premium or *mandi* only.

The transactions with which we are concerned are *teji* transactions. On the 6th January 1919, the plaintiff bought from the defendant twenty five cases of Japanese camphor at the rate of Rs. 2-12-0 a tin for delivery on the 15th April 1919. On the 7th January 1919 the plaintiff paid the defendant Rs. 125 as *teji* at the rate of one anna on every Re. 2 12-0. On the 7th February 1919 the plaintiff bought for the same delivery one hundred cases of Japanese camphor at Rs. 2-13-0 a tin and on the 8th February paid Rs. 500 as *teji* at the rate of one anna on every Re. 2 13-0. On the 15th February 1919 the plaintiff bought one hundred and fifty cases of Japanese camphor for the same delivery at Rs. 2 15-0 a tin and on the same day paid the defendant Re. 750-0-0 as *teji* at the rate of one anna for every Rs. 2-15 0. Now, if the price of the camphor had fallen, no matter how little or how much, the plaintiff would have forfeited his *teji*. Unfortunately for the defendant, the price of camphor had risen by settling day to Re. 5-2-0 per tin. The plaintiff, on the 14th April 1919, wrote to the defendant an Attorney's letter saying that he would take delivery the next day (Exhibit A). On the 15th he went to the defendant's firm, tendered the contract price, and asked for delivery of the camphor. The defendant had no camphor to deliver. At the same time he wrote in reply to the plaintiff's letter that the plaintiff was not entitled to any delivery and that the transactions were invalid. After some correspondence the plaintiff filed the present suit for the difference between the rate at which he bought the camphor and its price on the settling day

Before discussing the arguments advanced by the learned Counsel, I wish to record my appreciation of the assistance which they have both given me in this difficult and intricate case.

Mr. Khan for the defendant has relied on the judgments of Beaman, J., in a series of *te i-mandi* suits. The first in order of time was *Hariram* v. *Trikamdas*, O. C. J. Suit No. 100 of 1908 (Unrep). Therein the learned Judge has observed:—

"While, therefore, I am now prepared to admit that it is open to any party suing upon a *teji mandi* transaction to satisfy the Court if he can that the particular instance was a genuine transaction in which the

parties did intend, at the time of entering into it, that delivery should be given and taken, I still think that the presumption would be very strong against *teji-mandi* transactions as a class being genuine and lawful."

In *Jessiram* v. *Tulsidas* (1), Beaman, J., observed in regard to *teji-mandi* business (page 624*):—

"From the very nature of the transaction from the fact of a man being utterly indifferent whether he is going to buy or sell, there must arise a very strong presumption that he is not doing a genuine business and that the whole contract is really in the nature of a pure wager. I have already pointed out that that presumption may in special cases be rebutted; but as a rule, I think, it will be extremely difficult to do so."

Finally, in *Basantlal* v. *Shivnarayan*, O. C. J. Suit No. 665 of 1915, the learned Judge observed at the outset of his judgment:—

"I take this opportunity of re affirming emphatically, and now virtually stripped of any qualifications whatever, the opinion that in this market *teji mandi* transactions are all wagers. The more closely I look into the true character and intention of these transactions even when they are put forward as between Shroff and Shroff, the more evident it becomes that they are essentially by way of gaming and wagering."

On the strength of these authorities, Mr. Khan has strongly pressed on me to hold that the present transaction must be a wagering contract, until plaintiff has proved the contrary. But the learned Counsel has not realised the substantial difference between *teji-mandi* and *teji* transactions. With all deference to the eminent Judge who tried the three quoted cases, I am not sure that he did not go too far in his condemnation of *teji mandi* dealing. But whatever their character, there is no resemblance between them and the dealings in the present suit. The main ground on which Beaman, J., held *teji mandi* business to be wagering was the "utter indifference of one party whether he was going to buy or sell." That ground is absent in *teji* transactions. Therein the party who "applies" the *teji* is always a buyer.

Mr. Khan has next relied on two English cases: *Universal Stock Exchange* v. *Strachan* (2) and *Gieve, In re, Trustee, Ex parte* (3). In the former case the Jury found that the real meaning of the parties was that there should be merely a payment of differences. In the latter, the Judges found that "the conduct of the parties led almost necessarily to the inference that they only intended gambling transactions." These two cases have been the foundation of a number of decisions in the Bombay High Court of which the tenor has been much the same.

In *Tod* v. *Lakhmidas Purshotamdas* (4) Farran, J., observed (pages 415, 416):—

"Contracts are not wagering contracts, unless it be the intention of both contracting parties, at the time of entering into the contracts, under no circumstances to call for, or give delivery, from or to each other. There is no law against speculation, as there is against gambling."

In *Sassoon* v. *Tokersey* (5) Sir Lawrence Jenkins, C. J., remarked (page 621):—

"In cases of this description there is a danger of confounding speculation, or that which is popularly described as gambling, with agreements by way of wager, but the distinction in the legal result is vital....To make an agreement a wager there must be a common intention to bet."

In *Mathuradas* v. *Narbadashankar* (6) Beaman, J. observed (page 1004*):—

"I believe that before a Court can hold a contract, on the face of it genuine, or at any rate not clearly wagering as the contract in *Gieve, In re, Trustee, Ex parte* (3) was, to be a wagering contract, the Court must be satisfied that the intention of the parties was in no circumstances either to give or take delivery."

In *Motilal Partabchand* v. *Govindram Jeychand* (7) Batchelor, J., held a transaction to be a wagering contract because he held "it to be distinctly proved that in the contracts in suit neither party ever intended to give or receive delivery, but both parties

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(2) (1896) A. C. 166; 65 L. J. Q. B. 428; 74 L. T. 468; 44 W. R. 497; 60 J. P. 468.

(3) (1899) 1 Q. B. 794; 68 L. J. Q. B. 509; 80 L. T. 438; 47 W. R. 441; 6 Manson 136; 15 T. L. R. 251.

(4) 16 B. 441; 8 Ind. Dec. (N. S.) 773.

(5) 28 B. 616 at pp. 621, 624; 6 Bom. L. R. 521.

(6) 4 Ind. Cas. 99; 11 Bom. L. R. 997.

(7) 30 B. 83; 7 Bom. L. R. 385.

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intended to settle by the payment and receipt of differences."

In the earlier case, *Hurmukhrai* v. *Narotamdass* (8), Davar, J., laid down the following principle (page 138) :—

"If the Court is satisfied that when the parties entered into the agreements before it, both of them intended neither to take or give delivery, but merely intended to adjust the transactions on the due date or dates by the payment or receipt of differences, as the case may be,.....then the Court should have no hesitation in holding that the transactions were mere agreements by way of wagers and as such void in law."

Finally, in the recent decision of *Manalal Raghunath* v. *Radhakison Ramjiwan* (9) Macleod, C. J., observed (page 1032*) :—

"The defendants must prove that there was an understanding between them and plaintiffs, (1) that they were not only speculating but gambling, (2) that, if they ordered the plaintiffs to buy cotton, they would never call upon them to deliver it, and if they ordered them to sell, they would never themselves deliver it."

From these authorities the principle is clear. The defendant in this case has to prove that there was an agreement or understanding between him and the plaintiff that in case the market rose the plaintiff should not require the defendant to deliver to him any camphor. But such an agreement or understanding requires, in my opinion, strict proof. A defence that the contract was a wagering one is not one that an honourable man would advance on his own behalf. It is a dishonest man's defence, for if he won the defendant would never object to the wagering character of the contret, and such a defence should not be lightly allowed. In this connection, I would rely on the observations of Beaman, J., in *Jessiram* v. *Tulsidas* (1) (page 628†).

"Nor do I think the Courts ought lightly to favour gambling defences. My own leaning has always been very strongly against them...I think it is only too clear that if dishonest gamblers know that they can evade their liabilities upon every occasion without much trouble by merely pleading wagering, the worst class of gamblers will gamble more desperately and with a greater sense of impunity than they ever did before. The Courts by countenancing such gamblers in receiving their winnings when they win and refusing to pay when they lose, confident that they will not be compelled by process of law to pay, may indeed foster the evil which both the Legislature and the Courts would desire to see altogether suppressed."

I have, therefore, to see whether the defendant has adequately proved the existence of a definite understanding between him and the plaintiff that, in no circumstances whatever, was there to be any delivery. Beyond the defendant's own word he has led no evidence whatever. Both parties, however, tried to prove the existence or non existence of such an understanding by reference to a previous transaction between the defendant and plaintiff.

In January 1918 the plaintiff made a purchase of seventy five cases of camphor from the defendant. The contract rate per tin was Rs. 1-15-0 and the plaintiff paid *teji* at the rate of one anna per tin. The price of camphor rose, with the result that whereas the contract price of the seventy five cases of camphor was Rs. 11,595, it amounted on settling day to Rs. 13,840-5-0. According to the plaintiff he took delivery of the camphor. Unfortunately, his account shows a debit entry of Rs. 13,840-5-0 (Exhibit L) against the defendant and a subsequent entry of Rs. 2,244-6-0 (Exhibit M) to the defendant's credit. The plaintiff has explained that on the settling day he was in a great hurry and feared that unless he paid for the camphor before closing time the defendant would repudiate his contract. He did not know exactly what he owed him, he only knew the approximate amount. He, therefore, gave him a number of *chittis* or drafts on other firms. Afterwards he found that he had overpaid the defendant by Rs. 2,244-6-0 and the latter re-paid him this sum later. Now, it is most unlikely that a business man would overpay for camphor bought by him by Rs. 2,244-6-0. It is, moreover, absurd for the plaintiff to say that he only knew

(8) 9 Bom. L. R. 125.

(9) 62 Ind. Cas. 361; 22 Bom. L. R. 1018; 45 B. 86.

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the approximate price of the camphor. That had been paid in Januray and the settling day was in April. The defendant's story is more credible. The defendant and Gopalji Gangji have deposed that as regards fifty cases Vithaldas Asharam sold them to Gopalji Gangji, Gopalji Gangji sold them to defendant, defendant sold them to plaintiff who re sold them to Vithaldas Asharam. As the price of camphor had risen considerably on the settling day the parties, instead of delivering camphor from one to the other, simply paid each other the differences. Vithaldas Asharam and the plaintiff settled with each other and defendant and Gopalji Gangji settled with each other. The last two settled at Rs. 2-6 0 a case. But, instead of defendant paying Gopalji Gangji and the latter paying the plaintiff, the defendant paid the plaintiff direct the difference between Rs 1-15 0 and Rs. 2-6-0 a case, *i. e.*, 0-7-0 a tin. Each case has admittedly eighty tins. 50 multiplied by 80 is equal to 4000. 4000 multiplied by 7 is equal to 28000. 28000 annas are equal to Rs. 1,750. If from this rebate at one fourth per cent. (Rs. 4 6-0) be deducted the difference on fifty cases was Rs. 1,745- 0 0. As regards the remaining twenty-five cases the defendant sold them to the plaintiff who sold them to one Ramanlal and settled with him. The defendant settled with Ramanlal at Rs. 2 3-0. He, therefore, paid the plaintiff the difference between Rs. 2-3 0 and Rs. 1-15-0 equal to four annas. Now 25 multiplied by 80 is equal to 2000. 2000 multiplied by 4 is equal to 8000 annas equal to Rs. 500. If rebate be deducted the amount due was Rs. 498-12 0. If to Rs. 498-12 0 Rs. 1,745-10 0 be added the total comes to Rs. 2,244-6-0 the amount paid by the defendant to the plaintiff in Exhibit M. Therefore, I am forced to the conclusion that the plaintiff's story of dealing in this transaction is false and that the parties merely settled differences. The learned Counsel for the defendant has also laid great stress on the omission of the word *teji* from the contract and the plaint. But the plaintiff has explained that he worded the contract and the plaint in the way he did because he was afraid that if he inserted the word *teji* in the contract or the plaint the Courts could at once jump to the conclusion that the contract was a wagering one; and in view of the decisions of Beaman, J., in the *teji mandi* cases, this was not a wholly unreasonable point of view. And, although I agree with Mr. Khan that in the January transaction the parties settled differences I am not thereby forced to conclude that in the transaction before me the parties bound themselves not to make or take delivery. Before I could come to that conclusion I should have to feel certain that in no *teji* transaction is delivery ever given. But Dayal Lalji's Munim Nagindas Manickchand has deposed that his firm often gives delivery in *teji* transactions and similar evidence was given by Ali Mahomed Abdulla, a partner in the firm of Abdulla Maoji. In one of the cases mentioned by them the plaintiff had a *teji* contract with the firm of Dayal Lalji. They delivered to him one hundred and twenty five cases and he delivered them again on a *vaida* contract to Ali Mohamed Abdulla. Nor is there any thing strange in this. Behind all *vaida* and *teji* contracts there is a vast ganuine business. Camphor or other goods may be sold and re-sold a thousand times before they pass from *A*, the importer, to *Z*, the distributor. But in the end they reach their destination. There is no speculation in articles that are not imported into India. It has thus been rightly held that speculation in forward contracts is not necessarily wagering. Now what is the difference between ordinary *vaida* speculation and *teji* contract? Only this, that the *teji* contract is the less speculative of the two. For he who applies *teji* ensures himself by the payment of a *teji* or premium from a heavy fall in the price, I am thus of opinion that *teji* and *vaida* transactions are on exactly the same footing and that unless it can be positively proved that the parties agreed neither to ask for nor to give delivery the transactions are not wagering contracts. No such agreement has been proved here.

Since no such agreement has been proved and the transactions are not wagering contracts it remains for me to fix the rate of damages. The plaintiff has stated in his evidence that the rate of the camphor on settling day was Rs. 5-2-0 The parties agree to fix the rate at

GANGA RAM *v.* NANDA.

Rs. 5-1-0. The parties have also agreed that the *teji* was wrongly debited by the plaintiff to the defendant in the particulars. The plaintiff paid the *te i* by way of insurance and cannot ask for it back.

I award the plaintiff a decree for Rs. 48,000 with costs and interest on judgment accordingly.

N. H. *Suit decreed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 116 OF 1919.

October 21, 1919.

Present:—Sir Henry Rattigan, KT., Chief Justice.

GANGA RAM—PLAINTIFF—PETITIONER

versus

NANDA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 52—Punjab Loans Limitation Act (I of 1904)—Suit to recover price of articles sold.

A suit to recover a sum of money as representing the price of certain articles sold by the plaintiff to the defendant, is governed by Article 52 of Schedule I to the Limitation Act as extended by the Punjab Loans Limitation Act.

Application, under section 25 of Act IX of 1887, for revision of a decree of the Munsif, First Class, exercising powers of a Judge, Small Cause Court, Kangra, dated the 3rd/4th December, 1918.

Lala *Mehr Chand Mahajan*, for the Petitioner.

JUDGMENT.—The respondent has been served with notice of to-day's hearing, but has not appeared nor has he been represented at the hearing before me. I accordingly proceed to decide the petition *ex-parte*.

From the claim it is quite clear that the plaintiff is suing for a sum of money as representing the price of certain articles sold by him to the defendant, and to such a suit Article 52 of the Limitation Act is clearly applicable and not Article 115. The lower Court has found on the merits in favour of the plaintiff and as it dismissed his suit simply on the ground that it was barred under Article 115, whereas it is within time under Article 52 of the Limitation Act as extended by the Punjab Loans Limitation Act, I accept the petition and grant the plaintiff a decree for the amount claimed with costs.

Z. K. *Revision accepted.*

TARA PRASAD JHA *v.* MAYA DEBYA.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 16 OF 1919.

February 10, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Ross.

TARA PRASAD JHA BALIASEY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAYA DEBYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Presumption—Separation—Actual partition not proved—Separation inferred from circumstances.

In the case of a Hindu Mitakshara family there is a presumption of jointness and any one who pleads disruption must prove it. [p. 688, col. 2.]

Where there is no direct evidence of disruption separation may be inferred from other circumstances [p. 689, col. 1.]

Separation may be proved by acts or declarations which show an agreement and intention to separate, such as cesser of commensality, separate occupation of portions of the property, separate enjoyment of distinct shares of the profits, separate definement of shares in the Revenue Records, agreement to divide the proceeds in definite shares or other acts which are inconsistent with the family remaining joint, such as separate transactions between themselves or with others Mere cesser of commensality or of co-worship, division of the income, definement of shares in the revenue or land registration records, separate occupation of portions of the property or separate collections of rents, or separate dealings, are not conclusive, unless there is an intention to separate. They are all evidence of separation, and may lead to the inference that there was a separation [p. 689, col. 1.]

Deoki Singh v *Musammat Anupa*, 10 C. W. N. 838; 1 M. L. T. 96; 16 M. L. J. 109 (P. C.), *Girja Bai* v. *Sadashiv Dhundiraj*, 37 Ind. Cas. 321; 43 C. 1031 at p. 1050; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 151 (P. C.), *Joy Narain Giri* v. *Girish Chunder Myti*, 4 C. 434 at p. 437; 5 I. A. 228; 3 Sar. P. C J. 871; 3 Ind. Jur. 81; 2 Ind. Dec. (N. S.) 276 (P. C.), discussed.

Appeal from a decision of the Subordinate Judge, Dunka.

Messrs. *Kulwant Sahey*, *Lalit Mohan Ghosh*, *Sushil Madhab Mullick* and *S. S. Bose*, for the Appellants.

Messrs. *P. K. Sen*, *S. A. Sami*, *Harihar Prasad Sinha* and *Atul Krishna Roy*, for the Respondents.

JUDGMENT.

COUTTS, J.—This suit was brought for a declaration of the plaintiffs' title by survivorship to certain properties specified in

the schedule to the plaint and for possession. The suit has been dismissed and the plaintiffs have appealed.

Both the plaintiffs and defendants are descendants of one Jugal Kishore Jha. Jugal Kishore had two sons, Tribani and Kali Prassad. Tribani married Maya Debi and by her had two daughters, Rama Debi and Bhagbatti Debi. Maya Debi, Rama Debi and Bhagbatti Debi are defendants in the suit. The second son of Jugal Kishore, Kali Prasad, had two sons, Tara Prasad and Baidya Nath Prasad. Baidya Nath died without issue but Tara Prasad had two sons, Som Nath and Tung Nath. Tara, Som Nath and Nung Nath are the plaintiffs There is some discrepancy in the evidence as to the dates on which Jugal Kishore, Tribeni and Kali Prasad died, but in opening his case the learned Vakil for the appellants stated that Jugal Kishore died in 1906, Tribeni in 1911 and Kali Prasad in 1904 and as these dates are not objected to by the other side I will accept them as correct.

It appears that about 25 years before the institution of the suit, when Jugal Kishore's wife died, he left his ancestral home and went and lived with a mistress; Tribeni, who was then some 12 or 15 years of age, went to live with his uncle Bipro Charan Duari; and Kali, who was an infant, went with his father and was looked after by the mistress. After living with Bipro Charan for a few years Tribeni went and lived with a married sister, he was married from her house and afterwards went and lived with his father-in-law. Kali Prasad, after being with his father for a few years, went to Bipro Charan's house and lived there until his marriage when he also went and stayed in his father-in law's house till his death in 1904. Tribeni after living in his father-in law's house for some time bought back the ancestral house which had been previously sold in execution of a decree against Jugal Kishore. On the death of Kali Prasad he took his two sons, Tara Prasad and Baidya Nath, who were children, into his house. He kept them there for a short time and then rented a house next door for them. Tara Prasad afterwards purchased this house and there he and his children have remained. Tribeni died in 1911 but before his death he executed a Will by which he bequeathed the properties in suit to his widow and his daughters. After his death they took possession of the properties and the plaintiffs' case is that the family was a joint family, the properties were joint family properties and consequently they were entitled to succeed by survivorship. The defendants, on the other hand, who, as I have already said, are widow and daughters of Tribeni, alleged that there was a disruption of the family after the death of Jugal Kishore's wife when he went to live with his mistress, that the properties in suit were self acquired properties of Tribeni and as such they were entitled to them under the Will.

The main questions for consideration in the case were, (1) whether the family was a joint family, and (2) whether the properties in suit were Tribeni's self-acquired properties or whether they were joint family properties; and these are the only points on which we have been addressed in this appeal. The learned Subordinate Judge has found against the plaintiffs on both points.

The first contention of the learned Vakil for the appellants is, that the learned Subordinate Judge has wrongly placed the onus on the plaintiffs. What he has said is, that "the presumption in Hindu Law of the jointness of a Hindu family must give way to the general principle that the one who makes a claim must prove it in a case like this where *prima facie* from the history of the family and the facts and circumstances that have been admitted the family was not a joint family." Now, there can be no doubt that there is in the case of a Hindu Mitakshara family a presumption of jointness and that any one who pleads disruption must prove it: and it might seem at first sight as if the learned Subordinate Judge had taken a wrong view of the case, but a consideration of the whole of his judgment makes it clear that this is not so. He has clearly realised that the presumption is in favour of jointness but he finds that the facts of this case show that the family was separate. I do not think, therefore, that the onus has been wrongly placed on the plaintiffs but the question remains whether separation has been proved. Now, at the outset it must be admitted

that the defendants have not been able to establish exactly when disruption took place. In the plaint they put it at the time of the death of Jugal Kishore's wife when he went off to live with his mistress, but some of the witnesses have said that the separation took place at a later date. Very great stress has been laid on this point by the learned Vakil for the appellants and it has been urged that this of itself is sufficient to destroy the defendants' case. It is certainly a circumstance which must be taken into consideration, but in my opinion this fact is of itself not sufficient to show that the defendants' allegation that the family was separate is a false one. It may be and it often is difficult to say exactly at what point of time a family became separate and if the contention were correct it would be almost impossible to establish separation. We must examine the circumstances of the family. The circumstances from which separation may be deduced have been very clearly stated by Trevelyan, in his Hindu Law, at page 349—"Separation may be proved by acts or declarations which show an agreement and intention to separate, such as cesser of commensality, separate occupation of portions of the property, separate enjoyment of distinct shares of the profits, separate definement of shares in the Revenue Records, agreement to divide the proceeds in definite shares or other acts which are inconsistent with the family remaining joint, such as separate transactions between themselves or with others. Mere cesser of commensality or of co-worship, division of the income, definement of shares in the revenue or land registration records, separate occupation of portions of the property or separate collections of rents, or separate dealings, are not conclusive, unless there is an intention to separate. They are all evidence of separation, and may lead to the inference that there was a separation." Applying these principles to the present case we find, in the first place, that since the death of Jugal Kishore's wife and since he went to live with his mistress there has been no commensality in the family. Jugal Kishore lived with his mistress. Tribeni lived with his uncle, afterwards he lived in his father-in-law's house and subsequently by himself in the ancestral house after he had purchased it. Kali Prasad, when his mother died, was an infant, he lived for a short time with Jugal Kishore's mistress, afterwards he went to live with his uncle and after his marriage he lived in his father in law's house until his death. It is true that Tribeni, after the death of Kali Prasad, took his children, Tara Prasad and Baidaya Nath, into his own house and subsequently rented another house close by for them, he also appears to have invested them with the sacred thread and to have arranged their marriages, but this is not inconsistent with his position as a separate member, *Deoki Singh* v. *Mussammat Anupa* (1), and it is clear that there has been no commensality in the family since the death of Jugal Kishore's wife, nor does there appear to have been community of worship.

I now come to dealings by Tribeni and Tara Prasad: if the family had been a joint family Jugal Kishore would ordinarily have been the *karta* until his death. Now, as I have said, he died in 1906, yet in 1895 Tribeni purchased the ancestral house (Exhibit A): in 1896 he mortgaged a brick kiln which he describes as "my brick kiln" to one Udai Chand (Exhibit D); in 1899 he borrowed Rs. 50 from Parbati Charan Jha Duari for household expenses and the cost of building a *pacca* house (Exhibit F) and in 1900 he took the lease of a house from one Kalanand Barbai (Exhibit 4). All these transactions took place before the death of Jugal Kishore and they appear to indicate clearly that Jugal Kishore was not the *karta* of the family and, if this be so, they are very strong indications that the family was not a joint family. Subsequent to Jugal Kishore's death there are a number of transactions of Tribeni separately; namely, purchase of part of property No. 3 in the schedule to the plaint, in 1905 (Exhibit K); purchase of a portion of property No. 3 in 1905 (Exhibit C); purchase of *lakheraj* property in execution of a money-decree in 1908 (Exhibit S); purchase of property in execution of another money-decree in 1909 (Exhibit R) and, finally, the Will executed by Tribeni by virtue of which the defendants have taken possession of the properties. All these are, in my opinion, strong evidence that there had been separation and in support of

(1) 10 C. W. N. 333; 1 M. L. T. 96; 16 M. L. J. 100 (P. C.).

this view I may refer to the case of *Girja Bai* v. *Sadashiv Dhundiraj* (2) where their Lordships of the Privy Council remarked: "The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri* v. *Girish Chunder Kyti* (3) their Lordships regarded the conduct of one of the co-sharers who constituted the joint family 'when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin,' and treated 'the fact of his borrowing money for his maintenance, as well as making a Will, as indicating, at all events, that he himself considered that a separation had taken place.' The conclusion was based on the inference of intention derivable from the acts and declarations of the member who, it was alleged, had separated himself, and not from the conduct or attitude of any other party." In addition to the separate transactions of Tribeni, we have also separate transactions by Tara Prasad. In 1906 he purchased a house, the house in which he subsequently lived. This would appear from the evidence of the plaintiffs' own witness, Bipro Charan Duari, who says: "Tara Prasad is in a separate house purchased separately;" and also from the evidence of the defendants' witness, No. 1 Sambhu Charan Jha, who says: "Tara Prasad purchased a house with his own money." Again, in 1911, a mortgage was executed in favour of Tara Prasad (Exhibit 10). It is clear then that Tara Prasad also had separate transactions. Another piece of evidence which tends to show separation is the fact that different members of the family are shown in the Revenue Records as holding separate shares (Exhibit B). This Exhibit is a certified copy of a Khewat which shows "Tribeni Panda, son of Jugal Kishore Panda, 1 share, Tara Panda and Bhayya Ram Panda, sons of Kalika Panda, 1 share in equal shares."

I now come to the matter of the division of the income. There was possibly a very small income from certain ancestral property but this is practically negligible. Jugal Kishore's income was derived from Jajmani. He was a priest and his income was from fees paid to him by Jajmans. It is contended that this was ancestral property and that it has never been divided. Now, the facts with regard to these Jajmans appear to be that Jugal Kishore and after him Tribeni attempted to keep all the fees paid by the Jajmans, but there is evidence, and it is not disputed, that on two occasions at least there was a dispute as to the division of these fees, which was settled by a Punchayat and the fees were divided. It is strongly urged that this indicates that there was no separation. I am unable to accept the contention. It appears to me rather to indicate that the family was separate and that the different members were quarrelling as to the division of these fees; but, apart from this, the fees were not, in my opinion, ancestral property. In Gour's Hindu Code, at page 472, in paragraph 1054, he says: "Both the Mitakshara and the Dayabhaga devote a chapter each to the subject of self acquisition. Their substance is to exempt all acquisitions made without detriment to the joint estate. The rest is merely illustrative and most of the illustrations refer to occupations now no longer pursued. Thus the Dayabhaga gives the following list as constituting the gains of science:"

"(3) Fee for officiating as a priest."

It may be that the Jajmans were ancestral in the sense that Jugal Kishore, and his father before him, had acted as priests for the Jajmans and their fathers, but the fees were not joint family property, they were the self-acquisition of the member of the family to whom they were paid.

We have, thus, in the present case no commensality, no co worship, separate transactions and separate definement of shares in Revenue Records and in my opinion the circumstances are such as to lead to the irresistible conclusion that the family was separate although there had been no regular partition.

(2) 37 Ind. Cas. 321; 43 C. 1031 at p. 1050; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 151 (P. C.).

(3) 4 C. 434 at p. 437; 5 I. A. 228; 3 Sar. P. C. J. 871; 3 Ind. Jur. 81; 2 Ind. Dec. (N. S.) 276 (P. C.)

I shall now deal with the different portions of property claimed in the plaint. The first of these is the ancestral house. Admittedly, this was purchased by Tribeni. It was, as I have already said, purchased in 1895 when Jugal Kishore was still alive, there was no joint fund out of which it could have been purchased and it was clearly Tribeni's self-acquisition. The next item is a *pucca* house in the town of Deoghar Jhasa Gari. This was apparently ancestral property and all that Tribeni was entitled to was his share. The plaintiffs are, therefore, entitled to a share of this property. The next items (3) and (4) are on the same footing; both are *lakheraj* properties in the town of Deoghar purchased by Tribeni. Here, again, there was no joint fund out of which they could have been purchased and the circumstances indicate clearly that the defendants' case, that these were Tribeni's self-acquisition, is true. The next item is a 10-pies share in Taluk Marwa. This was admittedly ancestral property and as such Tribeni could only be entitled to his own share. The next items of property are the Jajmans and with regard to these I have already said that, in my opinion, the fees are self acquired property. The plaintiffs are, therefore, not entitled to any share in these. The next item is a *milkiat* in Arrah, this is ancestral property and stands on the same footing as the Marwa property. The last item is a mango garden in village Ramgarh, Taluk Rohini, which was purchased by Tribeni himself and, for the reasons I have already given in respect of the other properties purchased by him, is his self-acquired property.

In the result, then, I see no reason to interfere with the decision of the learned Subordinate Judge except in regard to Jhasa Gari, Marwa and Arrah properties in which the plaintiffs are entitled to a declaration of their right to their own share. They can, however, get no separate possession because there has been no prayer for partition. The respondents are entitled to their costs of this appeal.

Ross, J.—I agree.

P. D.

Decree modified.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 95 OF 1920.

April 8, 1921.

Present :—Mr. Justice Chevis and Mr. Justice Broadway.

MUHAMMAD DIN—DEFENDANT—APPELLANT

versus

SOHAN SINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 65, 115—Advance of grain—Suit to recover value of advance—Limitation.

When grain is advanced on a contract that it should be re-paid in kind and the contract is broken, a suit to recover the cash value of the advance is governed either by Article 65 or by Article 115 of Schedule I to the Limitation Act. [p. 692, col 1.]

Mengha Ram v. *Hassu*, 49 Ind. Cas. 231; 41 P. R. 1918, applied.

Ganga Ram v. *Nanda*, 65 Ind. Cas. 637; 2 L. L. J. 191, referred to.

Letters Patent Appeal against an order of Mr. Justice Wilberforce, dated the 14th April 1920, in Civil Appeal No. 1544 of 1919, reported as 56 Ind. Cas. 162.

Diwan *Mehr Chand*, for the Appellant.

Mr. *Kanwar Narain*, for the Respondent.

JUDGMENT.—The facts of this case are given in the judgment of the learned Judge in Chambers. The learned Judge has held that the Article of Limitation applicable to this suit is either 115 or 120, and that in either case the suit is within time. He has, therefore, reversed the decision of the lower Courts, who dismissed the suit as time-barred, and has remanded the case for a decision on the merits.

The defendant urges that this decision is incorrect and that the suit is not within limitation. The prayer in the plaint is for the delivery of a certain amount of grain valued at a thousand rupees, but Counsel for the plaintiff frankly admits that his client seeks a money-decree. So that, there is really no distinction between this case and that published in *Ganga Ram* v. *Nanda* (1). In that ruling it was held that Article 52 applied to such cases. But Article 52 refers to suits for the price of goods sold and delivered, and when, as in the present case, grain is advanced on a contract that it should be re-paid in kind we are unable to hold that it is a case of goods

(1) 65 Ind. Cas. 637; 2 L. L. J. 191.

being sold, for the words "goods being sold" we understand to refer to a case in which the contract is to pay for the price of the goods in money and not to return them in kind. In *Mengha Ram* v. *Hassu* (2), it is held that a claim like the present falls either under Article 65 or Article 115 of the Schedule, and this ruling seems to us correct. The defendant not having fulfilled the promise to return the grain in kind we can only regard the present claim as one for compensation for breach. Under both of these Articles the limitation is three years. Diwan Mehr Chand for the defendant admits that Article 115 applies, whereas Mr. Kanwar Narain for the plaintiff urges that the case is governed by Article 120. We cannot, however, apply Article 120 for that Article only applies when no other Article is applicable and we have already held that either Article 65 or 115 applies to the case. But the learned Judge in Chambers holds that the implied contract was broken only shortly before the suit. We are unable to discover on what grounds he so holds. The contract was to re-pay the grain with 50 per cent. interest (*Hasab rasum Sahukara*). Diwan Mehr Chand contends that this means that the grain was to be paid at the next wheat harvest and if this view be correct the suit is undoubtedly time-barred. Mr. Kanwar Narain, however, contends that the meaning of the phrase is that the grain was to be re-paid on demand. Both sides admit that demand has been made but Diwan Mehr Chand contends that it was more than three years prior to suit and that the suit is, therefore, time barred. On this point further enquiry must be made.

We so far accept the appeal as to hold that the case is governed either by Article 65 or 115. The order of remand to the First Court will stand good, but that Court will make further enquiry as to the meaning of the words, "*Pirt Sahukara*," and also, if necessary, as to when demand was made, and will then re decide the question of limitation in accordance with those enquiries.

Costs of this appeal will be costs in the cause.

Z. K. *Appeal accepted.*

(2) 49 Ind. Cas. 231; 41 P. R. 1918.

CALCUTTA HIGH COURT.

CIVIL RULE No. 628 OF 1921.

January 23, 1922.

Present :—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Pearson.

SUBALA DAS, WIFE OF GOUR MOHAN BHAT—DEFENDANT No. 6—PETITIONER

versus

INDRA KUMAR HAZRA—PLAINTIFF NATABAR HAZRA, SON OF LATE SRIMANTA LAL HAZRA, AND OTHERS—DEFENDANTS NOS. 7 TO 10—OPPOSITE PARTIES.

Evidence Act (I of 1872), ss. 146, 148 to 152—Scandalous and insulting question, relevancy of.

Where in a dispute as to property the defendant alleges that he derived title thereto from a certain lady and she is examined as a witness on his behalf, a question put to her by the plaintiff as to whether she had become pregnant by a certain person is relevant, if the plaintiff's case is that she did not inherit the property of her husband by reason of her unchastity during her husband's lifetime, but if it is asked for impeaching her credit as a witness the Court has to consider the provisions of sections 146 and 148 to 152 of the Evidence Act before allowing it. [p. 693, col. 1.]

Rule against an order of the Sub-Judge, Second Court, Howrah.

FACTS appear from the judgment.

Mr. *Avetoone* (with him Babu *Amarendra Nath Bose*), for the Petitioner.—The defendant No. 6 is the petitioner. The facts shortly are these. A title suit was brought against myself and others by the plaintiff in the Subordinate Judge's Court at Howrah. I was contesting the case and examined in my behalf a female witness on commission issued by the Court. I derived my title to the property in suit from that witness of mine. While the witness was being examined, the plaintiff asked her a grossly scandalous question as to whether she had been living with one Haridas Ghosh and had been made pregnant by him. I objected to the question as being quite irrelevant. The learned Judge has overruled my objection. I submit, under provisions of the Evidence Act, the question was quite irrelevant and grossly improper and scandalous. It ought to have been disallowed as having nothing to do with the facts of the case. Refers to sections 146, 148—152 of the Indian Evidence Act.

Babu *Rishindra Nath Sarcar*, for the Opposite Party.—Our case was that the petitioner could not have derived title from the

witness, inasmuch as she did not inherit the property by reason of her unchastity during the lifetime of her husband. It is on that ground that we opposed her being examined on commission. That is our case from the very beginning. I submit the question is perfectly relevant and the objection has been rightly disallowed.

Mr. *Avetoone* replied in brief.

JUDGMENT.—The petitioner, who is the defendant No. 6 in a suit pending in the Subordinate Judge's Court at Howrah, examined a witness—Manada Dasi—from whom the petitioner claims to have derived title to the property in dispute. Manada was examined on commission and the opposite party, who is the plaintiff in the suit, put to her the question as to whether she was made pregnant by one Hari Das Ghose. Objection was taken to this question and the matter was brought before the Court. The learned Subordinate Judge held that it was a relevant question.

Against that order, the petitioner moved this Court and obtained this Rule.

It is stated that the question is insulting and scandalous. But the opposite party contends that it was put because the plaintiff's case was that the witness did not inherit the property by reason of her unchastity during the lifetime of her husband.

The form in which the question was asked does not show what period it referred to—whether the lifetime of the witness's husband, or after his death If the plaintiff's case was that she did not inherit the property of her husband by reason of her unchastity during his lifetime, then the question would be relevant. If, however, it was asked for impeaching her credit as a witness, the Court will have to consider the provisions of sections 146 and 148 to 152 of the Evidence Act.

It is contended on behalf of the opposite party that the statements made in the plaint, taken with those made in the petition opposing the issue of commission for examining the witness, go to show that his case was that the witness did not inherit the property by reason of her unchastity during her husband's lifetime, and as such the question was relevant. The learned Subordinate Judge, however, has not stated any reasons for holding that the question was relevant.

In the circumstances, we think that the case should go back to the learned Subordinate Judge. He will consider, having regard to the plaint, the petition, and the issues as framed, whether the question, as it stands, is relevant; and if not, whether the question is allowable, having regard to the provisions of the Evidence Act.

No order as to costs.

J. P. *Case sent back.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 28-B OF 1921.

January 31, 1922.

Present:—Mr. Prideaux, A. J. C.

PANDU AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDUL KADAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Suit by reversioners—Proof of relationship, necessity of—Right of succession—Shradh, *effect of.*

It is incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward and he is also bound to satisfy the Court that, to the best of his knowledge, there are no nearer heirs, but he cannot be expected to do anything more, and it is for those who claim that their kinship is nearer to prove that relationship. [p. 695, col. 1.]

Rama Row v. *Kutiya Gounden*, 34 Ind. Cas. 294; 30 M. L. J. 514; 3 L. W. 331; 19 M. L T. 275; 40 M. 654, followed.

The preferable right to perform the *shradh*, funeral oblation, to the last owner is a primary fact to be taken into consideration in determining the rule which is to govern the right of succession. [p. 695, col. 2.]

Soorendronath Roy v. *Heeramonee Burmonsah*, 12 M. I. A. 81; 10 W R. P. C. 35; 1 B. L. R P. C. 2; 2 Suth. P. C. J. 147; 2 Sar. P. C. J. 372; 3 Mad Jur. 434; 20 E. R. 271; 1 Ind. Dec. (N. S.) 17, followed.

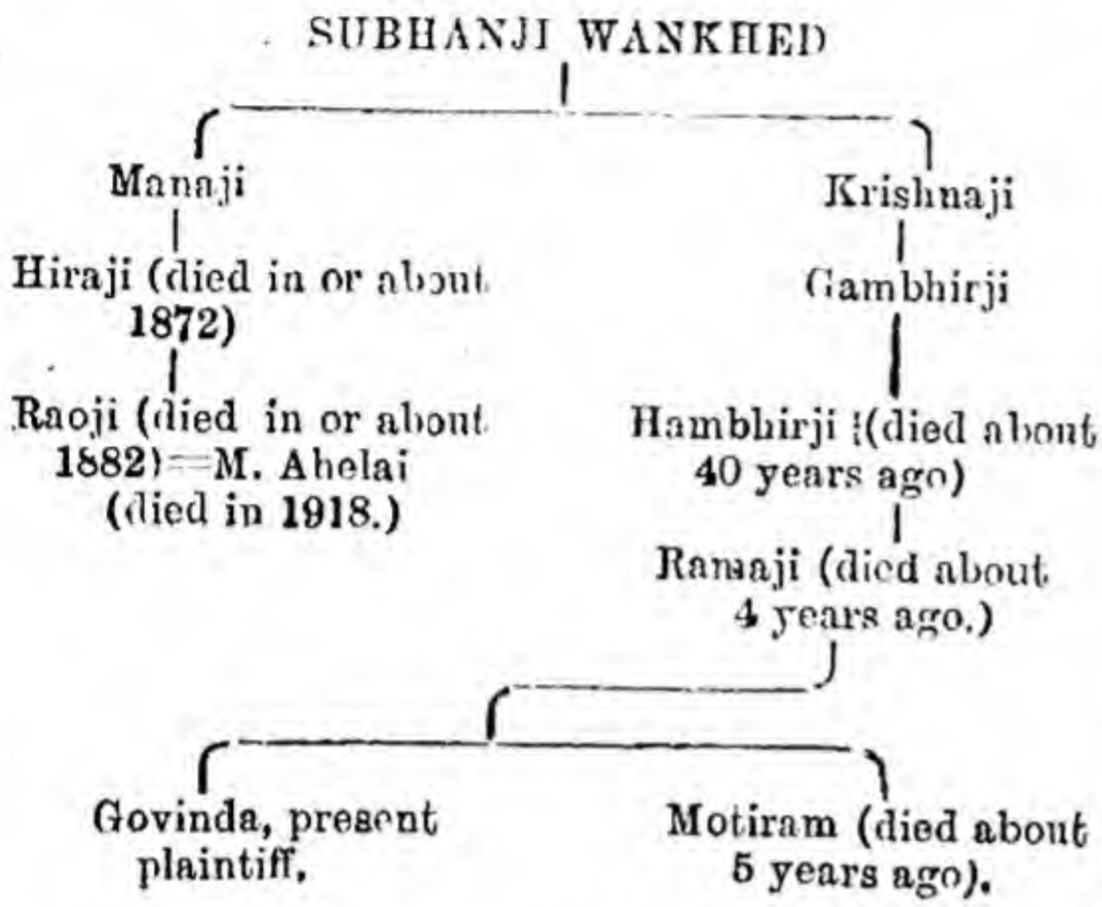
Appeal against a decree of the District Judge, Akola, dated 15th December 1920, in Civil Appeal No. 18 of 1920.

Sir *B. K. Bose* and Messrs. *P. N. Rudra*, and *A. V. Khare*, for the Appellants.

Messrs. *G. M. Gupta*, *F. W. A. Forbes*, *J. C. Ghosh* and *R B. Oka*, for the Respondents.

PANDU v. ABDUL KADAR.

JUDGMENT.—The following genealogical tree as given in the plaint shows the relationship of plaintiff No. 2 with Raoji, who died about 1882, leaving a widow Ahelai:—



The plaintiffs' story is that on the death of Ahelai, the widow of Raoji, the present plaintiff No. 2, Govinda, became the rightful claimant of all the immoveable property left by Raoji at the time of his death. He has sold a nine-anna seven-pie share in the six fields and an eight-anna share in the seven houses asked for in the plaint to plaintiff No. 1 for Rs. 3,000 by a deed of sale dated 25th May 1918. The property is claimed as having belonged to Raoji.

It was denied by the defendants Nos. 1 and 2 that plaintiff No. 2 is the reversioner of Raoji the correctness of the genealogical tree given in the plaint being disputed. Plaintiff No. 1's purchase was said to be without consideration and champertous and defendants pleaded that their father purchased fields Survey Numbers 5, 36 and 252 together with houses Nos. 1 to 4 in the plaint under a registered sale deed dated 30th March 1899 for Rs. 1,600 from Ahelai, the widow of Raoji, and purchased Survey No. 2 of Hasnapur for Rs. 600 orally from the same lady about 1905. The sale was in favour of their father, Narayan, and was said to be for legal necessity, as Ahelai wanted money for maintenance and cultivation expenses and also to pay off creditors. It was contended that their father and they themselves (defendants) have been accepted as tenants by the Jagirdar of the villages in which the fields in suit are situate and, therefore, plaintiffs cannot eject them.

Defendants Nos. 3 to 5 further contended that Survey Number 106 of Ladegaon was gifted by Ahelai to their father Sonaji, he having served her during her illness; and field Survey Number 25 of Vilegaon was orally sold by that lady to Sonaji in 1899 for Rs. 350. That sale was also for legal necessity as she wanted money for maintenance expenses. They also claimed houses Nos. 5, 6 and 7 stating that this was their ancestral property and never belonged to Ahelai or her husband.

Defendant No. 6, who is in possession of Survey Number 26, stated he got it in exchange from one Sheoram Madangopal some years ago who had purchased it from one Krishnaji Khandooji. It was denied that the field belonged to Ahelai or her husband.

The findings of the Trial Court may be summarised as follows. Plaintiffs had failed to prove the alleged relationship between plaintiff No. 2 and Raoji. The sale in favour of the first two defendants' father Narayan by Ahelai was held established. Rupees 1,050 of the consideration was found to be for legal necessity and the remaining Rs. 550 was found not to be for legal necessity. Narayan was held to have purchased field No. 2 of Hasnapur from Ahelai for Rs. 600 but that sale was not for legal necessity. Issue No. 3 dealing with the alleged gift of Survey Number 106 of Ladegaon and the oral sale of Survey No. 25 of Vilegaon was found in the negative. Field No. 26 was found to have formed part of Raoji's estate. Plaintiff No. 2's sale of a portion of the disputed property in favour of plaintiff No. 1 was held established and it was found that defendants had failed to prove any special tenure of the fields. The case was dismissed.

On appeal, the learned District Judge, Akola, a Judge of great experience, finds that the second plaintiff is the reversioner of Raoji and plaintiffs were given a decree for all the property mentioned in the plaint, except houses Nos. 3 to 7. Against that decision, the present appeal has been filed.

It has to be remembered that the findings on which the case has been decided are findings of fact; but it is contended that these findings cannot be accepted because the evidence on record does not sufficiently establish the relationship claimed by the plaintiff No. 2 with Raoji. It is frankly admitted that, apart from the plea of plaintiff No. 2 not being the next reversioner, appellants have no case and if this Court holds with the lower Appellate Court the property in suit must go to the plaintiffs.

The appellants' argument is that it is not sufficient for the second plaintiff to prove some relationship; that does not help him. He has to establish every link in the genealogical chain connecting him with Raoji and in this connection are quoted *Kedarnauth Doss* v. *Protab Chunder Doss* (1), *Rama Row* v. *Kuttiya Gounden* (2) and *Mewa Singh* v. *Basant Singh* (3). It seems to me, following the case reported in the Madras Law Journal Reports [*Rama Row* v. *Kuttiya Gounden* (2)] quoted, that "it is incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward and he is also bound to satisfy the Court that, to the best of his knowledge, there are no nearer heirs, but he cannot be expected to do anything more and it is for those who claim that their kinship is nearer to prove that relationship." The lower Appellate Court here has gone on circumstances which certainly go a very long way towards establishing the justice of Govinda's case. The land is situate in a Izara village and it has apparently been customary on the death of a Khatadar by the officials to report to the Izardar such death. The Izardar then holds a formal enquiry and admits a new Khatadar. In fact, these mutation proceedings before the Izardar are exactly the same as those appertaining to the Revenue Courts in Berar. It is not here contended that the evidence of the mutation proceedings upon which the decision of this case rests was improperly admitted. It is clear that in the mutation proceedings of 1889 (Exhibit P-6) Abelai made a statement in which she admitted that Rama, son of Hambirji, was also an heir. She describes him as the nephew of the deceased. Rama was also examined in those proceedings, which, it has to be remembered, took place long before the disputes arose. He states:

"Kamaljabai, wife of Hiraji, was directly my *Sakhha chulti* (wife of paternal uncle)." He further states that he was separate. He performed the obsequies of Raoji and also Kamaljabai and mentioned that he had one son named Gondya and another by name Moti. The word "*putanis*," like the word "*bhau*," is indifferently used not only for real nephews and brothers but for cousins and first cousins, and it seems to me that Abelai's statement made in that former case has been rightly held to show that Rama, son of Hambirji Wankhede, was undoubtedly the father of Govinda, plaintiff No. 2, and was related to Raoji, and I see no reason to disbelieve that he was related in the manner given in the genealogical tree despite the want of direct evidence on the point. It seems to me that the present plaintiff No. 2 has sufficiently proved his pedigree. The fact that Rama performed the obsequies of Raoji shows that he was a fairly near relative. It has been held that the preferable right to perform the *shradh*, funeral oblation to the last owner, is a primary fact to be taken into consideration in determining the rule which is to govern the right of succession; see *Soorendronath Roy* v. *Heeramonee Burmoneah* (4). Rama was a cousin and the finding that he is the sole reversioner, (it is not contended that there was any other reversioner) is one of fact and cannot be challenged on the ground of insufficiency of evidence. The word "*sakhha*" in Rama's deposition means, closely related. There is evidence on record from which certain inferences are justly made and unless these inferences are shown to have been wrong, the appel-

(1) 6 C. 626 at p. 629; 8 C. L. R. 238; 8 Ind. Dec. (N. S.) 407.

(2) 34 Ind. Cas. 294; 30 M. L. J. 514; 3 L. W. 331; 19 M. L. T. 275; 40 M. 654.

(3) 46 Ind. Cas. 540; 21 Bom. L. R. 232 at p. 235; 24 M. L. T. 429; 28 C. L. J. 540; 1 P. W. R. 1919; 28 P. L. R. 1919; 9 L. W. 416 (P. C.).

(4) 21 M. I. A. 81; 10 W. R. P. C. 35; 1 B. L. R. P. C. 26; 2 Suth. P. C. J. 147; 2 Sar. P. C. J. 274; 3 Mad. Jur. 434; 20 E. R. 271; 1 Ind. Ind. Dec. (N. S.) 17.

lants cannot succeed in this appeal. In my opinion these inferences have not been shown to have been wrong. The family names of Rama and Raoji were the same and Ahelai would not have mentioned him as her husband's relative unless he had been one. He comes within the 14th degree; the finding is, I think, correct.

The result is that this appeal fails and is dismissed with costs. The appellants will pay the respondents' costs.

G. R. D.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 485 OF 1921.
January 17, 1922.
Present:—Mr. Justice Greaves.
GOLAM SOBHAN—DEFENDANT—PETITIONER
versus
ALI HOSSAIN BAHADDAR—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Exclusion of evidence—Revision.

A mere error of law committed by a subordinate Court in excluding certain evidence does not justify a High Court in interfering under section 115, Civil Procedure Code.

Amir Hassan Khan v. *Sheo Baksh Singh*, 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec (N. s) 760, *Kristamma Naidu* v. *Chapa Naidu*, 17 M. 410 (F. B.); 6 Ind. Dec. (N. s.) 284, *Ramgopal* v. *Joharmal*, 15 Ind. Cas. 547; 39 C. 473, referred to.

Rule against an order of the Court of the Additional District Judge, Chittagong.

FACTS appear from the judgment

Babu *Charu Chandra Sen*, for the Petitioner.—The defendant is the petitioner. Plaintiff brought a suit for recovery of money due on a hand note for an amount below Rs. 500. The defence was that there was no consideration for the bond and, therefore, defendant was not liable to pay anything. The learned Judge held that no evidence was admissible to show that there was no consideration having regard to the provisions of section 92 of the Indian Evidence Act. My submission is that the learned Judge has overlooked the provisions of proviso (1) to section 92. Evidence is admissible to prove want of consideration. I submit the Judge has failed to exercise jurisdiction vested in him by law. The judgment ought, therefore, to be set aside.

Babu *Narendra Kumar Das*, for the Opposite Party.—It is not open to this Court to interfere in a matter like this under section 115 of the Code of Civil Procedure. The lower Court has jurisdiction to decide any matter be it rightly or wrongly. Refers to *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), *Kristamma Naidu* v. *Chapa Naidu* (2), *Ramgopal* v. *Joharmal* (3), A mere error of law does not empower this Court to interfere in revision.

Babu *Charu Chandra Sen*, replied in brief.

JUDGMENT.—On the 18th July 1921 this Rule was issued at the instance of the defendant calling on the plaintiff to show cause why the decision of the Additional District Judge of Chittagong should not be set aside and that of the Munsif dated the 15th September 1919 restored. The suit was brought on a hand-note. The defence was that there was no consideration. The First Court held in favour of the defendant's contention, namely, that there was no consideration, and the suit was dismissed. The lower Appellate Court, while stating that the defendant's evidence that no money passed was stronger than the plaintiff's evidence, allowed the appeal on the ground that no evidence was admissible to show that there was no consideration, having regard to the terms of section 92 of the Evidence Act.

The learned Additional District Judge, it would appear, failed to take into account the provisions of proviso (1) to section 92 of the Evidence Act. In the circumstances, I am asked to interfere under the provisions of section 115, Code of Civil Procedure, on the ground that the Additional Dis-

(1) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83 5 Ind. Dec. (N. s.) 7 0.
(2) 17 M. 410 (F. B.); 6 Ind. Dec. (N. s.) 234.
(3) 15 Ind. Cas. 547; 39 C. 473.

trict Judge acted with material irregularity in excluding the evidence adduced by the defendant as to the lack of consideration. On behalf of the plaintiff it is said that, under the provisions of section 115, Code of Civil Procedure, it is not open to this Court to interfere and I have been referred to the cases of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), *Kristamma Naidu* v. *Ohapa Naidu* (2) and *Ramgopal* v. *Joharmal* (3) as deciding that under section 115 mere error of law does not give the Court jurisdiction to interfere. Now, it seems to me that the Additional District Judge has erred in law in this case in excluding the defendant's evidence. But, even so, I do not think that I have jurisdiction to interfere. I do not think, having regard to the decisions, that a mere error of law, as is the case here, justifies the Court in interfering under section 115, Code of Civil Procedure.

The result is the Rule is discharged with costs. Hearing fee one gold *mohur*.

J. P. & B. N.

Rule discharged.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 133 OF 1920.

June 29, 1921.

Present :—Mr. Dhobley, A. J. C.

SHAMLAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DHANWA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 132, applicability of—Mortgage—Grain-debt—Limitation—Foreclosure, condition of, effect of.

Where a bond hypothecates property to secure payment of grain with interest also in grain a suit brought upon the bond is nevertheless a suit to enforce payment of money charged upon immoveable property and is governed by Article 132 of Schedule I to the Limitation Act, even though there be no specific condition in the mortgage-bond for determining the rate at which the grain debt is to be valued, in case it is not delivered as agreed inasmuch as it is the money value of the grain-debt that is really charged upon the mortgaged property. [p. 698, col. 2.]

Rash Bihari Das v. *Kunjabihari Patra*, 37 Ind. Cas. 805; 24 C. L. J. 348, *Nilmoney Singh* v. *Hardhan Das*, 2 Ind. Cas. 111; 13 C. W. N. clxxxiv (184) *notes*, *Sripati Lal Dutt* v. *Sarat Chandra Mondal*, 46 Ind. Cas. 78; 22 C. W. N. 790, *Jogendra Nath Singh* v. *Mohanlal Khan*, 58 Ind. Cas. 935; 23 C. W. N. 951, *Sridhar Chandra Maiti* v. *Ram Gobinda Jana*, 50 Ind. Cas. 603; 29 C. L. J. 368, referred to.

The fact that such a mortgage contains a condition of foreclosure and not of sale does not make any difference in this connection. [p. 698, col. 2.]

Appeal against a decree of the District Judge, Raipur, in Civil Appeal No. 44 of 1919, dated the 27th November 1919.

Mr. *J. C. Ghosh*, for the Appellants.

Mr. *Atmaram Bhagwant*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on a mortgage executed for a money-debt of Rs. 400 and a grain-debt of 60 *khandis dhan*. The bond provided that the money debt was to carry interest at 1 per cent. per annum and that the interest on the grain-debt was to be at the rate of 6 *kottas* per *khandi* per year. The money as well as the grain were to be re-paid with interest within 22 months and compound interest at the above rates was to be payable till satisfaction. There was a condition of foreclosure of the mortgaged property, in case the debts were not paid. The cause of action for the recovery of the money and grain-debts accrued on 15th April 1910 and the plaintiffs' suit for foreclosure in lieu of those debts brought on 23rd December 1918 was thus more than six years after the accrual of the cause of action. In the plaint, the plaintiffs calculated the value of the grain-debt found due on the date of the suit at the then prevailing rate.

The mortgagor's contention that the plaintiffs' claim in respect of the grain-debt was time-barred was accepted by both the Courts below and that portion of the claim was dismissed, it being held that Article 132, First Schedule, Limitation Act, was inapplicable to it. The correctness of this view is questioned for the plaintiffs-appellants who contend that Article 132 was applicable to the grain-debt, as well as to the money-debt, there being no difference between these two parts of their claim.

The Article runs thus :—

132—To enforce payment of money charged upon immoveable property.	Twelve years.	When the money sued for becomes due.

The term used in the Article is "money," and the argument of the defendant-respondent is that as "grain" is not "money" the Article could not possibly apply to the plaintiffs' claim in respect of the grain-debt. According to him, either Article 116 or Article 120 would be applicable and the claim would be governed by six years' limitation. This latter argument finds support from the case of *Rash Bihari Das* v. *Kunjabihari Patra* (1) in which it was heldthat such a suit could not be treated as one to enforce payment of "money" charged upon immoveable property and that Article 132 would not, therefore, apply. The judgment of the learned Chief Justice (Jenkins, C. J.) who decided the case is a very short one and proceeds apparently on the sole ground that "grain" could not be called "money". A different view had been taken by another Judge of the same High Court in *Nilmoney Singh* v. *Hardhan Das* (2) which was a very similar one, where Article 132 was held applicable. The learned Judge's judgment is not given in full, but a reference to it in *Sripati Lal Dutt* v. *Sarat Chandra Mondal* (3) would show that the case involved a money claim too. That would not, however, in my opinion, make any difference. It was also referred to and followed in the case of *Jogendra Nath Singh* v. *Mohanlal Khan* (4), the following observations being quoted with approval :—

"The substance of the transaction was that the land was made security for the value of the paddy, because upon failure to deliver the paddy, the mortgagee would be entitled not to claim specific paddy, but merely to recover the price thereof..... In my opinion, it is a reasonable construction of Article 132 to hold that in a case like this the interest which was the value of the paddy, though variable from time to time, was charged upon the mortgaged premises."

In this case no rate at which the grain was to be valued was given in the mortgage. In the case of *Sripati Lal Dutt* v. *Sarat Chandra Mandal* (3) and also *Indra Narain Shao* v. *Dijabar Samanta* (5) and *Sridhar Chandra Maiti* v. *Ram Gobinda Jana* (6) the case of *Rash Bihari Das* v. *Kunjabihari Patra* (1) was distinguished on the ground that in those cases the mortgage itself provided the rate at which the grain-debt was to be valued and the claim was, therefore, said to be really one for money. In *Sridhar Chandra Maiti* v. *Ram Gobinda Jana* (6) Teunon, J., in the course of his judgment observed as follows :—

"But I desire further to say that if the present case cannot be distinguished from the one to which I have just referred, I am not prepared to concur or follow the view taken in that case, that where a bond hypothecates property to secure payment of paddy, the suit brought upon that bond is not a suit to enforce payment of money charged upon immoveable property."

In such cases Article 132 would, in my opinion, be applicable, even though there be no specific condition in the mortgage-bond for determining the rate at which the grain-debt would be valued, in case it was not delivered as agreed. The mortgagee would, irrespective of any such condition, be entitled to claim the value of the grain-debt in case of its non-payment, though the rates would be different at different times. The mortgagee is not entitled to claim nor is the mortgagor bound to deliver grain. The mortgagor is entitled to pay its value in money instead. Under Order XX, rule 10, the Court is bound to state in a decree for delivery of moveable property the amount of money to be paid as an alternative, if delivery cannot be had. Thus, it is the money value of the grain debt that is really charged upon the mortgaged property. If it became necessary for the mortgagee to enforce the security, the land would be liable for the value of the grain due under the mortgage. The fact that the mortgage in suit contains a condition of foreclosure and not of sale, would not, in my opinion, make any difference.

The result is that the appeal is allowed and the plaintiffs' claim for the grain-debt is decreed. The amount of grain

(1) 37 Ind. Cas. 805; 24 C. L. J. 348.
(2) 2 Ind. Cas. 111; 13 C. W. N. clxxxiv (184) *notes*.
(3) 46 Ind. Cas. 78; 22 C. W. N. 790.
(4) 58 Ind. Cas. 995; 23 C. W. N. 951.
(5) 51 Ind. Cas. 849; 23 C. W. N. 949; 47 C. 125.
(6) 50 Ind. Cas. 608; 29 C. L. J. 368.

due on the date of the suit as given in the plaint is 428 *khandis* 18½ *kattas*. The rate of 3½ *kattas* per rupee as given in the plaint was not admitted by the defendant, nor was any evidence adduced by the plaintiffs to prove it; under the circumstances the rate of 5 *kattas* admitted by the defendant shall have to be accepted. The value of the grain at this rate comes to Rs. 1,715-12 0. The date fixed for payment is extended to 20th December 1921. An account of the grain and money-debts payable by that date is separately made. A preliminary foreclosure decree shall now be framed in lieu of the decree passed by the First Court. The amount payable to the plaintiffs shall include their proportionate costs in this Court as well as in the Courts below.

J. P. & G. R. D.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2006 AND 2007 OF 1919.

December 21, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt. and Mr. Justice Panton.

MOHAR ALI SARKAR—DEFENDANT—APPELLANT

versus

MAFIZUDDIN SARKAR—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Judgment not inter partes, *admissibility of.*

In a suit for recovery of possession of land a judgment in a previous suit for ejectment from the same land brought by the plaintiff against a third person in which the defendant's title was set up is admissible in evidence for the purpose of showing that that was a suit in which the title of the defendant was set up by a third person and the suit was decreed.

Appeals against decrees of the Subordinate Judge, Second Court, Pabna in Pabna and Bogra, dated the 30th May 1919, affirming that of the Munsif, First Court at Serajganj, dated the 22nd of February 1919.

FACTS appear from the judgment.

Babu *Nishitha Nath Ghatak*, for the Appellant.—The defendants are the appellants. The appeal arises out a suit for declaration of title and recovery of *khas* possession. The land in dispute is a non-transferable occupancy holding appertaining to the *jote* of one Naibulla. He mortgaged the entire holding to plaintiff's father Alimuddi. The latter purchased the same in execution of the mortgage-decree and took symbolical possession. My objection under section 335 of the Civil Procedure Code of 1882 was rejected. The plaintiff's case is that they have been in possession ever since after obtaining settlement from the landlords. My case is that the landlord evicted Alimuddi and made a fresh settlement with me. The plaintiff then instituted criminal proceedings under section 145 of the Code of Criminal Procedure, which was decided in my favour. Hence the present suit by the plaintiff. His case is that he settled the lands with the heirs of the judgment-debtor. There was an ejectment suit to which I was not a party. That suit was decreed. The judgment and depositions in that case have been received in evidence against me. I submit, I being no party to that suit, the documents are not admissible in evidence. Then, there are two other documents of which secondary evidence has been given on the ground that the originals have been lost. I submit they must prove the loss first before the documents could be admitted.

Babu *Nil Ratan Banerjee*, for the Respondent, was not called upon to reply.

JUDGMENT.—The main ground urged in these appeals is that certain documents were improperly admitted in evidence.

Two of the documents were copies of judgments in a previous suit for ejectment brought by the respondent against one Jait-un-nissa Bibi, in which he obtained a decree. It is contended by the learned Pleader for the appellant that they were not admissible in evidence as the appellant was no party to that suit, and that the reasons contained in the judgment could not be used against him.

But the learned Subordinate Judge on appeal has not considered the reasons for the judgment and has merely referred to the fact that there was a suit in which the title of the present defendant was set up by Jait-un-nissa Bibi and that the suit was decreed. For this purpose the judgments were admissible in evidence.

KHAWAJ DIN v. NUR.

The criminal case has been referred to as showing that the defendant has all along been fighting with Alimuddin and on his death with his son, the present plaintiff, but has been mostly unsuccessful.

Objection is taken to the documents (Exhibits 18 and 28) on the ground that the originals had been proved by Enatulla and Sadek Khan (their depositions are marked as Exhibits 16 and 17) in the ejectment suit to which the defendant was no party.

But the loss of the original documents was proved by the plaintiff himself in the present suit and secondary evidence was adduced to prove these documents (*likhans*).

The learned Pleader for the appellants contends that the *first* with which these *likhans* were produced in the ejectment suit ought to have been proved. But the Pleader's clerk who swore to the handwriting was the person who wrote out the *first*. In these circumstances, we are unable to hold that the documents were inadmissible in evidence.

That being so, and the Courts below having found in favour of the plaintiffs on the merits the appeals must be dismissed with costs.

B. N.

Appeals dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2613 OF 1917.

November 9, 1921.

Present:—Mr. Justice Chevis and Mr. Justice Harrison.

KHAWAJ DIN—PLAINTIFF—APPELLANT

versus

Musammat NUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Oaths Act (X of 1873), s. 9—Offer to be bound by oath—Withdrawal before acceptance—Discretion of Court.

Where a party offers to be bound by the oath of the opposite party, the Court has full discretion to call upon the opposite party to accept or refuse the offer, and, subject to the exercise of that discretion, the offer once made cannot be withdrawn, and if the opposite party eventually accepts it, the party making the offer is bound by the result.

The principle that an offer can be withdrawn before it is accepted is true in the case of an ordinary contract, but does not apply to an offer made under the Oaths Act.

Second appeal from a decree of the District Judge, Jhelum, dated the 7th June 1917, affirming that of the Senior Subordinate Judge, Gujrat, dated the 2nd March 1917.

Dr. *Nand Lal*, for the Appellant.

Mr. *S. A. Razaq*, for the Defendant No. 1, Respondent.

JUDGMENT.—The plaintiff, Khawaj Din, brought this suit against his wife, *Musammat* Nur, and some of her relations, for restitution of conjugal rights. The suit was dismissed by both the lower Courts, and the plaintiff has presented this second appeal. At the hearing *Musammat* Nur alone appeared through her Counsel, Sheikh Abdul Razaq, who stated that she had returned to the plaintiff and was living with him. The appellant admits this to be correct and asks for costs against the remaining respondents only. He has failed to show any reason why these costs should be allowed, for he has not established that the finding of the lower Courts was not justified.

The facts are that the plaintiff agreed to abide by the oath of *Musammat* Nur and two other defendants to be taken in a certain shrine. The two other defendants at once agreed and subsequently took the oath. *Musammat* Nur was not present and before she could be asked whether she was also willing to take the oath, the plaintiff tried to resile from the position and said that he would not be bound by the oath if taken. He was not allowed to withdraw, and as *Musammat* Nur agreed to take the oath judgment was given in accordance with the statements made by the three defendants. Counsel contends that, wherever there is an offer, that offer can be subsequently withdrawn before it is accepted. That is true in an ordinary case of contract but does not apply to an offer made under the Oaths Act. The Court has full discretion to call upon the defendant to accept or refuse the offer; and, subject to the exercise of that discretion, the offer once made stands, and if the defendant eventually accepts it, the plaintiff is bound by the result. These being the facts, we see no reason why any costs should be allowed to the plaintiff-appellant, and we order that parties will bear their own

costs in this Court. The appeal is dismissed.

Z. K. & N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1926 OF 1920.

January 6, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Cuming.

TUKA MEAH AND ANOTHER—PRINCIPAL DEFENDANTS—APPELLANTS

versus

NABIN CHANDRA MAZUMDAR—PLAINTIFF AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

*Tenancy—Under-*raiyati, *transferability of—Custom—Acquisition of occupancy right* - Benami—*Burden of proof—Appeal, second* - *New plea.*

Primarily, the party alleging that a person is a *benamdar* is bound to prove it. [p. 702, col. 1.]

Apart from custom, an under-*raiyati* as a general rule is not transferable. But an under-*raiyat* may, under certain circumstances, acquire a right of occupancy and if he so acquires it his right is transferable. [p. 702, col. 1.]

Parbati Dasi v. *Baikuntha Nath Das*, 22 Ind. Cas. 51; 18 C. W. N. 428; 15 M. L. T. 66; (1914. M. W. N. 42; 12 A. L. J. 79; 19 C. L. J. 129; 16 Bom. L. R. 101; 26 M. L. J. 248 (P. C.), *Aminunnisa* v. *Jinnat Ali*, 27 Ind. Cas. 271; 19 C. W. N. 43; 20 C. L. J. 548; 42 C. 751, *Akhil Chandra Biswas* v. *Hasan Ali Sadagar*, 20 Ind. Cas. 698; 18 C. L. J. 262; 19 C. W. N. 246 and *Biswambhar Mandal* v. *Nasarat Ali*, 57 Ind. Cas. 912; 32 C. L. J. 46, referred to.

A plea that an under-*raiyati* interest is not transferable cannot be raised for the first time in second appeal. [p. 702, col. 1.]

Appeal against a decree of the Additional District Judge, Noakhali, dated the 13th January 1920, reversing that of the Munsif, Second Court, at Sudharam, dated the 29th June 1918.

FACTS appear from the judgment.

Babu *Mohendra Nath Roy* (with him, Babu *Asiranjan Chatterjee*), for the Appellant.—The pure question of law is one of limitation. The suit is governed by the one year rule of limitation contained in Article 11A of the Schedule to the Limitation Act and not by the twelve years' rule. Then, on the question of *benami* the lower Appellate Court was wrong in throwing the onus upon the defendant: See *Parbati Dasi* v. *Baikuntha Nath Das* (1).

(1) 22 Ind. Cas. 51; 18 C. W. N. 428; 15 M. L. T. 66; (1914) M. W. N. 42; 12 A. L. J. 79; 19 C. L. J. 129; 16 Bom. L. R. 101; 26 M. L. J. 248 (P. C.).

My next contention is that the Court of Appeal below has erred in law in coming to a finding as to the under-*raiyati* title of the plaintiff. The interest of an under-*raiyat* is not transferable: See *Aminunnisa* v. *Jinnat Ali* (2). Lastly, the lower Appellate Court ought to have held that the title of the plaintiff had been destroyed by the suit for rent brought by the superior landlord which resulted in the sale of the holding in execution of the rent-decree.

Babu *Dhirendra Lal Kastgir* (with him, Babu *Nripendra Chandra Das*), for the Respondent.—Even if Article 11A of the Limitation Act is applicable, the suit is within time. The lower Appellate Court was quite correct in throwing the burden of proof of the *benami* on the defendant, for a party alleging that a transaction is not what it purports to be, is bound to prove it. The plea of transferability of the under-*raiyati* not having been raised in either of the Courts below, should not be allowed to be raised for the first time in second appeal, for if the point had been raised in the lower Courts a custom of transferability could have been established: See *Akhil Chandra Biswas* v. *Hasan Ali Sadagar* (3). As to the last point raised by my learned friend, my submission is that the finding that the rent-sale was a fraudulent transaction cannot be challenged in second appeal.

Babu *Mohendra Nath Roy* replied.

JUDGMENT.—In this suit the plaintiff sued for recovery of possession of 1 *kani* 14 *gandas* of land on declaration of his *raiyati* title to 6 annas 8 *gandas* share and of his under-*raiyati* title by purchase at a sale for arrears of rent due by the under-*raiyat*. The suit was dismissed in the First Court but has been decreed by the lower Appellate Court.

The plaintiff's cause of action arose on the defendant Tuka Meah succeeding in an application under Order XXI, rule 100, Code of Civil Procedure. The first point argued in this appeal is, that the suit is barred by limitation under Article 11A of the Schedule to the Limitation Act. Though on examination of the dates at first this objection

(2) 27 Ind. Cas. 271; 19 C. W. N. 43; 20 C. L. J. 548; 42 C. 751.

(3) 20 Ind. Cas. 698; 18 C. L. J. 262; 19 C. W. N. 240.

appears to be sound, we now see that, allowing for the closing of the Court for *Puja* vacation and the time allowed to the plaintiff to file deficit Court-fee, the plaint was filed within time.

The second point relates to a question of fact on which the two Courts differed. The first Court held that Nayantara, from two of whose five sons the plaintiff purchased his *raiyati* right, was a *benamdar* of her husband Krishna Chandra. The lower Appellate Court held that she was not a *benamdar*. It is contended that in coming to this finding of fact the burden of proof was wrongly thrown on the defendant. Primarily, the party alleging that a person is a *benamdar* is bound to prove it, and that is what the Additional District Judge has stated. He has further considered the evidence in the case. It appears to us that he has committed no error of law in coming to this finding of fact.

It is also contended that the lower Appellate Court has erred in his finding as to the plaintiff's under-*raiyati* title. The first contention is that the under *raiyati* is not transferable. This is true as a general rule, as was held in the case of *Amanunnisa* v. *Jinnat Ali* (2), which was followed in the case of *Biswambhar Mandal* v. *Nasarat Ali* (4). But as was held in the case of *Akhil Chandra Biswas* v. *Hasan Ali Sadagar* (3) an under-*raiyat* may under certain circumstances acquire a right of occupancy and if he so acquires it his right is transferable. It appears that this plea that the under-*raiyati* interest was not transferable was not raised in either of the lower Courts. Had it been so raised, the plaintiff might have been in a position to prove a custom of transferability of under *raiyati* holding in this locality. It is too late to raise this plea for the first time in second appeal.

It is also said that the lower Appellate Court has not overruled the finding of the Munsif that the under-*raiyati* of Lakshmi was non-existent. This, in our opinion, is not correct. After setting out the plaintiff's case the learned Additional District Judge states that he has *prima facie* shown his title to the land in suit. That evidently means both his *raiyati* and under-*raiyati* title as claimed. He then goes on to state that the defendant contends that Nayantara was a *benamdar* and Lakshmi's *Oudh raiyati* was fraudulent and collusive. He then discusses the evidence principally, it is true, with reference to the question of *benami*. But he sums up by saying that the plaintiff has got title to the land in suit. The questions of Nayantara's *benami* and the genuineness of Lakshmi's *Oudh raiyati* are inter-dependent and the finding of the Munsif that the latter was fraudulent largely depended on the finding that Nayantara was a *benamdar*. Having upset the finding in respect of Nayantara it was not necessary to discuss at lenght the question of Lakshmi's *Oudh raiyati*, and we must hold that what has been written in the judgment is a distinct finding that the under-*raiyati* was genuine and in existence at the time of the plaintiff's purchase.

The last point urged is that the plaintiff's title has been destroyed by the rent-suit brought by the superior landlord who put the whole holding in which this land was comprised to sale in execution of the rent-decree. The finding that this sale is a fraudulent transaction is one of fact which cannot be overruled in second appeal.

We hold, therefore, that points raised on behalf of the appellant failed.

We dismiss this appeal with costs.

B. N.

Appeal dismissed.

(4) 57 Ind. Cas. 912; 32 O. L. J. 46.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 319 OF 1920

March 30, 1921.

Present.—Mr. Lyle, A. J. C.,

GOPI CHARAN—DEFENDANT—APPELLANT

versus

DURGA PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 105 (5A)—Jurisdiction of Civil and Revenue Courts—Muafi, *transfer of—Suit by proprietor for possession, nature of.*

GOPI CHARAN v. DURGA PRASAD.

A suit by the proprietor of a *mahal* for a declaration that a transfer of the *muafi* rights in a plot of land is not binding on him and for possession of the land is in effect a suit for resumption of the *muafi* and is triable solely by a Revenue Court under the provisions of clause (5A) of section 108 of the Oudh Rent Act.

Gaya Prasad v. *Tasadduk Husain*, 6 O. C. 110 and *Suraj Bakhsh Singh* v. *Baldeo Bihari*, 53 Ind. Cas 459; 22 O. C. 186; 6 O. L. J. 490; 1 U. P. L. R. (J. C.) 83, distinguished.

Appeal from a decree of the Additional Subordinate Judge, Unao, dated the 29th July 1920, confirming that of the Munsif, Safipur, dated the 29th January 1920.

Mr. *Ishri Prasad*, for the Appellant.

Mr. *Hari Kishen Dhaon*, for Respondent No. 1.

JUDGMENT.—Jhagru and *Musammat* Bitti, defendants Nos. 2 and 3, were *muafidars* of plot No. 2600 in Mahal Lokman in village Ugu. On the 10th of October 1918 they sold their rights in the suit plot to Gopi Charan, defendant No. 1. The plaintiffs, Durga Prasad and Chandika Prasad, who are the proprietors of Mahal Lokman, brought a suit for pre emption on the basis of the sale but their suit was resisted on the ground that the vendors were merely *muafidars* and no right of pre emption had accrued to the plaintiffs. The pre emption suit was dismissed on this ground and the plaintiffs thereupon brought the suit out of which this appeal arises against Gopi Charan, Jhagru and *Musammat* Bitti for a declaration that they (the plaintiffs) are not bound by the sale-deed executed by the defendants Nos. 2 and 3 in favour of the defendant No. 1 and for possession of the plot.

The suit was resisted on various grounds. Among other grounds, it was pleaded that the Civil Court had no jurisdiction to decide the suit and that the plaintiffs had no cause of action and were not entitled to possession.

The Court of first instance held that it had jurisdiction, that the transfer made by defendants Nos. 2 and 3 to defendant No. 1 was invalid, and that the defendant No. 1 was, therefore, a trespasser, and decreed the plaintiffs' suit. The lower Appellate Court has agreed with the findings of the Court of first instance and confirmed the decree of that Court.

In second appeal it is urged that the appellant, Gopi Charan, is not a trespasser and that the Civil Courts have no jurisdiction. The lower Courts have relied on the rulings, *Gaya Prasad* v. *Tasadduk Husain* (1) and *Suraj Bakhsh Singh* v. *Baldeo Bihari* (2), but it seems to me that neither of these rulings is applicable to the present case. In *Gaya Prasad* v. *Tasadduk Husain* (1) the Zamindar had obtained a declaration that the *muafi* grant was liable to resumption and it was held that as the grant was liable to resumption the *muafidars* had no permanent interest which he could assign. This ruling was followed in *Suraj Bakhsh Singh* v. *Baldeo Bihari* (2) where it was held that a *muafidar* holding a rent-free tenure liable to resumption had no higher position than that of a tenant entitled to hold the land rent free unless he is a grantee under other conditions. In the present case there is nothing whatsoever to show that the land in suit is liable to resumption. The *muafi* in the present suit is admittedly a *muafi khairati* and there is nothing whatsoever on the record to show under what conditions, if any, the *muafi* was granted. The present suit is in effect a suit for resumption of the *muafi* and such a suit is triable solely by the Revenue Courts under the provisions of clause (5A) of section 108 of the Oudh Rent Act. It may be that the *muafidars* have no interest which they can transfer and that the deed of sale in favour of the appellant, Gopi Charan, has in fact conveyed no interest to him. But even if this were so it would not follow that the appellant, Gopi Charan, was holding the land against the Zamindar as a trespasser. As I have said, there is nothing to show under what conditions the *muafi* was granted and, therefore, if the sale-deed in favour of Gopi Charan is invalid he must be assumed to be in possession of the land not adversely to the Zemindars but with the permission of the *muafidars*. The suit is in effect a suit for resumption of the *muafi* holding and is not cognizable by the Civil Courts. For these reasons, I allow the appeal, set aside the decree of the lower Appellate Court and dismiss the plaintiff's suit with costs in all Courts.

E. K. *Appeal allowed.*

(1) 6 O. C. 110.

(2) 53 Ind. Cas. 459; 22 O. C. 186; 6 O. L. J. 490; 1 U. P. L. R. (J. C.) 83.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2483 OF 1919.

January 12, 1922.

Present :—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Newbould.

SAMADDI SHEIKH—PLAINTIFF—APPELLANT

versus

FULBASH BEWA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 1 —Suit, withdrawal of, with liberty to bring fresh suit, —Court trying subsequent suit cannot question propriety of order.

Where a suit was allowed to be withdrawn with liberty to bring a fresh suit, the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit, had properly made such order.

Hridyanath Roy v. *Ram Chandra Barua Sarma*, 58 Ind. Cas. 806; 24 C. W. N. 723; 31 C. L. J. 482 (F. B.); 48 C. 138, followed.

Kali Prasanna Sil v. *Panchanan Nandi Chowdhury*, 33 Ind Cas. 670; 23 C. L. J. 489; 20 C. W. N. 1000; 44 C. 367, referred to.

Appeal against a decree of the Additional Subordinate Judge, Rangpur, dated the 26th August 1919, affirming that of the Munsif, First Court, Kurigram, dated the 6th July 1918.

FACTS appear from the judgment.

Babu *Surendra Chandra Sen* (with him, Babu *Hemendra Chandra Sen*), for the Appellant :—Having regard to the Full Bench decision in *Hridyanath Roy* v. *Ram Chandra Barua Sarma* (1) the judgment of the Courts below cannot be supported. The authority relied upon by the Courts below is no longer good law. Under the Full Bench ruling the Court is not competent to question the properiety of the leave to withdraw granted in the previous suit.

Babu *Jatendranath Sanyal*, for the Respondent :—The appeal was only allowed to be withdrawn but not the suit. So that, strictly speaking, there was no leave to withdraw the suit with liberty to bring a fresh suit.

(1) 58 Ind. Cas. 806; 24 C. W. N. 723; 31 C. L. J. 482; 48 C. 138 (F. B.).

Babu *Surendra Chandra Sen*, was not called upon to reply.

JUDGMENT.—The suit out of which this appeal arises has been dismissed by the Courts below, on the ground that the leave granted to the plaintiff in a previous suit to institute a fresh suit was improper.

The Courts below proceeded upon the view taken in the case of *Kali Prasanna Sil* v. *Panchanan Nandi Chowdhury* (2), the same case in 20 Calcutta Weekly Notes, 1000. But that case has been overruled by the Full Bench in *Hridyanath Roy* v. *Ram Chandra Barua Sarma* (1) where it was laid down that the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order.

It is contended by the learned Pleader for the respondents that the plaintiff was allowed to withdraw the appeal and not the suit. But the order clearly states that it gave him liberty to bring a fresh suit and awarded the defendant costs of both Courts. Taking the order as a whole there is no doubt that the suit was allowed to be withdrawn and with liberty to bring a fresh suit.

The orders of the Courts below must accordingly be set aside and the case sent back to the Court of first instance for trial on the merits.

Costs to abide the result.

B. N.

Order set aside.

(2) 33 Ind. Cas. 670; 23 C. L. J. 489; 20 C. W. N. 1000; 44 C. 367.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 173 OF 1920.

March 21, 1921.

Present :—Mr. Daniels, A. J. C.

JAGANNATH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DIN MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Acquiescence, what amounts to.

For a defence of acquiescence to be successful it is necessary that the defendant should have acted in good faith, believing that he had a valid right to do the act in question and that the plaintiff, knowing that the defendant was under this mistaken belief, should have abstained from doing anything to prevent his spending money in doing that act. [p. 705, col. 2.]

Beni Ram v. *Kundan Lal*, 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.) and *Paddu* v. *Mahabir Prasad*, 53 Ind. Cas. 683; 6 O. L. J. 455, referred to.

Appeal from a decree of the First Subordinate Judge, Sitapur, dated the 15th May 1920, reversing that of the Munsif, Sitapur, dated the 22nd September 1919.

Mr. *Ishri Prasad*, for the Appellants.

Syed *Ali Mohammad*, holding brief of Mr. *Wasir Hasan*, for Respondent No. 1.

JUDGMENT—This is a second appeal in a suit brought by the co-sharers owning an eight annas share in Mauza Chandanpur in the Sitapur district, for a mandatory injunction against a tenant Din Muhammad compelling him to uproot a grove which he has planted and for possession of the land. The co-sharers owning the other eight annas share in the village were made defendants in the suit. The land was let to Din Muhammad, for the purpose of planting a grove, by Chhote Lal *alias* Chhutkau, one of the co-sharers, and there is a concurrent finding that he was acting on behalf of the Lambardar, his sister-in-law *Musammat* Jaswant Kuar The lower Appellate Court, without deciding whether the lease was within the powers of the Lambardar, has dismissed the suit on the ground of acquiescence. The learned Subordinate Judge finds that the grove was planted three or four years before the suit, that the plaintiffs were aware from the first of the lease and of the planting of the grove and that they took no steps for three or four years to prevent its being planted.

The principles which govern the defence of acquiescence are laid down by the Privy Council in *Beni Ram* v. *Kundan Lal* (1), which has been followed and interpreted in various later decisions of which the decision of this Court in *Paddu* v. *Mahabir Prasad* (2) may be taken as an instance. For a defence of acquiescence to be successful it is necessary that the defendant should have acted in good faith believing that he had a valid lease and was entitled to plant the trees and that the plaintiffs knowing that he was under this mistaken belief should have abstained from doing anything to prevent his spending money in planting the grove. It is found that the defendant has spent a considerable amount of money in this case. It is also found by the lower Appellate Court that the lease granted was not in fact prejudicial to the other co-sharers as the interest on the *nazrana* paid by Din Mohammad would be equal to the rent which they could have got for the plot. Both Courts appear to have found that the defendant acted in perfect good faith. The learned Munsif has stated this in very clear terms. The matter is not so clearly stated in the judgment of the lower Appellate Court but the latter quotes the Munsif's findings apparently with approval. It also finds that the planting of the grove was accompanied by public ceremonies and done with a certain amount of ostentation, which is an indication that the defendant was under the impression that there was no doubt as to his rights. In view of the fact, also found by the lower Appellate Court, that some of the plaintiffs themselves have taken land from Chhote Lal for a grove in the same way as the defendant, and the admission of one of the plaintiffs that he himself has been giving leases whenever he wished without any reference to the other co-sharers the defendant had good reason to suppose that Chhote Lal

(1) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

(2) 53 Ind. Cas. 683; 6 O. L. J. 455,

was authorised to grant the lease which he did and that it was not necessary that he should have obtained the express permission of all the co-sharers in the village. It has been expressly found that the plaintiffs were aware of the planting of the grove and they must have known that the defendant was acting in good faith. They asserted, indeed, that they protested against the grove being planted but the learned Subordinate Judge has disbelieved this statement. On the fact found by the learned Subordinate Judge he was fully justified in holding that the plaintiffs were estopped by their acquiescence from obtaining a mandatory injunction for the uprooting of the trees and I find accordingly.

There is only one other point which it is necessary to mention. The First Court, the Munsif, decreed the suit against the defendant. The latter thereupon filed a suit for return of the *nazrana* which he had paid and got a decree. It has been suggested on behalf of the appellants that by this conduct he has debarred himself from resisting the present suit. There is no force in this plea. In the state of things which existed when the claim for the return of the *nazrana* was brought the defendant's conduct was perfectly natural. He was in danger of losing both his grove and his money. The Munsif's decree having been reversed it would seem that a fresh cause of action for return of the *nazrana* has arisen in Chhote Lal's favour.

The result is that the appeal fails and it is accordingly dismissed with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1405 OF 1920.

December 15, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

HRIDAY NATH MONDAL AND ANOTHER —DEFENDANTS—APPELLANTS

versus

TALA BEWA AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Appeal, second—Issue dependent on facts cannot be raised for first time.

It is not open to an appellant to raise, for the first time in second appeal, an issue which would depend upon a finding of fact. [p. 707, col. 1.]

Appeal against a decree of the Officiating District Judge, Jessore, dated the 25th of March 1920, affirming that of the Munsif, Third Court, at Narail, dated the 30th of May 1916.

FACTS appear from the judgment.

Babus *Surendra Chandra Sen* (with him, Babu *Hemendra Chandra Sen*) for the Appellants.—The question is, what was the status of the plaintiffs. My submission is that at the time when the holding was purchased by the plaintiffs their status was that of a *raiyat* at fixed rates We are, therefore, not liable to be ejected after notice under section 49 of the Bengal Tenancy Act. The fact that the plaintiffs have surrendered their right of *raiyats* at fixed rates and are satisfied with the status of occupancy *raiyats* cannot affect my position. Refers to *Buzlul Karim* v *Satish Chandra* (1).

Babu *Apurba Charan Mukerjee*, for the Respondent, was not called upon to reply.

JUDGMENT.—In the suit out of which this appeal has arisen the plaintiffs sued to recover *khas* possession on declaration of their title to a certain holding. Their case was that the defendants were their under-*raiyats* and they had served notice on them under section 49 of the Bengal Tenancy Act. The learned Munsif found that the interest of the plaintiffs was that of occupancy *raiyats* and the interest of the defendants was that of under *raiyats* and that they were liable to ejectment on notice. On appeal to the District Judge he first allowed the appeal in the absence of the respondents. A petition of review was allowed and the appeal re-heard and the District Judge has now dismissed the appeal.

The point so far as we understand it which is now raised by the learned Vakil for the appellants is that at the time when their present landlords purchased the holding the status of the landlords was that of a *raiyat* at fixed rate and he would argue that it is immaterial if, for some reason or other, the plaintiffs have surrendered some of their rights as *raiyats*

(1) 10 Ind. Cas. 325; 13 C. L. J. 418; 15 C. W. N. 752.

at fixed rate and are now content to be regarded as occupancy *raiyats*. The answer to this contention would seem to be that this point was never raised before in the Court of first instance. As far as can be seen, the case has been hitherto argued on the consideration of what is the status of the plaintiffs at the present time. We do not think that it is open to the appellants to raise, for the first time in appeal, an issue which would depend upon a finding of fact. The learned District Judge has found as proved that the plaintiffs are not and cannot claim to be *raiyats* at fixed rate. This is a finding of fact with which we cannot interfere in second appeal.

The result is that the appeal must be dismissed with costs.

B. N.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 14 OF 1921.

May 9, 1921.

Present :—Syed Wazir Hasan, A. J. C.

Babu LACHHMAN DAS—DEFENDANT—APPELLANT

versus

BHAGWANT RAM AND OTHERS—PLAINTIFFS

THAKUR PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of document—Lease—Estate granted—Naslan bad naslan, *meaning of.*

It is not safe to import considerations into the question of construction of a document which might have arisen or may arise with reference to the question of construction of other documents. [p. 708, col. 1]

Cases of construction of documents must be decided on their own facts and the only question in each case is, how the law is to be applied to the particular facts which are put before the Court. [p. 708, col. 2.]

Kalka Singh v. *Suraj Bali Lal*, 45 Ind. Cas. 208; 5 O. L. J. 80, followed.

A lease recited that the lessee would be in possession of the leasehold *naslan bad naslan* (generation after generation) and *ba qaemuqami* (in substitution in the place) of the lessor, on payment of a certain amount of annual rent, and in no circumstances and under no contingency, whether arising out of default of non-payment of rent reserved or arising out of any other breach of conditions, would the lessor have the right of re-entry in himself:

Held, that the lease conferred an absolute interest on the lessee subject to the payment of the annual rent. [p. 708, col. 2]

Held, also, that the use of the words *naslan bad naslan* in documents had technical import in legal vocabulary and that if there was nothing else to control that import the use of the words meant an intention to convey an absolutes estate. [p. 708, col. 2.]

Thakur Harihar Baksh v. *Thakur Uman Parshad*, 14 I. A 7; 14 C. 296. 1 Ind. Jur. 194; 4 Sar. P. C. J. 766; Rafique and Jackson's P. C. No 95; 7 Ind. Dec. (N. S.) 196, followed.

Appeal from a decree of the District Judge, Rae Bareli, dated the 29th November 1920, upholding that of the Subordinate Judge, Partabgarh, dated the 5th July 1920.

Mr. *Ram Chandra*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra* and Saiyad *Mohammad Sibtain*, for Respondents Nos. 1 to 4.

JUDGMENT—Thakurain Ajit Kunwar, *taluqdar* of Patti, District Fyzabad, granted a perpetual lease on the 31st October 1885 to one Sheoambar Prasad. The property which was the subject matter of the lease, has on more occasions than one been transferred under deeds of mortgage executed by the sons of Sheoambar Lal after his death. Some of these mortgages were in favour of the defendant-appellant who brought a suit against the mortgagors for the enforcement of those mortgages and obtained a decree thereon. The grandsons of Sheoambar Lal brought the suit out of which this appeal has arisen for a declaration that the property was not liable to be sold under the decree obtained by the defendant appellant on the basis of his mortgages. The grounds of the claim as set out in the plaint were numerous. One of them was that the lease of the 31st October 1885 conferred no transferable rights on Sheoambar Lal, the lessee. This construction of the lease was disputed by the defendant-appellant, who alleged that the lease in question conferred heritable and transferable rights on Sheoambar Lal. The state of pleadings on the point under consideration gave rise to an issue in the case which the learned Subordinate Judge framed as issue No. 2 "Is the property mortgaged

under the said deed non-transferable as alleged by the plaintiffs ?"

But along with this issue the pleadings gave rise to a number of other issues some of which were decided by the learned Subordinate Judge in favour of the plaintiffs and the result of his findings was that the plaintiffs' suit was decreed. The defendant went in appeal to the Court of the District Judge of Rae Bareli. The learned Judge disposed of the appeal by giving a finding on issue No. 2 which I have already quoted. That issue was decided by the learned Subordinate Judge in favour of the defendant and against the plaintiffs.

In my opinion the form of the issue in which it was cast by the learned Subordinate Judge was perfectly proper and in view of the terms of the lease I am clearly of opinion that the onus of proving the issue lay on the plaintiffs. Be that as it may, the learned District Judge in appeal, as I have stated before, confined himself with the discussion relating to that issue and came to the conclusion in disagreement with the Court of first instance that the lease of the 31st October 1885 did not confer transferable rights on the lessee. In the result, he upheld the decree of the Court of first instance and dismissed the appeal. This second appeal is lodged against that decision of the learned District Judge.

The foremost point which arises for decision in the case is the construction of the lease of the 31st October 1885. The contention on behalf of the learned Advocate for the appellant is that the terms of the lease leave no room for doubt that the intention of the grantor was to confer an absolute estate on the grantee subject to the payment of Rs. 449-6-0 per annum, which represented the proportionate share of revenue on the property, which was the subject matter of the lease, and might as well have included *haq malikana*, which the grantor reserved for herself. On behalf of the respondents their learned Advocate, Pandit Gokaran Nath Misra, contends that the lease in question confers nothing more than a heritable estate on the lessee. His argument is that the document must be treated as one of the nature of an agricultural lease and consequently restriction on the right of transfer should be applied to this lease.

In my judgment, the document, when read as a whole, confers an absolute interest on the lessee subject to the payment of the annual rent described above. It would not be safe to import considerations into the question of construction of this document which might have arisen or may arise with reference to the question of construction of other documents. My attention has, however, been drawn to a recent decision of a learned Judge of this Court, now Mr. Justice Lindsay, in *Kalka Singh* v. *Suraj Bali Lal* (1). The learned Advocate for the respondents has in fact pressed that case hard on me. But when I decline to seek aid in the construction of this document from the decision of Mr. Lindsay in that case I am simply following the dictum of that learned Judge expressed in that case. Mr. Lindsay says:—"Cases like these must be decided on their own facts and the law being well understood the only question in each case is, how the law is to be applied to the particular facts which are put before the Court." If I must distinguish the decision of Mr. Lindsay from the case before me, I have very strong grounds to do so. The document before me says that the lessee shall be in possession of the village leased *la qaemuqami* of the lessor. These words were wanting in the document which Mr. Lindsay had to construe in the case mentioned above. I attach very great importance to these words. The intention to confer an absolute estate subject to the liability mentioned above could not be expressed in a language stronger than the one just now referred to if the document were to be written in Urdu as this document was. The use of this language clearly means the substitution of the lessee in the place of the lessor. Added to these words I find further words *naslan bad naslan*. These words have acquired a technical import in legal vocabulary. If there were nothing else to control that import the use of those words would generally be understood to have been made with an intention to convey an absolute estate. In support of this observation of mine I may refer to a decision of the Privy Council in the case of *Thakur Harihar Baksh* v. *Thakur Uman Parshad* (2). Yet there

(1) 45 Ind. Cas. 208; 5 O. L. J. 80.
(2) 14 I. A. 7; 14 C. 296; 11 Ind. Jur. 196; 4 Sar. P. C. J. 766; Rafique and Jackson's P. C. No. 95; 7 Ind. Dec. (N. s) 196.

is another significant feature of this document. In no circumstances and under no contingency, whether arising out of default of non-payment of rent reserved or arising out of any other breach of conditions, the lessor reserves the right of re entry in herself. Why does she not do so, if her intention was in the event of a default being made in the payment of the rent or in the event of the lessee making a transfer of the leasehold property to avoid the lease and enter into possession of the property? The obvious answer to that question is that she did not intend to avoid the lease either on the ground of non-payment of rent or on a transfer of the leasehold property being effected by the lessee. This to my mind is very strong indication of the intention of the parties that the original rights which are available to all persons holding an interest in any property, of transfer of that interest were not to be taken away in this particular instance. I, therefore, disagree with the learned Judge on his construction of the document.

The result is that the appeal is allowed, the decree of the lower Appellate Court reversed, that the record is sent back to that Court with directions to re-admit the appeal under its original number in the register of appeals of that Court and dispose of it according to law. The costs of this appeal and hitherto will abide the event.

Z. K. & J. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1329 OF 1919.

December 12, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

SIBA PROSAD DAS CHAUDHURY —PLAINTIFF—APPELLANT

versus

KAZIMUDDIN SARKAR —AND OTHERS DEFENDANTS—RESPONDENTS.

Mortgage suit—Decree—Interest pendente lite—Suit whether pending during existence of an ex parte decree obtained earlier in suit but set aside—Costs—Plaintiff's laches

A plaintiff in a mortgage suit should get interest at the rate stipulated for the entire period during which the suit is pending [p 710, col. 1.]

Where an *ex parte* decree in a mortgage suit is set aside the suit is considered to be pending between the date of the *ex parte* decree and the date when that decree is set aside. [p. 710, col. 1.]

A delay in the disposal of a suit due to the laches of the plaintiff should be taken into consideration in dealing with the question of costs. [p. 710, col. 1.]

Appeal against a decree of the District Judge, Dinajpur, dated the 22nd March 1919, affirming that of the Subordinate Judge of that District, dated the 29th May 1917.

FACTS appear from the judgment.

Babu *Surendra Chandra Sen*, (with him, Babu *Surendra Nath Bose* No. I), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for mortgage. There were several defences. I have obtained a decree on the merits excepting on one point, *viz.*, whether I am entitled to interest from date of suit till decree. In this matter Court has no discretion. Refers to Order XXXIV, rule 4, Civil Procedure Code. The facts are these. The suit was instituted on 11th June 1903. It was decreed *ex parte* on 12th August 1903. Then decree absolute followed. One of the heirs of defendant No, 5 came in and pleaded non-service on one of the heirs of the mortgagors. On 10th November 1915 an application was made for the setting aside of the *ex parte* decree. It was set aside by consent on 12th February 19 6. The suit was again heard and decided and a decree was passed on 29th May 1917. The Court said that, ordinarily one would get stipulated rate of interest *pendente lite*. First Court held that interest at the stipulated rate was to run till the date of payment fixed in the decree; but that interest will not run from the date of the *ex parte* decree, *i. e*, from 12th August 1903 to 12th February 1916. My submission is that the defendant was aware of the decree. He did not care to pay up. Therefore, he should pay interest.

[CHATTERJEA, J.—What were you doing all the time?]

I practically did nothing. But all the same, justice would allow me interest for the period. Refers to Order XXXIV, rule 4

Civil Procedure Code; Order IX, rule 13, Civil Procedure Code. They took false defences. I submit section 34, Civil Procedure Code does not apply. Refere to *Jawahir Singh* v. *Someshwar Dat* (1).

Babu *Bon Bihari Sarkar*, for the Respondent.—Interest has some up to a huge amount already. He still claims about Rs. 2,000 more. I submit the effect of the decree was an order to pay. The decree-holder ought not to have slept over for 12 years or so. I submit section 34, Civil Procedure Code read with Order XXXIV, rule 4, Civil Procedure Code would apply to the present case. Refers to Ghosh on Mortgages (4th Edition) 67. There are some cases no doubt but they are all under the Code of 1882. which has been changed since. Refers to *Sundar Koer* v. *Kai Sham Krishen* ( ). section 209 of the Civil Procedure Code of 1882.

Babu *Surendra Chandra Sen* replied in brief.

JUDGMENT.—The Courts below have disallowed interest from the date of the *ex parte* decree, *i. e.*, from the 14th August 1903 up to the 12th February 1916, the date on which the *ex parte* decree was set aside. The learned District Judge was of opinion that the suit was not pending between the date of the *ex parte* decree and the date when that decree was set aside.

We do not see how it can be said that the suit was not pending during that period, when the *ex parte* decree was set aside subsequently. It is not so hard upon the defendant as it seems at first sight; because the defendant did not offer to pay up any money during this period and the rate of interest in two out of the three bonds was not at all high, being only 6 and 8 per cent. per annum respectively. The fact that the delay in the final disposal of the suit took place owing to the laches of the plaintiff should, however, be taken into consideration in dealing with the question of costs.

We are accordingly of opinion that the plaintiff should get interest at the rates stipulated for the entire period during which the suit was pending but that each party should bear his own costs in all Courts, and it is ordered accordingly.

Order accordingly.

J. P.

(1) 28 A. 225; 10 C. W. N. 266; 1 M. L. T. 66; 3 C. L. J. 354; 33 I. A. 42 (P. C.).

(2) 34 C. 150; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 42; 2 M. L. T. 75; 4 A. L. J. 109; 5 C. L. J. 106; 34 I. A. 9 (P. C.).

MADRAS HIGH COURT.

CIVIL APPEAL No 355 OF 1920.

November 30, 1921.

Present :—Mr. Justice Spencer and Mr. Justice Ramesam.

KORALLA BUCH LINGAM—PLAINTIFF—APPELLANT

versus

KORALLA SATYANARAYANAMURTHI AND OTHER—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss 151, 152—Amendment of decree by Court other than that which passed decree, legality of—Transfer of application for amendment of decree, whether valid.

An order of a Court amending in execution a decree of another Court is wholly *ultra vires* and is not saved by sections 15 and 152 of the Civil Procedure Code [p. 71, col .]

A transfer by a District Judge of an application for amendment of a decree passed by him to another Court for disposal is improper and out of order [p. 71, col .]

Appeal against a decree of the District Court, Godavari, in Original Suit No. 33 of 1912, as amended by order of the Court of the Subordinate Judge, Rajahmundry, in Execution Appeal No. 405 of 1920.

Messrs. *P. Somasundaram* and *P. Satyanarayana*, for the Appellant.

Messrs. *P. Narayanamurthi* and *G. Lakshmana*, for the Respondents.

JUDGMENT.—The parties to Original Suit No. 33 of 1912, which was a suit for partition, referred their disputes to be settled by three arbitrators who made an award on April 2nd 1913.

After this, the 3rd arbitrator divided the properties and reported to the Court on 6th October 1915 and at the foot of his report it was written that both the parties agreed to the matters in that report, and the plaintiff and the first defendant for himself and as guardian of the second defendant signed this statement. In this report the 3rd Panchayatdar apparently exceeded his powers as a sigle arbitrator by fixing the amount of mesne profits to be paid after the date of the award,

On 13th December 1915 the District Judge (Mr. Roy) passed orders on this report but omitted (apparently by oversight) to specifically direct a decree to be drawn up in accordance with the award and the report.

But a decree was drawn up and signed by the District Judge's successor Mr. Fernandez on 14th December 1915.

Nearly five years later, when a review petition if presented would have been long out of time, an execution petition was put in on 9th August 1920 by the defendants asking for amendment of the decree and for restitution, and after several adjournments the case was transferred by the District Court to the Sub-Court for disposal, although it should have been obvious to the District Judge that the Sub Court would have no power to amend the District Judge's decree.

On 2nd November 1920 the Subordinate Judge amended the final decree of the District Judge by ordering the clause relating to mesne profits to be expunged and the plaintiff to refund to the second defendant Rs. 776 collected in pursuance of the final decree.

It is clear from the above facts that the Subordinate Judge's order amending in execution the decree of another Court was wholly *ultra vires* and that sections 151 and 152, Civil Procedure Code, which were invoked in the petition gave him no power to make such an order. The decree in question had become final, no appeal had been preferred, no application for review had been filed in time, and there was no reason on the merits to convert an execution application into a review petition. The District Judge's order transferring the petition pending before him to the Sub-Court was itself improper and out of order.

These alone are sufficient reasons for setting aside the Subordinate Judge's order and we need not deal with the further reason against such interference with the decree, namely, that it was based on the consent of the parties who signed the arbitrator's report.

We allow the appeal and set aside the order of the Subordinate Judge dated 2nd November 1920 and we restore the decree of the District Judge dated 14th December 1915, and we direct the respondent to pay the appellant's costs in this Court and the Court below.

M. C. P.
J. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1863 OF 1919.

December 16, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

SAIBESH CHANDRA SARKAR—DEFENDANT—APPELLANT

versus

Maharadhiraj SIR BEJOY CHAND MOHATAP BAHADUR—PLAINTIFF AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 31, cl. (2), scope of—Award—Suit to contest award not maintainable—Jurisdiction, exclusive—Civil Court, jurisdiction of—Proper remedy—Person not having notice not bound.

Where on acquisition of land under the Land Acquisition Act a party to it is served with notice under section 9 of the Land Acquisition Act he is bound to apply for reference under section 18 of the same Act when he is dissatisfied with the Collector's award, and he cannot maintain a suit in the ordinary Civil Court. [p. 716, col. 2.]

Bhandi Singh v *Ramadhin Rai*, 2 C. L. J. 359; 10 C. W. N. 991, referred to.

The Land Acquisition Act creates a special jurisdiction and provides a special remedy and, ordinarily, when jurisdiction has been conferred upon a Special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive. [p. 714, col. 1.]

Bhandi Singh v *Ramadhin Rai*, 2 C. L. J. 359; 10 C. W. N. 991, relied on.

Where by an Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of the Civil Court is ousted and in the case of injury the party cannot proceed by action. [p. 714, col 1.]

Stevens v. *Jeacocke*, (1849) 11 Q. B. 731; 17 L. J. Q. B. 163; 2 Jur 477; 116 E. R. 647; 76 R. R. 614, *West* v. *Downman*, (1880) 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6 and *Ram Chandra* v. *Secretary of State for India in Council*, 12 M. 105; 13 Ind. Jur. 50; 4 Ind. Dec. (N. S.) 422, relied on.

The proviso to section 31, clause (2) of the Land Acquisition Act is of limited application and applies

only to cases where the person is under a disability or is not served with notice of the proceedings before the Collector. [p. 715, col. 1.]

Raja Nilmoni Singh v. *Ram Bandhu Rai*, 7 C. 388; 4 Shome L. R. 263; 10 C. L. R. 393; 8 I. A. 90; 4 Sar. P. C. J. 234; 5 Ind. Jur. 388; 3 Ind. Dec. (N. S.) 799 (P. C.) and *Bhandi Singh* v. *Ramadhin Rai*, 2 C. L. J. 359; 10 C. W. N. 99, referred to.

Srimati Punnabati Dai v. *Rajah Pudmanund Singh Bahadur*, 7 C. W. N. 538, not followed.

Where a person has no notice of the apportionment proceedings under the Land Acquisition Act, he cannot be bound by the award or by the decision. [p. 715, col 2.]

Hurmutjan Bibi v. *Padma Lochan Das*, 12 C. 33; 6 Ind. Dec. (N. S.) 22, followed.

Appeal against a decree of the District Judge, Birbhum, dated the 16th of July 1919, affirming that of the Subordinate Judge of that District, dated the 25th of November 1918.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him, Babu *Sambhu Nath Banerjee*), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for refund of money which was awarded as compensation for the acquisition of certain lands under the Land Acquisition Act and withdrawn by the defendant. The lands were acquired for a Railway. I am the *putnidar* and the plaintiff is my landlord. The Maharaja did not appear in the land acquisition proceedings before the Collector nor did he ask for any reference. The Collector's order was that I was to get half the amount awarded as compensation which I drew. The Maharaja has instituted the present suit for the recovery of that money from me. My point is that the *putni patta* has not been rightly construed. The *putni patta* was dated the 26th June 1855 when there was no Railway in that part of Bengal. The words in the *patta* are to the effect that the landlord shall be entitled to all compensation for any decrease in the lands owing to acquisition for purposes of roads or embankments and that I shall have no concern in those matters and shall not be entitled to claim any abatement of rent therefor. I submit these terms are clearly illegal and unconscionable. I cannot be deprived of the compensation. Act XLII of 1850 was then in force. The words are vague. The word "Railway" could have been used in the *patta* as the word was then in use. Then the word *puraskar* does not mean compensation. I submit no Court of Equity would give effect to such an unconscionable contract. The landlord is at best entitled to the value of the land at the inception of the *putni*. A suit is not maintainable under the Land Acquisition Act. He was served with notice but he did not apply for a reference nor did he put forward any objection to the amount of compensation awarded by the Collector. The landlord cannot now have recourse to a regular suit having regard to the special remedy provided in the Land Acquisition Act itself. The Act creates a special jurisdiction and provides a special remedy. Refers to sections 9, 31 (2) of the Land Acquisition Act. Refers to *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (1), *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2), *Bhandi Singh* v. *Ramadhin Rai* (3) and *Icharan Singh* v. *Nilmoney Balidar* (4). The intention of the Legislature was never to allow persons sleeping over their rights to have the luxury of separate regular suits. He had notice and had speedy remedy provided in the Act. He did not avail himself of it. Legislature intended to allow simply those persons who had no notice at all to have recourse to regular suits. It is very difficult to draw the line between these cases. The case in *Srimati Punnabati Dai* v. *Raja Pudmanund Singh Bahadur* (1) goes thus far that a person who appears and applies for a reference which is not adjudicated will be barred from bringing a regular suit. The case in *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (1) proceeds on a misinterpretation of the Privy Council decision in *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2). Refers to *Hurmutjan Bibi* v. *Padma Lochan Das* (5), *Icharan Singh* v. *Nilmoney Balidar* (4) and *London & N. W. Ry. Co.* v. *Bradley* (6).

(1) 7 C. W. N. 538.

(2) 7 C. 388; 4 Shome L. R. 263; 10 C. L. R. 393; 8 I. A. 90; 4 Sar. P. C. J. 234; 5 Ind. Jur. 388; 3 Ind. Dec. (N. S.) 799 P. C.).

(3) 2 C. L. J. 359; 10 C. W. N. 991.

(4) 35 C. 470; 12 C. W. N. 636; 7 C. L. J. 499.

(5) 12 C. 33; 6 Ind. Dec. (N. S.) 22.

(6) (1851) 3 Mac. & G. 356; 6 Railw. Cas. 554; 15 Jur. 639; 42 E. R. 290.

Babu *Sarat Kumar Mitra*, for the Respondents.—The question of the unconscionable nature of the lease cannot be raised now as it was not done in the Courts below. The lease is dated (1855) 1262 B. S, *i. e.*, more than sixty years ago. The point was given up in the lower Appellate Court. The word *rasta* which occurs in the lease and for the acquisition of which they will not be entitled to any compensation I submit includes railroads. It is true that Railways were known at the time and that no mention of it was made in lease. But I submit the lease would have made express exceptions in the case of Railways.

[N. R. CHATTERJEA, J.—Would you call Railway a *rasta*?]

Of course, that cannot be done. But *rasta* is a generic term and would cover a Railway. *Purskar* means anything given in lieu of the land or compensation. As regards the other question of jurisdiction of Court to entertain a suit like the present, I submit my suit is maintainable. The only case in point is that of *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (1). The other cases cited by the other side are all distinguishable and do not apply to the facts of the present case. I submit the decision of the Court below is right.

Babu *Jogesh Chandra Roy*, replied in brief.

JUDGMENT.—This appeal arises out of a suit for refund of money which had been allowed as compensation for certain lands acquired under the Land Acquisition Act and withdrawn by the defendant.

It appears that the lands in question were acquired for a Railway. The plaintiff (the Zemindar) and the defendant, (the *putnidar*) were served with notices under section 9 of the Land Acquisition Act. The Collector apportioned the compensation half and half between the Zemindar and the *putnidar*. Neither party applied for any reference under section 18 of the Act and the *putnidar* withdrew the amount awarded to him by the Collector. The Zemindar thereupon brought the suit, out of which this appeal arises, for recovery of the amount which had been withdrawn by the defendant, on the ground that under the *putni kabuliyat*, the *putnidar* was not entitled to any portion of the compensation money. The defense *inter alia* was that the plaintiff ought to have applied for reference under section 18 of the Act and that no separate suit lies. The Courts below have overruled that contention and the defendant has appealed to this Court.

Section 9 of the Land Acquisition Act (I of 1894) provides for notice being given by the Collector to all persons known or believed to be interested in the land acquired. Section 11 provides for inquiry by the Collector into the objections (if any) which any person interested had stated pursuant to the notice given under section 9 to the measurements made under section 8, and into the value of the land, and into the respective interests of the persons claiming the compensation, and further provides for an award being made by him under his hand of,

(*i*) the true area of the land;

(*ii*) the compensation which, in his opinion, should be allowed for the land; and

(*iii*) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him.

Section 12 lays down (1) that such award shall be filed in the Collector's office and shall, except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested, (2) that the Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made.

Under section 18 any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested. This application for reference is to be made within the time fixed by sub-section (2) of that section. Section 30 provides that if any dispute arises as to

apportionment of the compensation or as to the persons among whom it is payable, the Collector may of his own motion refer such dispute to the decision of the Court. The "Court" means the principal Civil Court of Original Jurisdiction unless the Local Government has appointed a Special Judicial Officer to perform the functions of the Court under the Act, and the provisions of the Code of Civil Procedure are to apply to proceedings before the Court under the Act.

The Act creates a special jurisdiction and provides a special remedy. And, ordinarily, when jurisdiction has been conferred upon a Special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive. [See *Bhandi Singh* v. *Ramadhin Rai* (3)].

It is an established principle that where by an Act of Legislature powers are given to any person for a public purpose from which an individual may receive injury if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of Civil Court is ousted and in the case of injury the party cannot proceed by action. [See *Stevens* v *Peacocke* (7), *West* v. *Downman* (8) and *Ramchandra* v. *Secretary of State for India in Council* (9).]

A difficulty, however, arises from the proviso to section 31, clause (2), which lays down: "Provided also that nothing herein contained shall affect the liability of any person who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto." There was a similar proviso to section 40 of Act X of 1870 and the proviso was considered by the Judicial Committee in the case of *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2). In that case the appellant Raja Nilmoni Singh was a party to the apportionment proceedings under sections 38 and 39 of Act X of 1870 and it was held that he could not re open the question by a regular suit. Their Lordships with reference to the proviso observed: "Such a proviso, which appears to have been but a repetition of a provision in a previous Act *in pari materia*, is necessary in this as in almost all acts of a similar character. It is necessary for the Government, or the persons or Company entitled to take property compulsorily, to deal with those who are in possession or ostensibly the owners: but it may happen, and frequently does happen, that the real owners, possibly being infants or persons under disability, do not appear, and are not dealt with in the first instance and, therefore, a provision of this sort is necessary for the purpose of enabling the parties who have a real title to obtain the compensation money. Their Lordships went on to observe that the proviso applied only to persons whose rights had not been adjudicated upon in pursuance of the sections (38 and 39). This is the passage on which reliance has been placed in *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (1) in which it was held that, as between the claimants *inter se*, an award by a Collector under section 11 of the Land Acquisition Act does not amount to an adjudication of any question regarding the apportionment of compensation adjudged under the Land Acquisition Act, and that any such question can be determined only by the Civil Court.

In that case the learned Judges observed: "Their Lordships decided the case of *Raja Nilmoni Singh* v *Ram Bandhu Rai* (2) under the old Act X of 1870, and the proviso that their Lordships had to construe is word for word the same as the last proviso to sub section (2) of section 31 of the present Act, and their Lordships referring to an adjudication in pursuance of sections 38 and 39 go clearly to show that it is an adjudication of the Civil Court upon a reference by the Collector that their Lordships had in view."

It is to be observed, however, that the Collector under Act X of 1870 had no power to decide the question of apportionment in any case. Whenever there was any question of apportionment, he was bound to refer the matter to the Court, *i. e.*, the Civil Court, and the Civil Court had to decide the matter under sections 38 and 39 of the Act. This appears to be the reason why their Lordships in *Raja Nilmoni Singh's case* (2) referred to the adjudication under sections 38 and 39.

Under Act I of 1894, compulsory reference was abolished, and the Collector has full power to deal with the question of appor-

(7) (1848) 11 Q. B. 731; 17 L. J. Q. B. 163; 12 477; 116 E R. 647; 75 R. R. 614.
(8) (1880) 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6.
(9) 12 M. 105; 13 Ind. Jur. 50; 4 Ind. Dec. (N. S.) 422.

tionment under section 11, and his award, subject to the other provisions of the Act, is final under section 12, no doubt as between the Collector on the one hand and the person interested on the other. The person aggrieved by the award, whether his objection be to the measurement of the land, the amount of compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested, may apply to the Collector for a reference to the Court. The "Court" by which is meant the principal Civil Court of original jurisdiction or a judicial officer specially empowered to perform the functions of the Court under the Act has to decide the questions referred to the Court. That being so, it is not reasonable to hold that the Act, while creating a Special Court to decide such questions, intended an adjudication of any question relating to apportionment by the ordinary Civil Courts. The proviso as it stands under the present Act, or as it stood under the old Act, is very general in its terms. Admittedly, it cannot be given effect to in its entirety, it cannot be held that a suit lies notwithstanding a reference to the Court upon the application of a party under section 18, or by the Collector of his own motion under section 30. The proviso, therefore, must be given a limited application, and we think that it applies only to cases where the person is under a disability or is not served with notice of the proceedings before the Collector.

In the case of *Srimati Punnabati Dai* v. *Raja Padmanund Singh Bahadur* (1), cited above, the learned Judges, although they referred to the contention that there being a special remedy provided by the Act the general remedy was not available, did not discuss the question, and the observations of the Judicial Committee in Raja Nilmoni Singh's case as to the persons to whom the proviso was applicable do not appear to have been considered by them. Then, again, the contention raised in that case that a separate suit if allowed would enable a party to avoid the limitation prescribed by section 18, namely, six weeks from the date of the Collector's award where the party was present before the Collector, or six weeks of the receipt of the notice from the Collector, or six months from the date of the Collector's award whichever period shall first expire, was disallowed on the ground that there is no limitation prescribed for a reference under section 30. Section 30, however, applies only to a reference made by the Collector of his own motion presumably before the final award is made; whereas section 18 deals with a reference upon an application made by a party. For the above reasons, therefore, and with all respects to the learned Judges we are unable to follow the decision in the case of *Srimati Pannabati Dai* v. *Rajah Padmanund Singh Bahadur* (1).

In the case of *Hurmutjan Bibi* v. *Padma Lochan Das* (5) the plaintiff who brought the suit was no party to the apportionment proceeding, and Wilson, J., pointed out that "apportionment" of the compensation is intended to be a proceeding distinct from that of settling the amount of compensation under the previous provisions of the Act and any dispute as to the apportionment is only decided as between those persons who are actually before the Court. A separate notice, therefore, of the apportionment proceedings is requisite to bind any person by those proceedings and where such a notice has not been served, any person interested, although served with notice of the proceedings for settling the amount of compensation, cannot be considered a party to the proceedings for apportioning it." The decision was under the old Act (Act X of 870), and apportionment proceedings under that Act were taken before the 'Court" under sections 38 and 39 of the Act.

We quite agree in holding that where a person has no notice of the apportionment proceedings he cannot be bound by the award or by the decision.

In the case of *Bhandi Singh* v. *Ramadhin Rai* (3) certain persons who were parties to a land acquisition proceeding being dissatisfied with the apportionment of the compensation money made by the Collector obtained a reference to the Court under section 18 of the Land Acquisition Act, but as they did not appear at the hearing before the Court it was struck off. It was held that the suit instituted by them in the Civil Court for the apportionment of the compensation money was barred under section 103, Civil Procedure Code, as the procedure to be observed by the Court is the same as that laid down in the Code of Civil

Procedure. In that case Mookerjee, J., discussed the question whether, when special jurisdiction had been conferred, such jurisdiction was exclusive or not, and came to the conclusion that the jurisdiction of the Civil Court was exclusive. He, however, expressed an opinion, having regard to the provisions of section 31, clause (2) and the decision in the case of *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2), that a question as to the persons to whom compensation is payable or its apportionment among the persons interested may be determined either under a reference as contemplated by section 1, clause (1), or by a suit at the instance of persons lawfully entitled to it as against another who has drawn the compensation money; but that if a party has once availed himself of a reference to the Court under section 18 he cannot again ask for an injunction to litigate the same matter in the ordinary Civil Court. In that case, as stated above, the plaintiff had obtained a reference under section 18, which was dismissed for his non-appearance. Consequently, no suit was maintainable It was unnecessary, therefore, to consider whether the Special Court under the Land Acquisition Act, and the ordinary Civil Courts have or have not concurrent jurisdiction and it is to be noticed that the observations of their Lordships in *Raja Nilmoni Singh's case* (2) as to the persons to whom the proviso is applicable do not appear to have been considered by the learned Judges.

Although the Legislature has created a Special Court (the principal Court of Original Jurisdiction or a Judicial Officer specially empowered to perform the functions of a Court under the Act) to adjudicate all questions of apportionment upon a reference made within the period fixed by the Act, the effect of holding that such Court and the ordinary Civil Courts have concurrent jurisdiction will be that a party may institute a suit even in a Munsif's Court, (in cases where the amount in dispute does not exceed Rs. 1,000) and that long after the periods prescribed by section 18. The Act expressly provides that any party dissatisfied with the award of the Collector as regards apportionment, may apply to the Collector for a reference under section 18 and on such a reference he can get relief in the same way as he can do in the ordinary Civil Court, as the procedure in the Court under the Act is the same as in ordinary Civil Courts, with a right of appeal to the High Court. It would not be reasonable to hold that the Legislature, having provided a special remedy in the Land Acquisition Court, intended to make it optional with a party to apply for a reference under section 18 or to institute a suit in the ordinary Civil Court. The scope of the proviso may be amply satisfied by holding that it applies only to particular persons. The Collector under section 9 has to serve notices upon the persons known or believed to be interested in the land. There may be persons who are not known to the Collector and who might not be in possession and the interests of this class of persons are protected by the proviso to section 31, sub-section (2).

We are of opinion that the plaintiff, having been served with notice under section 9 of the Act, was bound to apply for reference under section 18 when he was dissatisfied with the award, and he cannot maintain a suit in the ordinary Civil Court.

In this view, it is unnecessary to consider the question whether the word "*rasta*" in the *kabuliyat* includes land taken for the purpose of a Railway.

We accordingly set aside the decrees of the Courts below and dismiss the suit, but we direct each party to bear his own costs in all Courts.

J. P.

Decree set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 353 OF 1921.

February 11, 1922.

Present :—Mr. Batten, J. C.

NANDRAM—DEFENDANT—APPELLANT

versus

RANCHHODDAS AND OTHERS—PLAINTIFF—RESPONDENTS.

Contract Act (IX of 1872), s. 25 (3), applicability

NANDRAM v. RANCHHODDAS.

of—Contract by guardian—Void or voidable—Minor ratification by—Limitation Act (IX of 1908), s. 19—"Prescribed", meaning of.

A contract entered into by a guardian is voidable by the minor on attaining majority but not void. [p. 718, col. 1.]

Section 25 (3) of the Contract Act applies to the case of a minor who executes a promise in writing to pay a debt entered into by his guardian. [p. 718, col. 2.]

A minor has full power to ratify a contract entered into by his guardian, whether it is for his benefit or not, with this qualification that he cannot ratify a transfer made during his minority by his guardian so as to affect the rights of an intermediate transferee for value. [p. 718, col 1.]

Seth Ghasiram v. *Musammat Binia*, 1 N. L. R. 63, referred to.

The word "prescribed" in section 19 of the Limitation Act means, prescribed by the Schedule and is not subject to the provisions in section 4 of the Act. [p. 718, col. 2.]

Bai Hemkore v. *Masamalli*, 26 B. 782; 4 Bom. L. R. 668, referred to.

Appeal against a decree of the District Judge, Nimar, dated the 17th March 1921, in Civil Appeal No. 30 of 1921.

Messrs. *W. R. Puranik* and *Fida Hussein*, for the Appellant.

Mr. *V. Bose* and Sir *B. K. Bose*, for the Respondents.

JUDGMENT.—The judgment of the lower Appellate Court deals with two bonds but only one of these bonds is the subject of this appeal. On the 12th June 1917 the appellant executed a bond in which he promised to pay Rs. 1,500 with interest on demand. The defense of the appellant as regards this bond was, that he was defrauded into signing it under a belief that he was putting a second signature on the bond for Rs. 500. This defense has been found to be entirely false, which is not surprising, considering that in the bond for Rs. 500 that was executed the following day and which the appellant admits having executed, it is recited that there was a separate bond for Rs. 1,500. The bond for Rs. 1,500 recited that accounts were made up on the bond executed on the 5th June 1914 and that Rs. 1,500 were found due thereon. It was in satisfaction of this old bond that the new bond was executed. The bond does not recite the full facts of the case which were that the bond of the 5th June 1914 was not executed by the appellant who was a minor at the time but by his mother as his guardian. The plaintiffs have made no attempt to prove that Rs. 999 borrowed by the appellant's guardian were for the benefit of the minor. It has, however, been proved that, when the appellant signed the bond in suit, the bond executed by his mother as the guardian was read out to him and the state of account under it was explained to him and that when he executed the new bond the old bond of his guardian was returned to him. The pleas actually taken by the appellant included no plea that he did not understand the situation when he signed the bond. He raised an entirely different and false plea. It must be taken, therefore, as established that the defendant was in full possession of all the circumstances when he signed the bond and that he ratified the act of his guardian by signing the new bond for Rs. 1,500 in satisfaction of the former bond.

The first contention of the learned Pleader for the appellant, so far as I have been able to understand it, is that according to the wording of the new bond it purports to be a renewal of the old bond and does not purport to be a new contract; that is to say, a ratification of the old bond. This might be the case if there was any evidence on the record except that of the bond itself which does not mention that the first bond was executed not by the appellant but by his guardian. But the learned Pleader does not contend, nor could he successfully do so, that evidence to show the circumstances under which the bond in suit was executed is inadmissible.

The learned Pleader further contends that the plaintiffs had to show that the old debt was binding on the minor because it was for his benefit. He relies on *Seth Ghasiram* v. *Musammat Binia* (1) as showing that a minor on attaining majority cannot ratify an obligation incurred by his guardian unless the obligation was one binding on him as minor. The argument is based on a misunderstanding of the ruling in question which fully recognised that the occasion for ratification only arises when the obligation was not one originally binding on the minor and that,

(1) 1 N. L. R. 66.

as far as he is concerned, the minor has full power to ratify a contract entered into by his guardian, with this qualification that he cannot ratify a transfer made during his minority by his guardian so as to affect the rights of an intermediate transferee for value. In this case there is no intermediate transferee for value and the ruling so far from helping the appellant is against him. Moreover, it is clearly laid down at the beginning of Chapter XXI of "Trevelyan's Law relating to Minors" that "a ward after coming of age is entitled to adopt any of the acts of his guardian, which were done on his behalf, whether they were or were not for his benefit." Moreover, a contract entered into by a guardian is voidable by the minor on attaining majority but not void and the minor here so far seeking to avoid his guardian's bond ratified it.

The bond in suit was executed more than three years after the execution of the bond by the guardian, but the plaintiffs could still have sued on the earlier bond since the second bond was executed during the Court vacation, and under section 4 of the Limitation Act a suit could have been brought under the earlier bond up to the 16th June 1917. But even if a suit had been time barred on the 2th June 1917, section 25 (3) of the Contract Act would still operate in favour of the plaintiffs. From the following passage at page 158 of "Pollock's Indian Contract Act" Edition?* it is clear that sub section (3) of section 25 applies to the case of a minor who executes a promise in writing to pay a debt incurred by his guardian:—

"Sub section (3) re-produces modern English Law. The reason for upholding these promises was thus stated, soon after the Act came into force, by Westropp, C. J.: 'The general rule of law, no doubt, is that a consideration merely moral is not a valuable consideration such as would support a promise, but there are some instances of promise which it was formerly usual to refer to the now exploded principle of previous moral obligation, and which are still held to be binding, although that principle has been rejected. Amongst those instances is a promise after full age to pay a debt contracted during infancy, and a promise (in writing) in renewal of a debt barred by the Statute of Limitations. The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection.'"

A minor's contract is void and cannot be ratified even within limitation, so that, as far as the minor is concerned, sub-section (3) must refer to a debt incurred by the guardian since it cannot refer to a debt incurred by the minor himself during his minority. For the above reasons, I am of opinion that the minor could ratify by the bond in suit the debt incurred by his guardian and the bond can be enforced against him.

I may mention an argument addnced by the learned Counsel for the respondents which is to the effect that the bond in suit would operate as an acknowledgment under section 19 of the Limitation Act, even though it was executed more than three years after the execution of the previous bond since it was executed before the Courts opened, with reference to section 4 of the Limitation Act. It is suggested that the word "prescribed" in section 19 of the Limitation Act means, prescribed by the First Schedule subject to the provisions in section . A contrary view has, however, been taken in *Bai Hemkore* v. *Masamulli* (2) where it was held that the word "prescribed" in section 19 means, prescribed by the Schedule. The first ground of appeal is of no force, since the observations of the lower Courts on which it is based must be regarded as *obiter dicta*, being mere conjectures based on neither evidence nor pleadings.

For the reasons given above, the appeal is dismissed with costs.

J. P. & G. B. D.

Appeal dismissed.

(2) 26 B. 782; 4 Bom. L. R. 603.

*3rd Edition pp. 160-161.—[*Ed.*]

SANT RAM *v.* SAHIB KAUR.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3013 OF 1917.

November 16, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

SANT RAM—DEFENDANT—APPELLANT

versus

Musammat SAHIB KAUR—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit—Appeal.

An order granting permission to a plaintiff to withdraw a suit is not a decree, and is, therefore, not appealable [p 720, col 1]

Jogodindro Nath v. *Sarut Sunduri Debi*, 18 C. 322; 9 Ind Dec (N. S.) 25, *Abdul Hossein* v. *Kasi Sahu*, 27 C. 36; 4 C W. N. 41; 4 Ind. Dec. (N. S.) 239, *Mary Dick* v *Louisa Dick*, 15 A. 69; A. W. N (1893) 78; 7 Ind. Dec. (N. S.) 826 and *Genda Mal* v. *Pirbhu Lal*, 7 A. 97; A. W. N. (1885) 17; 8 Ind. Dec. (N. S.) 387, followed.

Second appeal from a decree of the District Judge, Gurdaspur, dated the 12th July 917, reversing that of the Senior Subordinate Judge, Gurdaspur, dated the 29th March 1917.

Bakhshi *Tek Chand* and Mr. *Shamair Chand*, for the Appellant.

Mr. *Deo Raj Sahoney*, for *Musammat* Sahib Kaur, Respondent.

JUDGMENT.—This is an appeal on behalf of the defendant against an order passed under Order XXIII, rule 1, permitting the plaintiff to withdraw her suit. The following facts will explain the nature of the question which we have to decide :—

On the 31st of July 1912 a decree for Rs. 2,442 was passed in favour of Sant Ram, the appellant, against Sarup Singh and Umrao Singh. In execution of that decree the property in dispute was attached. Thereupon, *Musammat* Sahib Kaur, the wife of Sarup Singh, objected to the attachment on the allegation that the property had been gifted to her by her husband, Sarup Singh, by a deed of gift dated the 28th February 1912. On the 14th March 1916 this objection was disallowed. This led to the institution of the present suit on the 13th October 1916. In the meantime, Sarup Singh had applied to be adjudged an insolvent and on the 21st February 1917 he was adjudicated an insolvent. On the 29th of March 1917 this suit was dismissed by the learned Subordinate Judge. Appended to the judgment of the Subordinate Judge we find a note to the following effect :—

"After recording the above at the time of announcement of the order, the *mukhtar* of the plaintiff has presented the attached application to withdraw the claim: this is apparently made to make Sarup Singh escape the consequence of not including the property in the list of assets in the insolvency proceedings; there is no use now to do this and it is rejected; the applicant on hearing the above order wants it back, but this cannot be done and it will be placed on file."

It appears that during the insolvency proceedings *Musammat* Sahib Kaur had put in an objection claiming the property as hers under the gift of the 28th February 1912. This objection was accepted by the Judge of the Insolvency Court and it was held that the gift was a *bona fide* transaction and that the widow had acquired a title under the said deed of gift. Apparently it was due to this circumstance that she wanted to withdraw her suit. The learned Senior Subordinate Judge, as appears from his judgment, dismissed the suit of the plaintiff on the ground that the gift in her favour was a fraudulent one and had been executed to defraud the creditors. Upon this main ground her suit had been dismissed.

Against the decree of the learned Senior Sub-Judge dismissing her claim *Musammat* Sahib Kaur preferred an appeal to the lower Appellate Court raising six pleas in her memorandum of appeal. The fourth plea taken in the memorandum of appeal was that the finding of the Insolvency Court that the property in dispute belongs to Sahib Kaur is a conclusive proof of the plaintiff's claim, and that the lower Court should have allowed the withdrawal of the suit. The learned Judge of the Court below mainly considered the question as to whether the decision by the Insolvency Court operated as *res judicata* on the question of the validity of the gift in favour of *Musammat* Sahib Kaur, and, after considering the facts and the law applicable to the point, he came to the conclusion that the order of the Insolvency

Court did operate as *res judicata*. At the end of his judgment, however, he made the following observation: "plaintiff's prayer in appeal is that she should be allowed to withdraw her suit, not that her suit should be decreed. Her Counsel recognises the fact that a decree would have no force as against the Receiver. He presumably relies on the finality, under section 41 of the Evidence Act, of Mr. Ross's finding on the subject of the validity of the deed of gift."

Then he makes the following order:—

"In these circumstances, I accept the appeal and set aside the decree and the order of the lower Court dismissing the suit. Instead thereof, I allow the suit to be withdrawn under Order XXIII, rule 1. In the circumstances, I leave the parties to bear their own costs in both Courts"

The formal order or the decree is in accordance with the terms contained in the judgment.

On the appeal coming on for hearing, a preliminary objection was raised by the learned Counsel for the respondent that no appeal lay from an order made under Order XXIII, rule 1. This contention is well supported by authorities. See, for example, *Jogodindro Nath* v. *Surat Sunduri Debi* (1), *Abdul Hossein* v. *Kasi Sahu* (2), *Mary Dick* v. *Louisa Dick* (3) and *Genda Mal* v. *Firbhu Lal* (4). In these cases it had been held that an order granting permission to the plaintiff to withdraw a suit or to abandon a part of his claim is not a decree, and is not, therefore, appealable. The effect of the order of withdrawal is that the finding on the question of *res judicata* by the lower Appellate Court becomes inoperative and must be disregarded, as this order is not made appealable under section 104 or any of the clauses of Order XLIII, Civil Procedure Code. Therefore, we hold that no appeal lies, and dismiss the appeal but without costs.

(1) 18 C. 322; 9 Ind. Dec. (N. S.) 215.

(2) 27 C. 362; 4 C. W. N. 47; 14 Ind. Dec. (N. S.) 292.

(3) 15 A. 169; A. W. N. (1893) 78; 7 Ind. Dec. (N. S.) 826.

(4) 17 A. 97; A. W. N. (1895) 17; 8 Ind. Dec. (N. S.) 387.

Mr. Tek Chand has requested us to treat this appeal as a revision and go into the merits of the case and restore the judgment and the decree of the Court of first instance, but we are, however, of opinion that no useful purpose can be served by adopting this course. The suit has been withdrawn and leaves the defendant with all his rights intact, and the question whether the order of Mr. Rose operates as *res judicata* is still open to the appellant. Having regard to all the circumstances of this case, we do not think that it is a case in which we should treat this appeal as a revision. We accordingly decline to adopt the suggestion made by Mr. Tek Chand.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 314 AND 315 OF 1920.

January 9, 1922.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Ramesam.

EGALA NAGAPPA NAIDU AND OTHERS —PLAINTIFFS—APPELLANTS

versus

P. MUNISWAMY IYER AND OTHERS —DEFENDANTS—RESPONDENTS.

Vendor and Purchaser—Contract to sell—Option to purchaser to pay amount agreed in particular month in any year—Enforceability of agreement—Executory contract—Offer to purchase—Contract Act (IX of 1872), s. 51—Specific Relief Act (I of 1877), s. 12.

Unless both parties agree there is no concluded agreement. It is only an offer. An instrument even though so worded as to express that both parties agree, is in point of law only an offer until both parties are bound. [p. 721, col. 2; p. 723, col. 1.]

Helby v. *Mathews*, (1895) App. Cas 471 at p. 477 64 L. J. Q. B 465; 11 R 232; 72 L. T. 841; 43 W. R 561; 60 L. P. 20, *Dickinson* v. *Dodds*, (1876) 2 Ch. D. 463; 45 L J. Ch. 777; 34 L. T. 607; 24 W. R. 694, referred to.

Where an agreement is executory on both sides;

with an option to one of the parties to do as he likes, there is nothing more than a standing offer, though it may be that, during the lifetime of the promisor the distinction between a binding offer and a complete agreement is not of much importance as between the parties. [p 722, col. 1.] *Charamude* v *Raghavulu*, 28 Ind. Cas. 571; 39 M. 462; 28 M. L. J. 47.; 18 M. L. T. 76; (1915) M. W. N. 596 and *South Eastern Railway* v. *Associated Portland Cement Manufacturers, Ltd*, (1910) 1 Ch. 12; 79 L. J. Ch. 150; 101 L. T. 865; 74 J. P. 21; 54 S. J. 80; 26 T. L. R. 61, explained.

Where in a suit for specific performance of an agreement to sell a land the promisee does not prove that the undertaking by the promisor not to withdraw the offer was not a mere *nudum pactum* but a binding undertaking there is no agreement which the promisee can enforce against a subsequent vendee of that property. [p. 722, col. 2.]

An agreement to sell land contained *inter alia* the following terms:- "On payment being made of the total amount of Rs 800 within the 30th Vygasi of any year whatsoever, I shall execute a sale-deed to you of the lands * * * * *. I shall not execute a sale-deed to any other person. Should a sale be so effected to any other person such sale shall not be valid":

Held, that the agreement was only an offer by the seller which could not be withdrawn and did not connote an agreement to buy, and that, as the seller could not charge the buyer with breach or failure to perform, there never was a contract at all. [p. 721, col. 2; p. 722, col. 1.]

Second appeals against decrees of the Court of the Temporary Subordinate Judge, Chingleput, in Appeal Suits Nos. 5 and 6 of 1919 respectively, preferred against decrees of the Court of the District Munsif, Tiruvellore, in Original Suits Nos. 667 of 1917 and 558 of 1916 respectively.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Appellant.

Messrs. *T. M. Krishnaswami Aiyar* and *S. Ranga Chariar*, for the Respondent.

JUDGMENT.

IN SECOND APPEAL No. 314 OF 1920.

This second appeal arises out of a suit for the specific performance of a contract for the sale of suit land executed by the second defendant on 10th October 1913 in favour of plaintiffs. The first defendant, to whom the land was sold by the second defendant on 14th March 1916, is the contesting defendant. The District Munsif decreed the suit; but, on appeal by the first defendant, the Subordinate Judge held there was no contract and dismissed the suit. The plaintiffs appeal.

The alleged contract is evidenced by Exhibit A, the material portion of which runs as follows: "In respect of the lands which you and others had sold to my mother Ammoyammal on the 2nd October 1902, you executed a cultivation *muchilka* to me on the 10th October 1913 specifying the land with particulars of numbers. The amount mentioned in the said sale-deed is Rs. 600. And the amount of small loans taken from time to time is Rs. 200. On payment being made of the total amount of Rs. 800 (Eight hundred), within the 30th Vygasi of any year whatsoever, I shall execute a sale deed to you in respect of the lands consisting of acres (10·52) ten and fifty two cents specified in the aforesaid sale-deed. I shall not execute a sale-deed to any other person. Should a sale be so effected to any other person such sale shall not be valid." It is clear that, under this document, the promisee has the option of paying the price agreed upon, within the 30th Vygasi of any year but that he was not bound to do so. Assuming that there was consideration for Exhibit A and that there is an agreement binding on the promisor, this agreement may, in popular language, be described as an agreement to sell. But what the second defendant really did was that she bound herself to sell to plaintiffs on certain terms, if they choose to avail themselves of the binding offer, and her agreement is, in truth, merely an *offer which cannot be withdrawn* and certainly does not connote an agreement to buy. It is only in this sense that there can be said to have been an agreement to sell in the present case. *Helby* v. *Mathews* (1) per Lord Herschell, L. C., in *Dickinson* v. *Dodds* (2) James, L J. said, "Unless both parties had agreed then there was no concluded agreement;" and Mellish, L. J., said, "I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it

(1) (1895) App. Cas. 471 at p. 477; 64 L. J. Q. B. 486; 11 R. 232. 72 L. T. 841; 43 W. R. 561; 60 J. P. 20.

(2) (1876) 2 Ch. D. 463; 45 L. J. Ch. 777; 34 L. T. 607; 24 W. R. 594.

is in point of law only an offer, and, until both parties are bound, neither party is bound."

The learned Vakil for the appellants, while conceding that the second defendant could not sue the plaintiffs for specific performance before the plaintiffs tendered the price, contended that the plaintiffs must be deemed to have agreed to buy but that only the payment of the price was postponed at their option and that this is a case of successive (as opposed to simultaneous) performance of reciprocal promises (section 54 of the Contract Act). But we find it difficult to follow this argument. So long as the second defendant cannot charge the plaintiffs with a breach or failure to perform though they are to begin, there never was a contract at all. The case in *Charamudi* v. *Raghavulu* (3) was referred to in the course of the arguments. The point now before us was neither argued nor decided in that case. The only point raised in it was whether the contract therein was void as opposed to the rule against perpetuities. It may be that, in the case of a personal contract executed so far as one party is concerned, as in *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (4), it is binding between the parties and no question of the application of the rule against perpetuities arises. But where the agreement is executory on both sides, with an option to one of the parties to do as he likes, there is nothing more than a a standing offer, though it may be that, during the lifetime of the promisor the distinction between a binding offer and a complete agreement is not of much importance as between the parties. In *Charamudi* v. *Raghavulu* (3) the case arose between the parties and the offer was not revoked by the death of the promisor or otherwise. But when the offer is at an end, *e.g.*, (1) by the death or insanity of the promisor [See Contract Act, section 6 (4)], or (2) by the destruction of the subject-matter of the offer [see *Edwards* v. *West* (5); *Cf.* Section 56 of the Contract Act], or (3) by the promisor selling it to a third party, the sale being known to the promisee before acceptance as in *Dickinson* v. *Dodds* (2), there is nothing to accept. In the last case, if the undertaking not to withdraw the offer was not a mere *nudum pactum* but a binding undertaking, it may be that the promisee might maintain an action for damages against the promisor. But in this case the plaintiffs made no such claim against the second defendant either in the Court below or in second appeal. So far as the first defendant is concerned, there is no agreement the specific performance of which can be claimed by the plaintiffs see *Dickinson* v. *Dodds* (2) and Second Appeal No. 2594 of 1914.]

The result is the second appeal fails and is dismissed with costs of the first defendant (first respondent).

IN SECOND APPEAL No. 315 OF 1920.

It is conceded that this second appeal follows the result of Second Appeal No. 314 of 1920 and is dismissed with costs of the plaintiff (first respondent).

M. C. P.

J. P.

Appeal dismissed.

(3) 28 Ind. Cas. 871; 39 M. 462; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M. W. N. 596.

(4) (1910) 1 Ch. 12; 79 L. J. Ch. 150; 101 L. T. 865; 74 J. P. 21; 54 S. J. 80; 26 T. L. R. 61.

(5) (1878) 7 Ch. D. 858; 47 L. J. Ch. 463; 38 L. T. 481; 26 W. R. 507.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1718 OF 1920.

November 2, 1921.

Present:—Mr. Justice Scott Smith.

DIWAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHAM DAS—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 10, Sch. I, Arts. 134, 144—Alienation by mahant—*Suit for possession—Limitation.*

A suit to set aside an alienation by a *mahant* of ordinary *wakf* property gifted for general pious or religious purposes, is governed by Article 144 and not by Article 134 of Schedule I to the Limitation Act. [p. 724, col. 1.]

DIWAN SINGH v. RAM SARAN.

Article 134 of the Limitation Act is controlled by section 10 of the same Act, and refers to cases of specific trust and property "conveyed on trust." [p. 724, col. 2.]

A Hindu or Muhammadan may "convey in trust" a specific property to a particular individual for a specific and definite purpose when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term. "Conveyed in trust" is, however, hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. [p. 724, col. 1.]

Vidya Varuthi Thirtha Swamigal v. *Balusami Ayyar*, 65 Ind Cas. 161; 41 M. L. J. 346; (1921 M. W. N. 419; 44 M. 831; 3 U. P. L. R P. C.) 62; 15 L. W. 78; 30 M L. T. 66 P. C., followed

Zafar Ali v *Kishen Chand*, 51 Ind. Cas. 795; 99 P. R. 1919, distinguished.

Second appeal from a decree of the District Judge, Amritsar, dated the 13th May 1920, modifying that of the Munsif, First Class, Amritsar, dated the 29th August 1919.

Bakshi *Tek Chand*, for the Appellant.

Pandit *Sheo Narain*, R. B, for the Respondent.

JUDGMENT.—Diwan Singh and others brought the suit, out of which the present second appeal arises, for possession of certain property which they alleged to be *waqf* and to pertain to a religious institution, and which they said had wrongly been alienated by a previous Mahant Amar Singh. The First Court decreed the whole claim, but the lower Appellate Court held that the suit as regards the agricultural land mortgaged by Amar Singh in 1892 was barred by time. It accordingly dismissed the suit as regards that part of the property and the plaintiffs have, therefore, filed a second appeal in this Court.

The agricultural land was, as already stated, mortgaged in 1892 by Amar Singh to Wazir Chand and others, and in 1894 was further mortgaged by the said mortgagor in favour of the same mortgagees. In 1895 Amar Singh sold the land to Ganga Ram, and Lachhman Das, the father of one Sham Das, defendant-respondent, obtained a decree for pre emption. He subsequently redeemed the mortgages in favour of Wazir Chand and others and got physical possession of the land pre-empted on the 15th March 1912. The First Court held that the suit as regards this land was within time under Article 134 of the Indian Limitation Act as it was brought within 12 years of the date on which the pre emptor obtained actual possession. The lower Appellate Court, holding that the *terminus a quo* was the date of the transfer and not the date of transferee's getting possession, was of opinion that the suit was barred by time and passed the order from which the present appeal has been lodged.

Counsel on both sides admit that there is a conflict of authority in the decisions of other High Courts as to whether, in a suit brought under Article 134 of the Indian Limitation Act, time runs from the date of the transfer or from the date upon which the transferee gets possession of the property. They also admit that the case reported as *Zafar Ali* v *Kishen Chand* (1) does not decide the question. The point, however, has not been argued before me, because Mr. Tek Chand on behalf of the appellants has cited a recent judgment of the Privy Council as authority for the proposition that the present suit is not governed by Article 134 of the Indian Limitation Act and that it is governed by Article 144 thereof, and that the present suit, having been brought within 12 years of the date upon which the transferee got possession, is within time. The case referred to by him is that of *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (2). In that case their Lordships held as follows:—

"Section 10 controls Article 134 of the Limitation Act of 1908, and gives the clue to the meaning and applicability of that Article. It clearly shows that the Article refers to cases of specific trust and relates to property 'conveyed in trust.' Neither under the Hindu Law nor in the Muhammadan system is any property 'conveyed' to a *shebait* or a *mutawalli*, in the case of a dedication, nor is any property vested in him. Whatever property he holds for the idol or the institution he holds as manager with certain beneficial interest regulated by custom and usage. *Prima facie*, an alienation by the manager or superior, by whatever name called, of a Hindu or Muhammadan pious institution cannot be treated as the act of a 'trustee' to whom property has

(1) 51 Ind. Cas. 795; 99 P. R. 1919.
(2) 65 Ind. Cas 161; 41 M. L. J. 346; (1921) M. W. N. 419; 44 M 831; 3 U. P. L. R. (P. C.) 64; 15 L. W. 78; 30 M. L. T. 66 (P. C.).

been 'conveyed in trust' and who by virtue thereof has the capacity vested in him which is possessed by a 'trustee' in the English Law. Of course, a Hindu or Mahammadan may 'convey in trust' a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English Law, when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term. 'Conveyed in trust' is, however, hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. There is, under the Hindu and Muhammadan Law, a distinction between a specific trust and a trust for general pious or religious purposes."

The nature of the institution to which the property in the present suit is said to pertain appears to be of the same kind as those discussed by their Lordships of the Privy Council, and in accordance with this authority, I think, it must be held that the present suit is not governed by Article 134 of the Indian Limitation Act Pandit Sheo Narain has not attempted to argue the point. He has pointed out that it was assumed in the lower Courts that the property in dispute was conveyed in trust within the meaning of Article 134. He suggests that there might be an enquiry as to whether there was any specific trust of the property in dispute for any specific purpose such as the Article, in accordance with the decision of their Lordships, refers to. The plaintiffs, however, in the Trial Court said that the property was *wakf* and was attached to a *gurdwara* for the ordinary purposes of the *gurdwara*. There was no allegation by them of a specific trust of any sort and the defendant respondent never made any such allegation. His defence was that the property was private property of Amar Singh, the previous manager. I, therefore, see no reason to order any further enquiry upon the points suggested by Pandit Sheo Narain. The Privy Council case is, in my opinion, on all fours with the present one, and I, therefore, hold that this suit is not governed by Article 134 of the Indian Limitation Act, and that so far as the alienation of the agricultural land is concerned it is within time.

There is a concurrent finding by the Courts below that the property in suit is *wakf* and this finding is conclusive, there remain for decision the questions raised by Sham Das, defendant, in grounds 7 and 8 of his appeal to the lower Appellate Court. I accept the appeal and setting aside the order of the lower Appellate Court remand the case thereto for re decision on the remaining points. Stamp in this Court will be refunded and other costs will be costs in the cause.

N. H.

Appeal accepted.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO 554 OF 1920.
January 13, 922
Present:—Mr. Justice Gokal Prasad and Mr. Justice Stuart.
BHUP SINGH—DEFENDANT—APPELLANT
versus
JHAMMAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Legal necessity—Simple money-bond executed by female owner—Decree—Execution—Life-interest liable to sale—No question of legal necessity arises.

In execution of a decree obtained on a simple bond executed by a female owner having a limited interest, her life-interest only is liable to be sold and in such a case no question of legal necessity arises as the bond being a simple one there is no charge on the property [p 725, col. 2]

Second appeal against a decree of the Second Additional District Judge, Aligarh, who reversed that of the First Court.

Mr. *Pannalal*, for the Appellant.

Mr. *Pearey Lal Banerjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for a declaration that certain property in possession of the defendants is liable to sale in execution of a decree which the plaintiffs obtained against one *Musammat* Durga Kunwar. It appears that *Musammat* Durga Kunwar was the daughter of one Bhagirath Singh. Durga Kunwar had two

sons, Ram Singh and Bhup Singh. She succeeded to the property after the death of her father and on the 15th of October 1914 Durga Kunwar and Ram Singh executed a simple bond in favour of the plaintiffs-respondents, Jhamman Singh and others. At that time the present appellant, Bhup Singh, the second son of Durga Kunwar, was a minor. The plaintiffs-respondents then sued on their simple bond. The suit was against Durga Kunwar alone as Ram Singh had died in the interval, and on the 27th of May 1918 they obtained a simple money decree against *Musammat* Durga Kunwar. On the 15th of August 1918 before they had put their decree into execution Durga Kunwar surrendered her life interest in the property in dispute her son, the appellant Bhup Singh. After this, attachment of the property in dispute was made in execution of the decree of Jhamman Singh and others. Bhup Singh objected to the attachment on the ground that the property was his and on the 15th of February 1919 he got an order releasing the property from the attachment. The present suit has now been brought by the decree-holders respondents for a declaration that the property was liable to sale in execution of their decree. The defence raised by Bhup Singh was, that Durga Kunwar had only a life interest and her life interest only could be sold, that he was in possession, that the deed of relinquishment executed by *Musammat* Durga Kunwar was not collusive and fictitious, that the attachment took place after the transfer in favour of the defendant was made, and that the plaintiffs had no right to get the property sold. The Trial Court came to the conclusion that the assignment by *Musammat* Durga Kunwar of her rights in the property was made to assist her in defrauding her creditors. It went on to hold that the assignment in question was fictitious, collusive and fraudulent. It also found that the bond was not executed for legal necessity. In the result it gave a decree to the effect that the life interest of Durga Kunwar could be sold and the sale would, therefore, be inoperative after her death. Both parties appealed. Durga Kunwar died during the pendency of the appeals and the defendant had his appeal dismissed. The plaintiffs' appeal, however, came to a hearing and the learned Judge of the Court below agreed with the finding of the First Court that the surrender of her estate by *Musammat* Durga Kunwar in favour of Bhup Singh was fictitious. He, however, went on to hold that the simple bond was executed in order to pay off a mortgage and for legal expenses and in the absence of any rebutting evidence he held that it was executed for legal necessity and the decree on it was, therefore, binding on the estate. In our opinion the question of legal necessity was totally irrelevant to the decision of this case. The bond in this case did not purport to create a charge on the property and no question of legal necessity arose. On the finding of the Court below that the surrender to Bhup Singh was a fictitious one, or, in other words, that it had not taken place, the life interest of *Musammat* Durga Kunwar was the only interest liable to be sold in execution of the plaintiffs-respondents' decree. In our opinion the consideration which the learned Judge applied towards the question of legal necessity was not required. That question is foreign to the present suit. In our opinion the decision of the lower Appellate Court was incorrect. We, therefore, set it aside and restore the decree of the Court of First instance, but in the peculiar circumstances of the case we make no order as to costs of this litigation.

J. P.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2929 OF 1918.

December 22, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

WALI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD, HEIR AND LEGAL REPRESENTATIVE OF BHAI KHAN, DECEASED AND OTHERS—DEFENDANTS—RESPONDENTS.

Shamilat—*Abandonment of* khewat *land*—*Abandonment of* shamilat.

Rights in *shamilat* lands are independent rights, for instance, a sale of a *khewat* holding without any reference to the *shamilat* would not result in the conveyance of the *shamilat* Similarly, abandonment of rights in a proprietary holding does not

necessarily amount to abandonment of rights in the *shamilat*. [p. 7 6, col 2]

Mirza v *Kahan Singh*, 52 Ind. Cas. 539; 96 P. R. 19 9, distinguished.

In a suit for a declaration that certain common lands are divisible between the parties an abatement of the suit affecting one of the share s would result in an abatement against all. [p. 726, col 2]

Hadu v *Lala*, 21 Ind. Cas. 951; 41 P. R. 19 5; 15 P. L. R. 1914; 16 P. W. R. 1914, referred to.

Second appeal from a decree of the District Judge, Shahpur, at Sargodha, dated the 25th June 19 8, affirming that of the subordinate Judge, Second Class, Sargodha, dated the 21st June 1917.

Mr. *Nanak Chand*, for the Appellant.

Dr *Nand Lal*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiffs-appellants against the defendants respondents for a declaration that they were the owners of certain *shamilat* lands situated in village Jara, the original owners of the same having left the village as far back as 1856 and abandoned all their rights therein. Their suit having been dismissed by the Trial Court and an appeal to the District Judge having failed, they have come up to this Court in second appeal through Mr. Nanak Chand, and we have heard Mr. Nand Lal for the respondents.

One of the principal respondents, Bhai Khan, has died and the date of his death is said to be the 27th May 1919. An application to bring his legal representatives on to the record was made on the 13th July 1921. This application is obviously much delayed and the reason for this delay is stated by Mr. Nanak Chand to be that his clients were unaware of Bhai Khan's death. The reason for their want of knowledge is stated to be that Bhai Khan and the plaintiffs-appellants lived in different villages at a distance of about nine miles apart, and that, therefore, it was impossible for the appellants to keep in touch with the respondents. Seeing that the respondents are only six in number, we are not prepared to accept this as a sufficient cause, and hold that the appeal has abated against Bhai Khan.

It was next contended by Mr. Nand Lal that the appeal had abated *in toto* on the ground that the interests of all the respondents were indivisible. He drew our attention to *Hadu* v. *Lala* (1) a case in which it was held that in a suit in which the shares of the parties in a joint property had to be determined, the Court must have all the shares before it, and that if one of the sharers had died without his legal representative being brought on to the record within time, the appeal abated in its entirety. The facts of that case are not, however, clear from the report, but it seems to have been a suit for a declaration that certain common lands were divisible between the parties and in such case there can be no doubt that an abatement affecting one of the sharers would result in an abatement against all. In the present case, we are unable to see that it is necessary to determine the shares of the parties and to that extent *Hadu* v. *Lala* (1) may be distinguished. As at present advised, we do not think that the appeal has abated in its entirety.

Turning to the merits of the case, it appears to us that the appeal must fail. The respondents admittedly abandoned their proprietary holding prior to 1855. In 1905 that holding was shown to consist of 33 *kanals* of land, of which only 8 *kanals* were culturable. The defendants-respondents denied having abandoned their right to the *shamilat*, and this matter was put in issue in Issue No. 2, which is to the following effect:—

"Have the plaintiffs for that reason been in possession of the corresponding share in *shamilat* land and are owners of it, *and have the defendants Nos.* 1 *to* 5 *given up their connection with it?*".

The Trial Court held, and we think correctly, that rights in *shamilat* lands are independent rights. A sale of a *khewat* holding without any reference to the *shamilat* would not result in the conveyance of the *shamilat*. This has been repeatedly held by this Court. Both the Courts have concurred in holding that the defendants-respondents, although they had abandoned their rights in the proprietary holding, had not abandoned their rights in the *shamilat*. This is a question of fact by which we are bound in second appeal. Mr. Nanak Chand lays stress on *Mirza* v. *Kahan Singh* (2) in which it was held that

(1) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914.

(2) 52 Ind. Cas. 539; 96 P. R. 1919.

the fact of the plaintiffs' ancestors having given up the whole of their holding and quitted the village for good showed that they abandoned all the rights they had in the village including rights in the *shamilat*. The facts of that case are different from those of the present one and it had not in that case been found by the lower Courts as a fact that the rights in the *shamilat* had not been abandoned.

Finally, Mr. Nanak Chand contended that the learned District Judge had erred in disposing of the question of the appellants' title, inasmuch as no argument had been addressed to him regarding it. In support of this, he has filed an affidavit by Wali, appellant. To this affidavit we cannot attach any weight. In all probability, the arguments were in English and in any case if the allegations contained in the affidavit are correct, we would expect them to be supported by an affidavit of Wali's Counsel. We, therefore, dismiss this appeal with costs.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 839 OF 1920.

January 11, 1922.

Present:—Mr Justice Spencer and Mr. Justice Krishnan.

J. V. SRINIVASA RAO, MINOR, BY FATHER AND NEXT FRIEND J. V. RANGANATHA ROW—PLAINTIFF—PETITIONER

versus

HANUMANTHA RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 150, O. IX, r. 13, applicability of—Transfer of territorial jurisdiction from one Court to another—Ex parte *decree, application to set aside—Forum, proper.*

Where the territorial jurisdiction of a Court in respect of a certain area is transferred to another Court, the Court to which the jurisdiction is so transferred can, under section 150 of the Civil Procedure Code, entertain an application under Order IX, rule 13 of Civil Procedure Code to set aside an *ex parte* decree passed by the former Court in a suit concerning the subject-matter within the area so transferred. [p 729, col. 1: p 730, col. 1.]

The expression "the Court by which the decree was passed" in Order IX, rule 13 of Civil Procedure Code is not so definite and precise as to create an exception to the general rule introduced by section 150 of the Civil Procedure Code. [p. 729, col. 1.]

Per *Krishnan, J*.—Section 150, Civil Procedure Code, is an enabling provision which prescribes what is to be done, in the ordinary course, to get an *ex parte* decree set aside. There is nothing in the section to restrict the making of an application to set aside an *ex parte* decree to the Court which passed it. [p. 730, col. 1.]

Bellary Press Co., Ltd. [*Mathura Das* v. *Venkata Rao*, 8 Ind Cas. 7; 21 M. L. J. 829; 8 M. L. T. 374; (1910) M. W. N. 631, *Jaharuddin* v. *Hari Charan Poddar*, 22 Ind Cas 493; 18 C. W. N. 470, *Ottapurakkal Thazath Suppi* v. *Alabi Mashur Koyyanna Koya Kunhi Koya*, 34 Ind. Cas. 588; 39 M. 907; 3 L. W. 430; 30 M. L. J. 523; 19 M. L. T. 314; (1916) 1 M. W. N. 328, *Panduranga Mudaliar* v. *Vythilinga Reddi*, 30 M. 537; 17 M. L. J. 417; 2 M. L. T. 466, *Subbiah Naicker* v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; 37 M. 462; 28 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251, *Seeni Nadan* v. *Muthuswamy Pillai*, 54 Ind. Cas. 213; 42 M. 821; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640; 11 L. W. 63, *Sarangapani* v. *Narayanasami*, 8 M. 567; 3 Ind. Dec. (N. S.) 359, *Paramananda Das* v. *Mahabeer Dossji*, 20 M. 378; 7 M. L. J. 89; 7 Ind. Dec. (N. S.) 269, *Karuppan* v. *Ayyathorai*, 9 M. 445; 3 Ind. Dec. (N. S.) 705 and *Sadhu Krishna Aiyar* v. *Kuppan Ayyangar*, 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479, considered.

Petition, under section 115 of Act V of 1908, praying the High Court to revise an order, dated the 15th September 1920 of the Court of the District Munsif, Anantapur, in I. A. No. 177 of 1920, in Original Suit No. 1230 of 1919 on the file of the Court of the District Munsif, Penukonde.

FACTS appear from the judgment.

Mr. *K. Shanyam Aiyangar*, for the Petitioner.—The Anantapur Court had no jurisdiction to set aside the *ex parte* decree. It is only the Penukonda Munsif's Court which passed the decree that could entertain such an application. Section 150, Civil Procedure Code, cannot help the defendant owing to the qualifying words, "save as otherwise provided." That expression limits such applications by the terms of Order IX, rule 13 to the Court which passed the decree. The change of jurisdiction does not affect this question. Analogous case-

where it is sought to enforce an injunction or to review an order of Court are helpful in construing section 150. *Jaharuddin* v. *Hari Charan Poddar* (1), *Bellary Press Co., Ltd.* [*Mathura Das*] v. *Venkata Rao* (2).

Section 150 applies when the whole business of a Court is transferred to another Court, as, where the former is abolished.

Mr. *B. Somayya*, for the Respondents.—The words of section 150 and Order IX, rule 13, should be liberally construed. Total transfer of jurisdiction and partial adjustment of local areas are alike covered by the rule. The provisions of Order IX, rule 13, are enabling in their nature. If the Court which passed the *ex parte* decree grants the prayer to set it aside it cannot proceed to dispose of the suit by reason of the jurisdiction over the subject matter being taken away. Cases of review petitions are peculiar and cannot be invoked in the interpretation of section 150 or Order IX, rule 13. See *Ottapurakkal Thazath Suppi* v. *Alabi Mashur Koyanna Koya Kunhi Koya* (3).

JUDGMENT.

SPENCER, J.—Section 150, which appeared for the first time in the Civil Procedure Code of 1908, provides for a Court to which the business of any other Court is transferred having the same powers as the Court from which the business is so transferred. But this useful provision is qualified by the words "save as otherwise provided," and the question in the case before us is whether the wording of Order IX, rule 13 of the Code of Civil Procedure is such as to take away the power of a Court that has territorial jurisdiction over the subject-matter of a suit to set aside an *ex parte* decree passed by another Court that originally tried the suit.

That rule declares that applications to set aside *ex parte* decrees may be made to the Court by which the decree was passed. It goes on to state that on making an order setting aside the *ex parte* decree the Court shall appoint a day for proceeding with the suit

Our attention has been drawn to reported decisions which relate to the powers of Courts other than the Court which granted an injunction to deal with a breach thereof: *Bellary Press Co., Ltd. Mathura Das*] v. *Venkata Rao* (2), *Jaharuddin* v. *Hari Charan Poddar* (1) and *Ottapurakkal Thazath Kuppi* v. *Alab Mashur Koyanna Koya Kunhi Koya* (3), also to decisions touching similar powers of Courts to execute the decrees of other Courts: *Panduranga Mudaliar* v. *Vythilinga Reddi* (4), *Subbiah Naicker* v. *Ramanathan Chettiar* (5), *Seeni Nadan* v. *Muthuswamy Pillai* (6) and to review the order and decrees of other Judges: *Sarangapani* v. *Narayanasami* (7). There is also an authority *Parmanunda Das* v. *Mahabeer Dossji* (8) for holding that only the Court that passed a decree can sanction agreements to give time to a judgment debtor under section 557A of the Code of 1882. The above are merely analogous cases, and no direct authority on the point before us has been cited.

In matters of execution, the law must now be regarded as settled by the definition of the expression "Court which passed a decree" in section 37 of the Code of 1908, and by the Full Bench judgment in *Seeni Nadan* v. *Muthuswamy Pillai* (6). Applications to get a review of judgment have been peculiarly restricted by Order XLVII, rule 2 permitting them to be made only to the Judge who personally passed the decree or made the order when they are based upon other grounds than the discovery of new and important matter or the existence of a clerical or arithmetical error. The use of the words "the Court granting injunction" was not considered by Srinivasa Iyengar, J., in *Ottapurakkal Thazath Kuppi* v. *Alabi Mashur Koyanna Koya Kunhi Koya* (3) or by Krishnaswamy Iyer and Munro, JJ., in *Bellary Press Co., Ltd.* [*Mathura Das*] v. *Venkata Rao* (2) to be

(1) 22 Ind. Cas. 499; 18 C. W. N. 470.
(2) 8 Ind. Cas 7; 21 M. L. J. 829; 8 M. L. T. 374; (1910) M. W. N. 631.
(3) 34 Ind. Cas. 585; 39 M. 907; 3 L. W 430; 30 M. L. J. 523; 19 M. L. T. 314; (1916) 1 M. W. N. 328.
(4) 30 M. 567; 17 M. L. J. 417; 2 M. L. T. 469.
(5) 22 Ind Cas 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 235; 1 L. W. 251.
(6) 53 Ind Cas. 213; 42 M 821; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640; 11 L. W. 63.
(7) 8 M. 567; 3 Ind Dec. (N. S.) 389.
(8) 20 M. 378; 7 M. L. J. 89; 7 Ind. Dec. (N. S.) 269.

an obstacle to a Court, to which the general business of another Court is transferred, dealing with applications to enforce injunctions through the powers given them under sections 150 and 36, the objection in the last named decision being only to the transfer of an application from the Court which had express power to deal with it.

The case thus being one of first impression we must put a reasonable construction on the words of the Code. It is one thing to say that an application made to the Court that passed the decree or order should not be transferred to another Court which has by transfer acquired jurisdiction to deal with further proceedings in the connected suit; it is another thing to argue that where the whole business of one Court has been transferred to another Court, the expression "the Court by which the decree was passed" is so definite and precise as to create an exception to the general rule introduced by section 150.

To adopt the latter argument is in effect to leave a defendant against whom an *ex parte* decree has been passed by a Court, which is afterwards abolished, without any remedy beyond a general right of appeal against the final decree [*Vide Karuppan* v. *Ayyathorai* (9) and *Sathu Krishna Ayyar* v. *Kuppan Ayyangar* (10)], and section 36 of the Code of Civil Procedure.

The direction at the end of this rule that upon setting aside an *ex parte* decree the Court shall appoint a day for proceeding with the suit would be, as my learned brother pointed out, meaningless if such application were to be disposed of by Courts which had ceased to have jurisdiction over the suit itself.

I would, therefore, place a liberal construction on the wording of section 150 and of Order IX, rule 13 and hold that the District Munsif of Anantapur had jurisdiction to deal with this petition.

As to the merits, the service of notice of suit purported to be by affixture to the outer door of the respondents' residence, the information given by his sister being that he had gone to a village in Mysore. The statement in his affidavit that he did not know till he attended the Taluk office on 27th March 1920 that an *ex parte* decree had been passed against him stands uncontradicted in detail. There appears, thus, to have been good reason for ordering the *ex parte* decree to be set aside. The civil revision petition is dismissed with costs

KRISHNAN, J.—The main question for our decision in the revision petition is one of jurisdiction regarding the setting aside of an *ex parte* decree.

The petitioner before us, who was the plaintiff in Original Suit No. 1230 of 1919 on the file of the District Munsif's Court of Pennukonda, obtained a decree against the respondent and others, the decree against him being an *ex parte* decree. Subsequently, there was a re-adjustment of territorial jurisdiction between that Court and the District Munsif's Court of Anantapur as the result of which, all the properties included in the decree were transferred to the jurisdiction of the latter Court. Consequently, the respondent applied to that Court to set aside the *ex parte* decree against him and that Court has granted his prayer. The revision is against that order and it has been contended before us, that the Pennkonda Court, as the Court which passed the decree, was the only Court competent to act under Order IX, rule 13 of the Code of Civil Procedure to set aside the decree and that the Anantapur Court had no jurisdiction to do so. That rule, it is true, authorises an application to the Court that passed the decree but the respondent relies upon section 150 of the Code of Civil Procedure as extending the power to act under that rule to the Anantapur Court in the present case, as the whole business of the former Court within the local area in which the suit properties are situate, has been transferred to the latter Court and he contends section 150 applies.

The petitioner's Vakil has put forward two contentions to exclude the applicability of section 150 and I shall consider them separately. He first argued that the section applied only when the whole of the business of the Court with reference to the whole of its jurisdiction is transferred to another Court; or, in other words, when the Court is abolished and another is substituted for it, and not to a case of partial adjustment of jurisdiction and

(9) 9 M. 445; 3 Ind. Dec. (N. S.) 705.
(10) 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479.

transfer of its business with reference to that part alone to another Court. There is nothing in the language of the section which compels us to put this restricted meaning on it: to do so would greatly reduce its scope and usefulness. No authority has been cited in favour of the restricted construction, nor is any general reason shown in support of it. On the other hand, there is as much reason to apply the section to cases of transfer of defined local areas as to cases of transfer of the whole jurisdiction. What little authority there is on the point, is in favour of the view I am taking, for in the Full Bench case in *Seeni Nadan* v. *Muthusamy Pillai* (6) there is an observation of Ayling, J., on page *35* which supports it, where the learned Judge says "this section (section 150 of the Code of Civil Procedure) certainly seems to me to cover the case of transfer of all the litigations arising out of a tract of country from one part to another." The first objection must, therefore, be overruled.

The next point taken is, that the words "save as otherwise provided" in the section prevent its applicability to the present case, as it is argued that Order IX, rule 13, requires that the application should be made to the Court that passed the decree and to no other Court. It does not say anything about other Courts and I am unable to read it as excluding the application of section 150. The rule is an enabling one which prescribes what is to be done in the ordinary course, to get an *ex parte* decree set aside. It does not say that the Court that passed the decree is the only Court that can set it aside. Nor is there anything restrictive in the wording.

No authorities have been cited on the precise point before us, by either side but the petitioner's Vakil has tried to argue by way of analogy with reference to certain rulings under Order XXXIX, rule 2, clause (3) of the Code of Civil Procedure, that when a *forum* is mentioned in a rule as having authority to do a certain thing it must be held that the jurisdiction of every other *forum* in the matter is excluded and he cited the cases in *Jaharuddin* v. *Hari Charan Poddar* (1) and *Bellary Press Co., Ltd.* [*Mathura Das* v. *Venkata Rao* (2). It is sufficient to say that in these cases, the effect of section 150 of the Code of Civil Procedure did not arise for decision and they are thus of little value in the present case. On the other hand, with reference to this very point, Srinivasa Iyengar, J., in his judgment in the Full Bench case in *Ottapurakkal Thaveth Ruppi* v. *Alabi Mashur Koyanna Koya Kunhi Koya* (3) expresses a clear opinion when he says that "where the business of one Court is transferred to another, the Court to which the business is so transferred may, I think, under section 150, entertain an original application for attachment or arrest under clause (c), rule 2 of Order XXXIX." That Full Bench overruled the rather extraordinary contention that, because the clause said that the Court granting the injunction may attach the properties of or imprison in civil jail the person guilty of disobedience, even the Appellate Court had no power to take action under it. If it is kept in mind that these are enabling rules in which there are no restrictive words as there is, for example, in Order XLVII, rule 2 under which except in certain circumstances an application for review can be made "only to the Judge who passed the decree or order" there is no difficulty in holding that the Court, given the same powers as the Court mentioned in the rules, as, for example, an Appellate Court or a Court to which the former Court's business has been transferred under section 150 of the Code of Civil Procedure can itself exercise those powers. To hold otherwise will be, in my opinion, entirely erroneous and will defeat the very object of the Legislature in extending such powers.

I have not referred to section 37 of the Code or to cases under it, for they all refer to proceedings in execution.

I agree with my learned brother that the contention that the Anantapur Court had no jurisdiction must be overruled.

The objections taken to the order of the lower Court on the merits are equally untenable. It is clear from the record that the defendant was not duly served and that his application is within time as he has sworn in his affidavit that he was not aware of the suit or of the affixture of the summons

*Page of 42 M.—[*Ed.*]

at his residence or of the existence of the *ex parte* decree till the 27th March, some 12 day before his application. The matter was tried on affidavits, no appliation being made to take evidence or to cross-examine the defendant. The plaintiff filed no affidavit himself but he left it to his Vakil to file an argumentative statement merely alleging that the defendants' affidavit could not be true. In these circumstances, the District Munsif cannot be said to have acted irregularly or even wrongly in setting aside the *ex parte* decree.

I agree that the civil revision petition fails and must be dismissed with costs.

M. C. P.

J. P. *Petition dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2709 OF 1917.

November 19, 1921.

Present:—Mr. Justice LeRossignol and Mr. Justice Campbell.

GOKAL CHAND—JUDGMENT-DEBTOR—APPELLANT

versus

THE FIRM OF HUKAM CHAND-NATHU MAL OF FEROZEPORE—DECREE HOLDER—RESPONDENT.

Hindu Law—Joint family—Separation—Separating member specially trained at family expense—Liability to satisfy decree against family property.

Where a decree is granted against the property of a joint Hindu family including the separate property of a particular member of the family which, being the result of some special training acquired at the expense of the joint family, is also declared family property, and that member subsequently quits the family, the only property of his that is liable for the satisfaction of the decree is his share in the joint family property and his separate property such as it was on the date on which he quitted the family His property acquried after he quitted the family is not liable for the satisfaction of the decree.

Miscellaneous second appeal from an order of the Senior Subordinate Judge, Ferozepore, dated the 15th July 1917.

Bakhshi *Tek Chand*, for the Appellant.

Mr. *Chiman Lal Gulati*, for Mr. *Bir Lal*, for the Respondent.

JUDGMENT.—This appeal arises out of the execution of a decree against appellant and others, in which the separate property of appellant was made liable as being a part of the joint family property.

The main question in the appeal is, whether the separate property of a member of a joint Hindu family whose separate property has been declared to be joint family property for the satisfaction of a decree remains joint family property for that limited purpose after he has quitted the family.

The Court below has refused to decide whether in fact the appellant has quitted the family on the ground that, whether he has or has not, his separate property remains liable to satisfy the decree until the decree has been completely discharged.

With this proposition we cannot agree. No doubt, it seems strange that a member of a Hindu family who has secured a special training at the expense of that family should by quitting it be able to avoid liability for a decree against that family property, but this is not the only anomaly in Hindu Law.

The decree under consideration is against the joint family property, including the separate property of a certain member of the joint family. It follows that when that member quits the family, all of his property that remains liable for the satisfaction of the decree is (1) his share in the joint family property, (2) This separate property such as it was up to the date on which he quitted the family. This separate property acquired after he quitted the family is not, and never was, joint family property.

Another objection by the appellant is that in this Court's decree there is no mention of interest, but this Court's decree affirmed the first Court's decree and merely specified in addition what property should to liable to satisfy the decree.

The Court below must decide the appellant's objection that he has separated from the family. We note that in the original suit a similar objection was put forward in argument and at that time no definite date of separation could be asserted but the appellant may be able to show that he separated at some date later than the original suit.

We accordingly accept the appeal and remand the case for the decision of the

above noted point if it is still pressed by the appellant.

Costs to follow final event.

N H.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 750 OF 1920.

December 22, 1921.

Present:—Mr. Justice Devadoss.

YAGNASAMI IYER *alias* AYYAVAYYAR—PETITIONER

versus

K. CHIDAMBARANATHA MUDALIAR —RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r 91– Sale certificate, amendment of, without notice to judgment-debtor, legality of—Revision—High Court, discretion of, where no prejudice caused to judgment-debtor– Limitation.

The amendment of a sale certificate at the instance of an auction purchaser without notice to the judgment-debtor is a material irregularity in procedure. [p. 733, col. 2]

Ajant Singh v. *Sundar Mall* [*F. T. Christien*], 16 Ind Cas 567: 17 C. W. N. 862 at p. 863, *Ram Nath Maity* v. *Rudra Mahanti*, 21 Ind Cas. 409: 18 C. L. J. 142 and *Jaydhari Dasya* v. *Rasik Lal Sikdar*, 24 Ind. Cas. 694, referred to.

Where, however, the irregularity has not prejudiced the judgment-debtor, a High Court will not interfere with the order in revision under section 115, Civil Procedure Code. [p. 734, col 2.]

It is in the discretion of a High Court, in proper cases to excuse the delay in presenting a revision petition after 90 days from the date of the lower Court's order. [p. 733, col. 1.]

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Mayavaram, in Execution Appeal No. 369 of 1919, in Execution Petition No. 202 of 1918, in Original Suit No. 28 of 1915, dated the 11th November 1919.

FACTS appear from the judgment.

Mr. *Muthiah Mudaliar*, for the Respondent, took the preliminary objections, (1) that the revision petition was barred as it was presented considerably after 90 days from the date of the lower Court's order, and (2) that the matter was *res judicata* by reason of the High Court's order in the prior appeal and revision Petition, Civil Miscellaneous Appeal No. 370 of 1919 and Civil Revision Petition No. 240 of 1920 [*Yagnasami Ayyar* v. *Chidambaranatha Mudaliar* (1)].

Though there was no notice of amendment of sale certificate to the judgment-debtor, by inclusion of more items, the actual conduct of the sale has not caused any prejudice to the judgment-debtor as the Samudayam rights appurtenant to the properties were also sold.

Mr. *T. R. Vencatrama Sastry*, for the Petitioner.—The delay was due to petitioner's having *bona fide* conducted other proceedings. It could be excused by the High Court.

Civil Miscellaneous Appeal No. 370 of 1919 was against another order. There is no *res judicata*.

The want of notice is a material irregularity and vitiates the amendment order: *Ajant Singh* v. *Sundar Mall* [*F. T. Christien* (2), *Ram Nath Maity* v *Rudra Mahanti* (3).

JUDGMENT.—This is an application under section 115, Civil Procedure Code, to revise the order of the Subordinate Judge of Mayavaram, dated 11th November 1919, directing an amendment of the sale certificate by including certain properties said to have been sold in auction.

Mr. Muthiah Mudaliar on behalf of the respondent raises two preliminary objections to the hearing of the petition. (1) It is 303 days out of time, and (2) the matter in dispute was disposed of by a Bench of this Court by the order on Civil Miscellaneous Appeal No. 370 of 1919 and Civil Revision Petition No. 240 of 1920 [*Yagnasami Ayyar* v. *Chidambaranatha Mudaliar* (1)].

Mr. Venkatarama Sastri for the petitioner argues that his client was pursuing his remedy in another proceeding, that there was no delay in the prosecution of that remedy, that this being a revision petition the period of limitation is only a rule of Court and (delay?) could be excused for proper reasons and that the order on Civil Miscellaneous Appeal No. 370 of 1919 and Civil Revision Petition No. 240 of 1920 [*Yagnasami Ayyar* v *Chidambaranatha Mudaliar* (1)] is not *res judicata*.

(1) 61 Ind Cas 961: 13 L W 15.
(2) 16 Ind. Cas. 567; 17 C. W. N. 862 at p. 863.
(3) 21 Ind. Cas. 409; 18 C. L. J 142.

The facts of the case are that certain items of property were sold by Court and on 10th November 1919 the auction-purchaser presented an application for amendment of the sale-certificate by the inclusion of certain items which he said were left out by oversight and that they should be included in the sale-certificate. The Subordinate Judge of Mayavaram, without giving notice of the application of the auction-purchaser to the judgment-debtor, ordered on 11th November 1919 that the sale-certificate should be amended as prayed for. The property was ordered to be delivered to the auction-purchaser on 5th December 1919. On 17th December 1919 the petitioner presented the said Civil Miscellaneous Appeal No. 370 of 1919 to the High Court which was disposed of on 7th September 1920. The High Court held that no appeal lay and, as there was no question of jurisdiction involved in the case, there was no ground for interference under section 115 Thereupon the petitioner presented this Civil Revision Petition on 27th September 1920. Hence the delay of 303 days. Though the High Court, as a rule, does not entertain revision petitions after three months, in proper cases the discretion of the Court could very well be exercised in excusing the delay. I should be most reluctant to excuse a long delay on the part of the litigant in ordinary cases. But in this case the petitioner acted on the advice of one of the recognised leaders of the Bar as to the course he should pursue, which course it was found afterwards to be ineffectual. On further advice he has preferred this petition. Without expressing an opinion as to the disposal of the petition on this preliminary point, I heard the case on the merits in order to see whether this is a fit case in which I should exercise my discretion in excusing the delay. Without intending to establish a precedent I hold this is a fit case in which the delay could be excused and the petition should be disposed of on the merits.

Mr. Mathiah Mudaliar's second preliminary objection is not tenable The said Civil Miscellaneous Appeal No. 370 of 1919 and Civil Revision Petition No. 270 of 1920 [*Yagnasami Ayyar* v. *Chidambaranatha Mudaliar* (1)] were against the order of the 5th December and though ground No. 6 of the said Civil Miscellaneous Appeal refers to the subject-matter of the present complaint, I cannot bring myself to hold that the matter is *res judicata*.

Coming to the merits of the case, I find that the Subordinate Judge of Mayavaram ordered amendment of the sale-certificate on 10th November 1919 without notice to the judgment-debtor. He has simply written the word 'add' on the application of the auction purchaser and the sale-certificate was accordingly amended by the inclusion of considerable property. It may be that the Subordinate Judge thought that there was no use in giving notice to the judgment debtor as he could not possibly raise any valid objection to the amendment. But whatever might be the result of an objection by the judgment-debtor, to quote the words of the learned Judge of the Calcutta High Court in *Aajnt Singh* v. *Sundar Mall* [*F. T. Christien*] (2), "it is an elementary rule of universal application and founded upon plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be finally made unless he has been afforded an opportunity to be heard." *Vide* also *Ram Nath Maity* v. *Rudra Mahanti* (3). It was the duty of the Subordinate Judge to have given notice of the auction-purchaser's application to the judgment-debtor, especially in a case where amendment is sought to be made of a sale-certificate, which, as their Lordships of the Privy Council observe, is a solemn document and could not easily be impugned, and I think he has acted with material irregularity in not giving to the judgment-debtor notice of the auction-purchaser's application of the 10th November 1919 wherein he prayed that the sale certificate be amended by the addition of certain items of Samudayam property: *Vide Joydhari Dasya* v. *Rasik Lal Sikdar* (4).

The next question is, what order should be passed on this petition? In order to decide that, I went into the facts of the case and I am satisfied that no injustice has been done to the judgment debtor by the want of notice. The properties of the judgment-debtor were ordered to be sold in nine lots. The sale proclamation shows

(4) 24 Ind. Cas. 604.

JUGLO v. ABDUL SALAM.

that some of the items had as appurtenant to them certain Samudayam rights. Lots Nos. 1 to 3 were sold. As the sale was held of those lots in accordance with the list prepared and the sale proclamation, it cannot be contended that the Samudayam rights which are appurtenant to the said items have not been sold. It may be that, in certain cases, the Samudayam rights are separately sold, but, when the Court proceeds to sell these rights as appurtenant to some items, it cannot, with any show of reason, be contended that the rights appurtenant were not sold or that the Court intended to sell the items without the appurtenances. The petitioner presented a petition to the Subordinate Judge of Mayavaram on 2nd December 1919 wherein he stated that the Samudayam property was not purchased by the auction-purchaser as it had not been sold in auction and also stated that it was not published in the said proclamation and that the said property would be sold in auction together with the village Samudayam. The last statement is clearly an incorrect one, for the sale-proclamation does mention the Samudayam properties as appurtenant to the main items of property to be sold. Evidently when this petition was heard by the Sub-Judge on 5th December 1919, the Vakil, who appeared for the petitioner, could not very well sustain the allegation that the Samudayam property was not sold; that is the reason why the Subordinate Judge of Mayavaram in his judgment, dated 5th December 1919, makes no reference to the allegation that the Samudayam properties were not sold in auction. He deals with the other objections raised by the petitioner. I, therefore, come to the conclusion that the petitioner gave up this contention as hopeless, and that is the reason why no application was made to the High Court against the order for amendment of the sale certificate. The matter is more than two years old and very probably other persons have acquired rights under the auction-purchaser and no good purpose will be served by reversing the order of the Subordinate Judge on 11th November 1919 and directing him to re-hear the petition after giving notice to the petitioner. No injustice has been caused by the material irregularity in the disposal of the respondent's petition on 11th November 1919, and I do not think it would be proper to interfere with the order passed so far back as 11th November 1919. The petition is, therefore, dismissed with costs.

M. C. P.

Petition dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 943 OF 1917.

October 26, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

Musammat JUGLO—DEFENDANT—APPELLANT

versus

ABDUL SALAM—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Caveat emptor—*Purchaser failing to make enquiries*—*Defective title*—*Earnest money, recovery of.*

Plaintiff made the highest bid at an auction for certain property and paid one-tenth of the purchase-money He subsequently discovered that the property was involved in litigation and filed a suit to recover the amount paid by him It was found that the sale had been duly notified and that in the conditions of sale, which were available to the plaintiff, the would-be purchasers were told to satisfy themselves as to the nature of the property sold:

Held, that the doctrine of *caveat emptor* applied to the case and that the plaintiff could not recover the amount paid by him, [p. 735, col. 2.]

Second appeal against a decree of the District Judge, Delhi, dated the 23th January 1917, reversing that of the Senior Subordinate Judge, Delhi, dated the 31st July 1916.

Lala *Moti Sagar*, R. S., and Mr. *Prem Lal*, for the Appellant.

Sheikh *Nioz Muhammad*, for the Respondent

JUDGMENT.—Sheikh Abdul Salam instituted the suit, out of which this appeal has arisen, against Lachhman Singh, claiming the refund of Rs. 2,300, paid by Sheikh Abdul Salam as earnest-money for the purchase by him of certain property. This property was sold by auction, and, according to the story told by the plaintiff, he happen-

ed to be passing along the road when he heard a drum being beaten and was attracted by the noise to the scene where he discovered on enquiry that the property in question was being sold by auction. On enquiry, he learnt from the auctioneer that the last bid was Rs. 22,000, whereupon he himself made a bid of Rs. 23,000, which being the highest was accepted and in due course the plaintiff paid Rs. 2,300, as earnest money at 10 per cent. Subsequently, he says that he discovered that the property was involved in litigation and that there had been litigation in regard to it previously. Thinking that the defendant's title to the property was defective, he sought to recover Rs. 2,300 from him and for that purpose brought this suit. It was also alleged in the plaint that the auctioneer had shown to the plaintiff a list of false bids. The Trial Court dismissed the suit. On appeal, the learned District Judge decreed it holding that the principles of section 55 (1) (*a*) of the Transfer of Property Act were applicable. The vendor has come up to this Court in second appeal through Mr. Moti Sagar and we have heard Mr. Niaz Muhammad on behalf of the respondent.

In our opinion, the view taken by the learned District Judge is erroneous. The sale was a sale by auction which had been duly notified. Our attention has been drawn to three notices, one yellow, one pink and one white. In the yellow and pink notices it is distinctly stated that the conditions of the sale could be ascertained from notices affixed to the property to be sold, copies of which could be obtained at the office of the auctioneer. A copy of those conditions duly signed by the plaintiff is on the record as Exhibit P. W. No. 1. In this Exhibit P. W. No. 1, the would-be purchasers are distinctly told to satisfy themselves as to the nature of the property sold and there being a contract "to the contrary" the principles of section 55 of the Transfer of Property Act are clearly inapplicable. In any event, it seems to us that the vendor could in law not be expected to do more than he did. He published notices regarding the sale. The conditions of the sale were also declared available at the office of the auctioneer. The plaintiff in this case was at the spot where the auction was held. His signature on Exhibit P. W. No. 1 clearly shows that copies of the conditions were available. If he did not take the trouble to read them that is his own lookout. It appears to us that the doctrine of *caveat emptor* distinctly applies to this case.

We have been asked to go into the question of the vendor's title, but we see no reason to do so, as in the view we take of the case whether the vendor's title is good or bad, it does not affect the decision of this case. Further, inasmuch as the vendor's title is in dispute, in another litigation (which has so far ended in favour of the vendor) we do not think it advisable to express any opinion on this point in this case. Finally, Mr. Niaz Muhammad urged that if it were held that section 55 of the Transfer of Property Act did not apply, the case should be remanded in order that the learned District Judge may come to a finding as to whether the copy of the conditions, P. W. No. 1, was actually posted on the premises or not. It seems to us that it is unnecessary to do so. The plaintiff has himself produced a copy of the conditions which he clearly could have seen (even if he did not do so) if he had so wished. He admits having seen the pink notice in which would-be purchasers are clearly told that the conditions of the sale were printed and were available at the auctioneer's office.

We, therefore, accept this appeal, and, setting aside the decree of the learned District Judge, restore that of the Trial Court dismissing the suit with costs. The appellant will get his costs throughout.

Z. K.

Appeal accepted.

SAMINATHA CHETTY v. ANGAMMAL.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 23 OF 1920.

October 19, 1921.

Present :—Mr. Justice Spencer and Mr. Justice Ramesam.

C. SAMINATHA CHETTY AND ANOTHER PLAINTIFFS—APPELLANTS

versus

ANGAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Succession—Step-sister's step-son no heir—Sapindaship, *what is—Female heirs.*

The step-son of a step-sister is not an heir under the Hindu Law (according to Mitakshara) as administered in the Madras Presidency. [p. 739, col. 1.]

Umaid Bahadur v. *Udoi Chand*, C. 19 at p. 124; 6 C. L. R. 500; 5 Ind Jur 585; 3 Shome L. R. 142; 3 Ind. Dec. (N. S.) 8, *Bibu Lal* v. *Nanku Ram*, 22 C. 399 at p. 344; 11 Ind Dec (N. S.) 224, *Ramchandra Martand Waikar* v *Vinayak Venkatesh Kothekar*, 25 Ind. Cas. 290; 42 C. 384 at p 407; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 845; 16 Bom L. R. 864; 12 A. L. J. 128 : 20 C. L. J. 573; 41 I. A. 290 (P. C.), *Mari* v. *Chinnammal*, 8 M. 107; 3 Ind. Dec (N. S.) 75 (F. B.), *Seethai Ammal* v *Nachiar Ammal*, 22 Ind. Cas. 18; 37 M 286; 4 M. L T 596; 1 L W. 11; (1914) M. W. N 28; 26 M L. J. 10, *Balamma* v. *Pullayya*, 18 M 138; 5 M. L. J. 22; 6 Ind Dec (N. S. 433, *Lallubhai Bapubhai* v. *Mankuvarbai*, 2 B. 388; 1 Ind Dec (N. S 682 (F B., *Rachava* v. *Kalingapa*, 16 B. 716 8 Ind Dec (N. S.) 954, *Kasibai* v *Moreshvar Raghunath*, 11 Ind. Cas. 560; 35 B 381, 13 Bom. L R 552, *Annapurni Nachiar* v. *Forbes*, 23 M. 1 at p. 9; 1 Bom. L. R. 611; 3 C W. N. 730 26 I. A 246. 9 M. L J. 209; 7 Sar. P. C. J. 591; 8 Ind Dec. (N S.) 395 (P C., *Gangadhar Bogla* v. *Hira Lal*, 34 Ind. Cas. 10; 43 C. 944 20 C. W. N. 489; 23 C. L. J. 372, *Kutti Ammal* v. *Radhakristna Aiyan*, 8 M. H. C. R. 88, *Lakshminammal* v. *Tiruvengada Mudali*, 5 M. 24; 2 Ind. Dec (N. S.) 169, *Narasimma* v. *Mangammal*, 1 M. 1; 1 Ind Dec (N. S.) 717, *Chinnammal* v. *Venkatachala*, 5 M 421; 2 M. L. J. 86; 5 Ind Dec. (N. S.) 645, *Nallan a* v. *Ponnal*, 14 M. 149; 1 M. L. J. 46; 5 Ind Dec (N S.) 105, *Ramappa Udayan* v. *Arumugath Udayan*, 17 M 182; 4 M. L. J. 30; 6 Ind. Dec. N. S.) 15, *Rajah Venkata Narasimha Appa Rao* v. *Rajah Surenani Venkata Purushothama Gopala Row*, 31 M. 321 at p 424; 4 M. L. T. 5 8 M L. J. 409, *Venkatasubramaniam Chetti* v *Thayarammah*, 21 M. 264; 7 Ind Dec (N. S.) 542, *Sundrammal* v. *Rangasami Mudaliar*, 18 M. 193; 4 M. L. J 275; 6 Ind Dec (N S.) 484, *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*, 60 Ind Cas 251; 40 M. L. J. 270; (1921) M. W. N. 153; 29 A L. J. 208; 2 P L T. 67; 33 C. L. J. 263; 29 M. L T. 240; 6 P. L. J. 140; 23 Bom L. R 692; 25 C. W. N. 847; 14 L. W. 20 (P. C.) and *Gridhari Lal Roy* v. *Bengal Government*, 12 M. I. A 448 at p 467; 10 W. R. P. C. 31; 1 B. L R. P C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 332; 20 E R. 408; 3 Mad. Jur. 386; 1 Ind Dec N S) 28 discussed

Obiter dicta — per *Ramesam, J.*—In general, *spindaship* involves descent from a common ancestor the only exception to this principle being in the case of wives of male *sapindas*. If *A.* and *B* (males) are *sapindas* of each, the wives of *A.* and *B.* are *sapindas*. [p. 737, col. 1.]

If *A* and *B*, not descended from a common ancestor, are each a *sapinda* of *C.*, *A.* and *B.* are not generally *sapindas* of each other [p 737, col 2.]

Female *bandhus* are postponed to all male *bandhus* They come in as heirs only as relations after the *bandhus*. [p 738, col. 2.]

Per *Spencer, J.*—There is no class of relations coming in after the lines of *gotraja sapindas* and *bandhus* are exhausted. [p. 739, col. 1.]

Appeal from a decree of Mr. Justice Kumaraswamy Sastri, dated the 6th January 1920, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 360 of 1919.

FACTS appear from the judgment.

Messrs. *V. C Seshachariar A Krishnaswami Aiyar*, and *N. K. Mahaurangam Pillai*, for the Appellant—A step son of the step-sister of a person is the *bandhu* of the latter as there is *sapinda* relationship as between the step sister and her step-son.

In any event, he is a relative of the deceased and is a preferential heir to the Crown. Even females come in the line of heirs and are loosely termed *bandhus*. See *Kutti Ammal* v. *Radhakristna Aiyan* (1), *Gridhari Lall Roy* v. *Bengal Government* (2), *Chinnammal* v. *Venkatachala* (3). *Nallanna* v. *Ponnal* (4).

A step-son stands on the same footing as a son and step-sister's sons have been recognised as coming in the line of succession. Manu, Chapter IX, Pl. 183, Smritichandrika, Chapter IV, Pl. 14.

Messrs. *T. R. Venkatrama Sastriar*, *T. Ethiraja Mudaliar*, *V. P. Srinivasa Ayyangar*, *A. Narasimhachariar*, *S. Balasingam Sattanadar* and *M. Sundaram Aiyar*, for the Respondents.—There is no common ancestor in the case of the step sister's step-son: West and Buhler, page 114. The texts relied on by the other side have become obsolete. A step-mother is not a mother for purposes of inheritance. *Mari* v. *Chinnammal* (5), *Seethai Ammal* v. *Nachiar Ammal* (6). A son of one of the wives of a person is not heir to all the co-wives. Loosely, he

(1) 8 M. H. C. R. 88.

(2) 12 M I. A. 448 at p. 467; 10 W. R. P. C. 31 1 B L. R P. C. 44; 2 Suth P. C. J. 159; 2 Sar. P. C. J. 382; 20 E R. 408; 3 Mad. Jur. 386; 1 Ind. Dec. (N. S.) 28

(3) 15 M. 421; 2 M. L. J. 86; 5 Ind. Dec. (N. S.) 645.

(4) 14 M. 149; 1 M. L J. 46; 5 Ind. Dec. (N. S.) 105.

(5) 8 M 107; 3 Ind. Dec. (N. S.) 75 (F. B.).

(6) 22 Ind Cas. 18; 37 M. 286; 14 M. L. T. 596; 1 L. W. 11; (1914) M. W. N. 28; 26 M. L. J. 10.

is the son of all the wives for purpose of performing funeral ceremonies.

JUDGMENT.

RAMESAM, J.—The plaintiffs are the step-sons of the step sister of the deceased and claim to succeed to his estate. Our learned brother, Kumarasami Sastri, J., dismissed the suit, holding that plaintiffs are not heirs. The plaintiffs appeal. The only point for decision in appeal is whether the step-son of a step sister is an heir under the Hindu Law (according to Mitakshara) as administered in the Madras Presidency.

Mr. A. Krishnasawmy Aiyar, who appeared for the appellant, started his case by saying (1) that the step sister is a *sapinda* of the *propositus* and (2) that the plaintiffs are her *sapindas*. But he did not, and rightly, follow up these propositions by arguing that the plaintiffs are, therefore, *sapindas* of the *propositus*. Later on, he expressly disclaimed any intention to argue that the plaintiffs are *bandhus* (or *bhinnagotra sapindas*) of the deceased. On this portion of the case, it is only sufficient to observe that, in general, *sapindaship* involves descent from a common ancestor, the only exception to this principle being the case of wives of male *sapindas*. If *A* and *B* (males) are *sapindas* of each other, the wives of *A* and *B* are *sapindas*. This follows from the definition of '*sapinda*' in the Ashara Adhaya of the Mitakashara [quoted in *Umaid Bahadur* v. *Udoi Chand* (7), *Babu Lal* v. *Nanku Ram* (8), *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (9), Rajkumar Sarvadhikari on Inheritance, pages 601—605 and West and Bahler (4th Edition, page 114)]. But the *sapinda* relationship of such females, except in the case of ancestors, such as mother, grandmother, etc., who come in among *sagotra* heirs has not served to bring them into the line of heirs; so that, a step-mother *Mari* v. *Chinnammal* (5), *Seethi Ammal* v. *Nachiar Ammal* (6), or a great-grand father's great-grandson's widow *Balamma* v *Pulloyya* (10)] is not an heir under the Mitakshara Law; except in Bombay [*Lallubhai Bapubhai* v. *Mankuvarbai* (11), *Rachava* v. *Kalingapa* (12), *Kashibai* v. *Moreshvar Raghunath* (13)] generally, there is no such principle of law as that—"If *A* and *B* not descended from a common ancestor, are each a *sapinda* of *C*, *A* and *B* are *sapindas* of each other.'

The arguments of the appellant are two-fold. (1) A step-mother is regarded as the equivalent of a mother (Manu IX, 183; see also Vishnu XV, 41 and Vasishta XVII, 11) for various purposes, (*a*) adoption, (*b*) sharing with sons in a partition, (*c*) in inheritance to a woman's *stridhan*. In the first case, the principle is that adoption is to a father primarily and only in a secondary sense to his wife, so much so that, except in the case of *pratipgrachita mata* or the wife, who is actually associated with the husband in the ceremony of adoption: *Annapurni Nachiar* v. *Forbes* (14), all the wives of an adopter are regarded as adoptive mothers. (See Mayne, section 167). In the second case, the plural is used in the texts—'wives' in Mitakshara, Chapter I, section 2, Pl. 9, and mothers (*matarau*) in Smriti Chandrika, Chapter IV, section 14, citing Vishnu and inferring that 'mother' includes 'step mother.' In the third case, the right to succession to a woman's *stridhanam* of her step-son is based on special texts, *e.g.*, Viramitrodaya, Chapter V, part II, section 5. Anyhow, it is clear that the argument may be carried too far. In the text of Brihaspate (quoted in Smriti Chandrika, Chapter IX, section 3, section 36, Vyavahara Mayukha, Chapter IV, section 10, in Mandlik, page 58 and Viramitrodaya, Chapter V, part II, section 14) certain other female relatives besides step-mother are regarded as mothers. It is clear that the general principle stated in Manu IX, 183 did not avail the step mother to become an heir, *Mari* v. *Chinnammal* (5), *Seethi Ammal* v. *Nachier Ammal* (6), and cannot in general be relied on in questions of succession: *Annapurni Nachiar* v. *Forbes* (14) and *Gangadhar Bogla* v. *Hira Lal* (15).

(7) 6 C. 119 at p. 124; 6 C. L. R. 500; 5 Ind. Jur. 585; 3 Shome L. R. 146; 3 Ind Dec. (N. S.) 78.

(8) 22 C. 339 at p. 344; 11 Ind. Dec. (N. S.) 228.

(9) 25 Ind Cas 290; 42 C. 384 at p. 407; 18 C. W. N. 1154; 27 M. L J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L T. 447; (1914) M. W. N. 855; 16 Bom. L R. 863; 12 A L. J. 1281; 20 C. L. J. 573; 41 I. A. 200 P C).

(10) 18 M. 163; 5 M. L. J. 22; 6 Ind. Dec. (N. S.) 466.

(11) 2 B. 388; 1 Ind. Dec. (N. S.) 692 (F. B.).

(12) 16 B 716; 8 Ind Dec. (N. S.) 956.

(13) 11 Ind. Cas. 561; 35 B. 359; 13 Bom. L. R. 552.

(14) 23 M. 1 at p. 9; 1 Bom. L. R. 611; 3 C. W. N. 730; 6 I A. 246; 9 M L. J. 209; 7 Sar. P. C. J. 59; 3 Ind Dec. (N. S.) 395 (P. C.).

(15) 34 Ind. Cas. 10; 43 C. 944; 20 C. W. N. 493; 23 C. L. J. 372.

The second line of argument adopted by the appellants may be stated as follows:—A certain number of females deemed to be heirs outside Madras except in Bombay (and not yet recognized by the Privy Council even in Madras) have been held to be heirs by the Madras High Court, *viz*, sister in *Kutti Ammal* v. *Radakrishna Aiyan* (1), *Lakshmanammal* v. *Tiruvengada Mudali* (16); father's sister, *Nrasimma* v. *Mangammal* (17), *Chinnammal* v. *Venkatachala* (3), son's daughter in *Nallana* v. *Ponnal* (4), daughter's daughter in *Ramappa Udayan* v. *Arumugath Udayan* (18), *Rajah Venkata Narasimha Appa Rao* v. *Rajah Surenani Venkota Purshothama Gopala Row* (19), brother's daughter in *Venkatasubramaniam Chetti* v. *Thayarammah* (20) and sister's in daughter *Sundrammal* v. *Rangasami Mudaliar* (21) apparently with some hesitation, (see page 198). These are not *bandhus* (I am here stating only the appellant's arguments). They cannot come in as '*bandhus*' for, if they do, as all *bandhus* are divided into *atma bandhus*, *pitri bandhus* and *matri bandhus* who take in the order of enumeration [see *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (22)]; famale *atma bandhus* should take precedence over male *pitri* and *matri bandhus*; and female *pitri bandhus* over male *matri bandhus*, whereas, according to the Madras High Court, these female heirs are postponed to all male *bandhus*. Therefore, they come in, as heirs, only as relations after the *bandhus*. The plaintiffs are at least such relations. Reliance is placed on *Gridhari Lal Roy* v. *Bengal Government* (2) where the Right Hon'ble Sir James Colville, discussing the right of the maternal uncle and quoting a passage from Viramitrodaya on the question, says: "If this be the correct reading, it would follow that even if the exclusion of maternal uncle and others not mentioned in the text relied upon by the respondent, from the list of *bandhus*, were established, they would still as relations, be heirs—" The next succeeding sentence of His Lordship repels the suggestion, if any, in the Viramitrodaya that the maternal uncle is not a *bandhu* but a relation. The appellants' Vakil also relies on *Sundrammal* v *Rangasami Mudaliar* (21), where it is said that sister's daughters are not *bandhus*. In view of the other decisions above mentioned, in all of which such female heirs are regarded as *bandhus*, it must be admitted that the language of *Sundrammal* v. *Rangasami Mudaliar* (21) is not quite clear. All that was meant was, that they are not male *bandhus*. The case was so explained by Subramania Aiyar, J., in *Venkatasubramaniam Chetti* v. *Thayarammal* (20) In *Lakshmanammal* v. *Tiruvengada Mudali* (16) even females, who would be *sagotra sapindas* by birth—such as sister and son's daughter—are said to be only *bandhus*, for either they pass away into another *gotra* by marriage, or are capable of so passing away, *Lakshmanammal* v. *Tiruvengada Mudali* (16). Incidentally, it may be observed, that the words 'relations,' and 'kinsmen' occurring in several of the English translations of the Sanskrit texts correspond to '*bandhu*' or '*sapinda*' in the original, *e.g.*, Mitakshara, Chapter II, section VI—1 and the text of Apastamba (I, 14 section 2) quoted therein *Lakshmanammal* v. *Tiruvengada Mudali* (16) Manu, IX, 187 (Banerjee's Translation) in *Babu Lal* v. *Nanku Ram* (8). As to the supposed difficulty in arranging the order of female and male *bandhus* for which reliance is placed on *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (22) it is only sufficient to say that no case of female *bandhus* has yet come up before the Privy Council; their Lordships' observation in *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (22) were made with reference to male *bandhus* only and it is unnecessary now to speculate as to whether the Privy Council will recognize female *bandhus*, and, if they do, they will postpone them to all male *bandhus*; or place the *atma bandhus* (male and female) before the *pitri bandhus* and similarly for *pitri* and *matri bandhus*. In this connection, it must be remembered that Yajnavalkya's text, Chapter II, sections 135-136 (Mandlik, page 220), mentions only *bandhus* between '*gotrajas*' and 'pupil.' The Mitakshara in commenting on this, does not

(16) 5 M. 241; 2 Ind. Dec. (N. S.) 169.
(17) 13 M. 10; 4 Ind. Dec. (N. S.) 717.
(18) 17 M. 182; 4 M. L. J. 30; 6 Ind. Dec. (N. S.) 125.
(19) 31 M. 321 at p. 324; 4 M. L. T. 5; 18 M. L. J. 409.
(20) 21 M. 263; 7 Ind. Dec. (N. S.) 542.
(21) 18 M. 193; 4 M. L. J. 275; 6 Ind. Dec. (N. S.) 484.
(22) 60 Ind. Cas. 251; 40 M. L. J. 270; (1921) M. W. N. 153; 19 A. L. J. 208; 2 P. L. T. 97 33 C. L. J. 268; 29 M. L. T. 240; 6 P. L. J. 140; 23 Bom. L. R. 692; 25 C. W. N. 842; 14 L. W. 20 (P. C.).

purport to add any new class (Chapter II, sections VI and VII). When Mr. Mayne questioned the correctness of the Madras High Court's decision in *Kutti Ammal* v. *Radakristna Aiyan* (1) on the ground that the High Court by that decision, added a new class of heirs, the High Court's reply in *Lakshmanammal* v. *Tiruvengada Mudali* (16) was that they did not but that they were construing the word '*bandhu*' in Mitakshara (section VI) as not confined to males. All the decisions above enumerated proceed on this ground. The learned Vakil for the appellants admitted before us that there is no case of a person who is not a *sapinda* (apart from pupil and teacher) being allowed to succeed as an heir. Mitakshara, Chapter II, section 3, Pl. 4, and *Lakshmanammal* v. *Tiruvengada Mudali* (16), show that propinquity of blood is still all important. I have, therefore, no hesitation in holding that the appellant is not an heir. The appeal fails and is dismissed with costs (proportionate to the respective interests of the respondents.)

SPENCER, J.—I am completely in accord with what my learned brother has said. There is manifestly no consanguinity between a man and his step sister's step-son, and there is no authority for holding that the latter is a *bandhu*. There is no class of relations coming in after the lines of *gotraja sapindas* and *bandhus* are exhausted. Colebrook's translation of the Sanskrit word "*adi*," occurring in the Mitakshara as well as "other relations," is a loose translation. It may be more correctly rendered as "the like" or "etc." In *Lakshmanammal* v. *Tiruvengada Mudali* (16) the suggestion that *Kutti Ammal* v. *Radakristna Aiyan* (1) was an authority for the existence of a class of heirs who being relations, are neither *gotrajas* not *bandhus* was negatived by Sir Charles Turner, C. J., and Kindersley, J. The appeal is dismissed with costs, proportionate to respondent's respective interests.

M. C. P.

J. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 346 OF 1920.

March 14, 1921.

Present:—Mr. Lyle, A. J. C.

SURAJ PRASAD *alias* MUNNI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DEBI DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Lambardar, *duty of, to collect rent—Failure to perform duty—Liability of heirs—Meagre collections—Presumption.*

It is the duty of a *lambardar* to take reasonable care in collecting the rents, and the liability incurred by his failure to perform that duty survives after his death. [p 741, col. 1]

The heirs of a deceased *lambardar* are liable to the extent of the assets of the deceased which have come into their hands for a co sharer's share of the profits which might with reasonable care have been collected [p. 741, col. 1.]

Dip Singh v. *Ram Charan*, 3 A. L. J. 608; A. W. N. (1906), 252; 29 A. 15, *Gulzari Lal* v. *Dan Dayal*, 4 A. L. J. 244; A. W. N. (1907) 107, *Murad-un-nissa* v. *Ghulam Sajjad*, 20 A. 73; A. W. N. (1897), 197; 9 Ind. Dec. (N. S.) 406, *Gulab* v *Fateh Chand*, A. W. N. (1886) 32; 4 Ind. Dec. (N. S.) 1152, *Banke* v. *Umrao Lal*, 8 O. C. 206, *Concha* v *Murrietta*, (1889) 40 Ch. Div. 543; 60 L. T. 798, *Peebles* v. *Oswaldtwistle Urban District Council*, (1896) 2 Q B 159 at p 164; 65 L. J. Q. B. 449; 74 L. T. 721; 44 W. R. 513; 60 J. P. 516, *Wheatley* v. *Lane*, (1668) 1 Wms. Saund 216a; 85 E. R. 228, *Bharath Singh* v. *Tej Singh*, 43 Ind. Cas 636; 40 A. 246; 16 A. L. J; 193 (F B.), referred to.

Where there is an extraordinary difference between the amount of the profits to which a co-sharer would be entitled on the basis of the gross rental, and the amount to which he is entitled on the basis of the actual collections, a presumption of dishonesty or gross negligence arises, which it is for the heirs of the deceased *lambardar* to rebut. [p. 740, col 1.]

Appeal from a decree of the Additional Subordinate Judge, Unao, dated the 22nd July 1920, confirming that of the Munsif, Purwa, dated the 30th March 1920.

Mr. *Rajeshwari Prasad*, for the Appellant.

Mr. *Gulab Chand Srimal*, for the Respondents.

JUDGMENT.—The plaintiffs in the suit out of which this appeal arises are owners of a 3 annas 4 pies share in village Shahpur. The defendants are the sons of one Chandra Dat, who was Lambardar of the *mahal* in which the plaintiff's property is situate. The suit was brought for recovery of Rs. 366 2.6 arrears of profits for the year 1326 Fasli

which were or ought to have been collected by the deceased Lambardar Chandra Dat.

The defendants pleaded that the plaintiffs were entitled to a share only of the profits acutally realised and denied their liability to pay profits calculated on the full rental.

The Court of first instance upheld the contention of the defendants and gave the plaintiffs a decree of Rs. 20 6-6 only with proportionate costs. It held that as the plaintiffs had sued the defendants as representatives of the deceased Lambardar, the defendants could not be held liable for any negligence on the part of the Lambardar and could not, therefore, be required to pay profits on the gross rental.

The lower Appellate Court has confirmed the decree of the Court of first instance. It seems to have held that negligence on the part of the deceased Lambardar was proved, but it has found that the defendants cannot be held liable for such negligence and in support of that finding it relied upon certain rulings of the Allahabad High Court:—*Dip Singh* v. *Ram Charan* (1), *Gulzari Lal* v. *Dan Dayal* (2), *Murad un nissa* v. *Ghulam Sajjad* (3), *Gulab* v. *Fateh Chand* (4) and also on a ruling of this Court, *Banke* v. *Umrao Lal* (5).

It is shown that on the basis of gross rental the plaintiffs would be entitled to the sum of Rs. 270-8 9 whereas, according to the collections admitted and dictated to the Patwari, the plaintiffs' share of profits would amount only to Rs. 20 6-6. There is such an extraordinary difference between these two sums as to raise a presumption either of dishonesty or of gross negligence on the part of the deceased Lambardar, and if the defendants are liable to the extent of the assets of the deceased which have come into their hands, the burden was certainly on them to rebut the presumption. That they have failed to do so is beyond question. They have produced no accounts. Not one of the defendants has gone into the witness box to explain why such an absurdly small amount had been collected. We find that in the other *mahals* of the village the rent was realised in full, that the tenants are not shown to be poor or insolvent and that, though the Patwari says that the *kharif* crop was bad, yet no portion of the revenue was remitted or suspended There can be no doubt, in the circumstances, that had the Lambardar Chandra Dat been alive the plaintiffs would have been entitled to a decree for profits on the basis of the gross rental. The only question is, whether a decree on the basis of the gross rental can be passed against his sons the defendants. The learned Counsel for the appellants admits that the defendants cannot be held personally liable. He claims that his clients are entitled to a decree against the assets of the deceased Lambardar which have come into the defendants' hands. It seems to me that there is force in his contention. The rulings of the Allahabad High Court on which the lower Appellate Court has relied are based on the provisions of sections 164 and 166 of the Agra Tenancy Act. The present suit has been brought against the sons of the Lambardar as representatives and in possession of the assets of the deceased and not in their capacity as Lambardar or co sharers. The suit has been brought not in the Revenue Court under clause (15) of section 108 of the Oudh Rent Act but in the Civil Court in accordance with the ruling published in *Banke* v. *Umrao Lal* (5). If the deceased Lambardar actually realised a larger amount than is entered in the Patwari's accounts there can be no doubt that the plaintiffs are entitled to their share of the amount realised out of his estate. And it seems to me that if he did not realise more than the amount so entered his estate is equally liable for the plaintiff's share of the profits which with reasonable care he might have collected. The deceased Lambardar was under an obligation to collect the rents of the tenants and in that case he has been grossly negligent in respect of the duty imposed upon him. In the case of *Concha* v. *Murrieta* (6) Cotton, L. J., has remarked: "It is true that no action for a tort can be revived or commenced against the representatives of the person who committed it; but the case is quite

(1) 3 A. L. J. 608; A. W. N. (1906) 252; 29 A. 15.

(2) 4 A. L. J. 244; A. W. N. (1907) 107.

(3) 20 A. 72; A. W. N. (1897) 197; 9 Ind. Dec. (N. S.) 406.

(4) A. W. N. (1886) 32; 4 Ind. Dec. (N. S.) 1152.

(5) 8 O. C, 206.

(6) (1889) 40 Ch. Div, 543; 60 L. T. 798.

different where the act is not a mere tort but is a breach of a *quasi* contract, where the claim is founded on breach of a fiduciary relation, or on failure to perform a duty." And in the case of *Peebles v. Oswaldtwistle Urban District Council* (7) A. L. Smith, L. J., has quoted the following note of *Wheatley v Lane* (8) with approval "It was a principle of the Common Law, that if an injury were done either to the person or the property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done..... But this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed, for there the action survived."

In the case before us there was clearly a duty imposed upon the deceased Lambardar to take reasonable care in collecting the rents and the liability incurred by his failure to perform that duty survives after his death. The case of *Bharath Singh v. Tej Singh* (9) was decided solely upon the construction of section 161 of the Agra Tenancy Act, but in his judgment at page 254,* Mr. Justice Banerji expresses the opinion: "On principle it does not seem that the assets of the deceased Lambardar should escape liability simply because the said Lambardar who had neglected to make collections or was guilty of gross misconduct happened to die after the expiry of the year during which the collections had to be made."

For these reasons, I am of opinion that the defendants are liable to the extent of the assets of their deceased father which have come into their hands for the plaintiffs' share of the profits which might with reasonable care have been collected. I have already pointed out that the burden was thrown upon the defendants to show that reasonable care had been exercised; and as they failed to discharge that burden they must be held liable to the plaintiffs for profits calculated on the gross rental. The appeal is, therefore, allowed and the plaintiffs-appellants will be given a decree for Rs. 270-8-9 with proportionate costs in all Courts. The decree will be against the assets of the deceased Lambardar which have come into the hands of the defendants.

The petition of objection is dismissed with costs.

Z K.

Appeal allowed.

(7) (1896) 2 Q. B. 159 at p. 161; 65 L. J. Q. B. 493; 74 L. T. 724; 44 W. R. 613; 60 J. P. 516.

(8) (1668) 1 Wms. Saund. 216a; 85 E. R. 228.

(9) 43 Ind. Cas 606; 40 A. 246; 16 A. L. J. 193 (F. B.).

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LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 938 OF 1919.

November 17, 1921.

Present:—Mr. Justice LeRossignol and Mr. Justice Campbell.

Mahant DIYAL DAS—DEFENDANT—APPELLANT

versus

Mahant SUNDAR DAS—PLAINTIFF *Musammat* BHAGWAN DEVI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 149, O. XLIV, r. 1—Leave to appeal as pauper—Application dismissed—Memorandum of appeal—Court-fee paid within time allowed—Limitation.

There is a distinction between applications to sue as a pauper, and applications to appeal as such. In the former the plaint is an integral portion of, the application; in the latter the memorandum of appeal is a separate document [p. 743, col. 1.]

Appellant applied for leave to appeal as pauper, and along with his application filed a memorandum of appeal as required by Order XLIV, rule 1 of the Civil Procedure Code. The application was made within the period of limitation allowed for an appeal. Eventually, long after limitation had expired, the application was dismissed and the Court made an order requiring the appellant to pay in Court-fees by a certain date, which was done. At the hearing it was objected that the appeal was barred by time:

Held, (1) that the dismissal of the application for leave to appeal as a pauper did not involve a dismissal of the appeal. [p. 742, col. 1.]

(2) that the order of the Court directing payment of Court-fees was made under section 149 of the Civil Procedure Code; [p. 742, col. 1.]

(3) that on payment of the Court-fees, the presentation of the memorandum of appeal was, under section 149 of the Code, validated as from the date of its original presentation and that, therefore, the appeal was within time. [p. 743, col. 1.]

DIYAL DAS v. SUNDAR DAS.

Nellavadivu Ammal v. *Subramania Pillai*, 38 Ind. Cas. 617; 40 M 657; 31 M. L. J. 269, followed.

Umed Ali v. *Municipal Committee, Jhang-Maghiana*, 56 Ind. Cas. 143; 2 L 1, *Dalip Singh* v *Umrao Singh*, 19 Ind. Cas. 788; 55 P. R 1913; 170 P L. R. 913; 293 P. W. R. 1912 and *Resal Singh* v *Shadi*, 43 Ind. Cas 317; 65 P.R. 1917; 174 P. W. R. 1917; 13 P. L. R. 1918, distinguished.

Second appeal from a decree of the District Judge, Sialkot, dated the 15th April 1919, affirming that of the Subordinate Judge, Second Class, Sialkot, dated the 15th June 1918.

Pandit *Sheo Narain*, R. S., for the Appellant.

Lala *Mool Chand*, R. S., for the Respondents.

JUDGMENT.—On the 9th July 1918 one Dial Das applied to the District Judge, Sialkot, for permission to appeal *in forma pauperis* against a decree of the Subordinate Judge, dated 15th June 1918. The application, as required by Order XLIV, rule 1, Civil Procedure Code, was accompanied by a memorandum of appeal.

After enquiry through a Munsif under rule 2 of the same Order, the District Judge on 5th December 1918 dismissed the application and recorded an order in the following terms: "Court-fee to be made up by the 16th December 1918."

The appellant paid the required Court-fee by due date and notice issued to the respondents who on coming into Court objected (1) that there was no appeal before the Court since the memorandum of appeal filed with the application could not survive after the dismissal of the application, and (2) that even if the Court had power to treat the appeal as still subsisting and to extend time under section 5 of the Limitation Act there was no sufficient reason for so doing.

The appellant replied that the District Judge's order for the payment of Court-fee was passed under section 149, Civil Procedure Code, and that the memorandum of appeal had been admitted by an order which was final.

The District Judge held on the consideration of certain authorities that, in spite of the pauper application having been dismissed, he could still treat the appeal as existing in the sense that he might extend time under section 5 of the Limitation Act, and also that, even if his order directing the Court-fee to be paid were tantamount to an order admitting the appeal, it was an order passed *ex parte* and could be re-considered on the appearance of the respondent. He recorded that he would not have passed his order regarding Court fee without further consideration had he realized that it was to have the effect of extending limitation. He discussed *Bai Ful* v. *Desai Manorbhai Bhavanidas* (1), and, while recognizing that it was a judgment delivered before the enactment of section 149 of the present Code of Civil Procedure, thought that it indicated that the memorandum of appeal presented with a pauper application could not be treated as a document contemplated under section 149, in which the only defect is the absence or insufficiency of stamp, but that it must be treated as a document which in itself is not an appeal unless and until a clear and definite order is passed extending time under section 5 of the Limitation Act. He proceeded to review the circumstances of the presentation and prosecution by the appellant of the application for leave to appeal as a pauper, found that it was neither presented in good faith nor prosecuted with due diligence and dismissed the appeal as barred by limitation.

Dial Das has appealed to this Court.

In our opinion the learned District Judge was mistaken in taking the view (as he apparently did) that the appeal was presented to him out of time and that there was a question whether time should be extended under section 5 of the Limitation Act. The appeal was presented when the application for pauperism was filed less than 0 days after the date of decree. The memorandum of appeal was unstamped, but Order XLIV, rule 1 expressly permitted it to be so. Had the application been accepted the appeal would have proceeded on that same memorandum. When the application was rejected, the appeal remained for *ex parte* disposal.

Counsel for the respondent has argued that Order XLIV says nothing about what is to be done when an application to appeal as a pauper has been dismissed, and has referred us to Order XXXIII which deals with pauper suits. He has asked us to draw an analogy from rule 15 of that

(1) 22 B. 849; 11 Ind. Dec. (N. S.) 1150.

Order, and to hold that the dismissal of an application to appeal necessitates the presentation of a fresh memorandum of appeal. But there is a distinction between applications to sue as a pauper, and applications to appeal as such. In the former the plaint is an integral portion of the application; in the latter the memorandum of appeal is a separate document. We agree with the reasons given in *Nellavadivu Ammal* v. *Subramania Pillai* (2) for holding that the distinction was drawn deliberately by the Legislature. The limitation periods for suits go up to sixty years and a person who wishes to sue as a pauper is expected to put in his application in sufficient time to allow of a suit being filed within limitation, if and after his application to sue has been rejected. In most cases a would be appellant, who must file his appeal to the District Judge within 30 days could not secure a decision on his application within that period.

In the present case, then, the District Judge, having rejected the application to appeal as a pauper, had to pass an order on the appeal. The order which he passed that the Court-fee was to be made up within 11 days must be taken to be one under section 149, Civil Procedure Code, and, in view of the explicit terms of the sentence "upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance," the appeal was clearly validated from the date of original presentation by the payment of Court fee within the time allowed. We do not think that the respondent was entitled to challenge that validity, when he was subsequently summoned, on the ground of limitation. His Counsel's claim that he was so entitled is based upon *Umed Ali* v. *Municipal Committee, Jhang-Maghiana* (3) where, however, the facts were different. In that case the order of a Single Judge of this Court converting a revision into an appeal was passed long after the period for an appeal had expired, and, therefore, the appeal was out of time from the very start. *Dalip Singh* v. *Umrao Singh* (4), and *Kesal Singh* v. *Shadi* (5), are cited, but they also are not in point.

We hold that there was no presentation of the appeal after the expiry of limitation, that the order dismissing the application to appeal as a pauper did not affect the fact that the appeal had been preferred within the prescribed 30 days, and that the appellant having paid Court-fee in obedience to the Court's order of the 5th December was entitled to have his appeal heard. The case is similar to *Nellavadivu Ammal* v. *Subramania Pillai* (2), already quoted, which we have followed.

We, therefore, accept this appeal and set aside the order of the learned District Judge dismissing the appeal to his Court as barred by limitation. The case is remanded to his Court for decision of that appeal on the merits. The stamp on appeal to this Court will be refunded and costs will be costs in the cause.

Z. K. & N. H.

Appeal accepted.

(2) 38 Ind. Cas. 617; 40 M. 687; 31 M. L. J. 269.

(3) 56 Ind. Cas. 143; 2 L. 1.

(4) 19 Ind. Cas. 700; 55 P. R. 1913; 130 P. L. R. 1913; 296 P. W. R. 1912.

(5) 43 Ind. Cas. 317; 95 P. R. 1917; 174 P. W. R. 1917; 13 P. L. R. 1918.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1436 OF 1919.

December 6, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr Justice Panton.

RADHA KRISHNA DAS—PLAINTIFF—APPELLANT

versus

MATIYAR RAHAMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Waste land—Boundary dispute—Land capable of actual possession—Burden of proof.

The principle that on questions of boundary, especially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable, does not apply to a case where, according to both parties, the land is capable of possession and each party is in actual possession of the land comprised within his tenure. [p. 744, col. 2.]

RADHA KRISHNA DAS v. MATIYAR RAHAMAN.

When the defendant in a suit for recovery of possession of land, even when the question is a question of boundaries, is clearly shown or found to have been in actual possession of the disputed area the burden lies on the plaintiff to establish his title. [p. 744, col. 2.]

Manindra Chandra Nandi v. *Sarabindu Ray*, 45 Ind. Cas. 408; 27 C. L. J. 599; 23 C. W. N. 593, followed.

Appeal against a decree of the District Judge, Noakhali, dated the 12th April 1919, affirming that of the Munsif, Hatiya, dated the 28th March 1917.

FACTS appear from the judgment.

Babu *Dhirendra Lal Kastgir* (with him Babu *Nagendra Nath Bose*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for declaration of title and recovery of possession on the ground that defendant No. 11 and the other defendants have dispossessed him. The defence was that the plaintiff was the *benamdar* of the landlord. The Courts below have dismissed my suit. Having regard to the nature of the land the onus of proof is on both parties. On the admission of the contesting defendant I am entitled to a part of the land in dispute. There was a local enquiry by the Commissioner. His report was not considered. These two holdings are in a *chur*. The common landlord settled the land to the parties within 12 years. The question of limitation would not, therefore, arise at all. The only question is one of title. Refers to *Lukhi Narain Jagadeb* v. *Jadu Nath Deo* (1). The question is, where to lay the boundary line. The Courts simply find that the plaintiff has failed to prove possession I submit in *chur* lands where boundary line is not to be easily ascertained the parties must both of them prove their case. The defendant admits that there has been encroachment.

Babu *Romesh Chandra Sen*, for the Respondent:—The defendant has been in possession for a pretty long time. The defendant is entitled to rely on that possession. Refers to *Manindra Chandra Nandi* v. *Sirabindu Ray* (2). It is not compulsory on the Appellate Court to direct a fresh local investigation. So far as the admission is concerned, I submit it is not an admission but is merely a denial of the plaintiff's allegation of the existence of the *ail*.

Babu *Dhirendra Lal Kastgir*, replied in brief.

JUDGMENT.—The only question involved in the appeal is, what is the boundary line between the tenure of the plaintiff and that of the defendant. The tenures are situated side by side.

The Courts below have held that the plaintiff has failed to prove title and possession of the land.

On behalf of the appellant, reliance is placed on the case of *Lukhi Narain Jagadeb* v. *Jadu Nath Deo* (1) where it was held that "on questions of boundary, specially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter-claimants and both parties are bound to do what they can to aid the Court in ascertaining the true line".

But the duty of both parties to aid the Court in ascertaining the true line is in cases where the dividing line in dispute runs through waste lands *which have not been the subject of definite possession*. In the present case, it was the case of both parties that the land was capable of possession and each party was in actual possession of the land comprised within his tenure. That being so, the principle does not apply to the present case. In this connection, we may refer to the case of *Manindra Chandra Nandi* v. *Sirabindu Ray* (2) where it was pointed out that, when the defendant in a suit for recovery of possession of land, even when the question is a question of boundaries, is clearly shown or found to have been in actual possession of the disputed area, the burden lies on the plaintiff to establish his title.

In the present case it is found that the defendant has been in possession all along up to the line found by the Court below and that has always been the dividing line between the two tenures. That being so, the contention has no force.

The learned Pleader for the appellant next relies upon certain statements made by defendant No. 11, the contesting defendant, and it is contended that the plaintiff is entitled

(1) 21 C. 504; 21 I. A. 39; 6 Sar. P. C. J. 408; 10 Ind. Dec. (N. s.) 966 (P. C.).

(2) 45 Ind. Cas. 408; 27 C. L. J. 599; 23 C. W. N. 593.

to a portion of the land according to the admission of the defendant. There was, however, no admission of the title of the plaintiff, or of the boundary line. On the other hand, there was a clear denial. There was, however, a statement as to how many *nals* of land intervened between the plaintiff's and defendant's land. It was stated in the written statement that the distance between the lands was no *less* than 20 *nals*, and in the evidence it was stated to be *about* 20 or 25 *nals*. The learned Judge pointed out that it was a statement by guess and not made by actual measurement. In the circumstance, the learned Judge did not attach any weight to the statement.

We think the learned Judge was right and the appeal must be dismissed with costs.

B. N.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 961 OF 1921.

November 9, 1921.

Present :—Mr. Justice Scott-Smith.

Musammat NIAMAT BIBI—

PLAINTIFF—APPELLANT

versus

MUHAMMAD FAIZ—DEFENDANT

—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 105 (2), O. XLI, r. 23, O XLIII, r. 1 (u)—Remand, order of—Appeal not preferred—Order, whether can be questioned—Burden of proof—Question of law.

An order of remand which purports to be made under Order XLI, rule 23 of the Civil Procedure Code, if not appealed against, cannot be subsequently questioned, in an appeal from the decree passed after the remand [p. 743, col. 1.]

The question upon which party the *onus* of proving any particular point lies is a question of law. [p. 745, col. 1.]

Second appeal from a decree of the District Judge, Jhelum, dated the 15th January 1921, reversing that of the Subordinate Judge, Second Class, Gujrat, dated the 21st June 1919.

Sheikh *Niaz Muhammad* for the Appellant.

Mr. *M. Shah Nawaz*, for the Respondent.

JUDGMENT.—This is a second appeal from the order of the District Judge of Jhelum dismissing the plaintiff's suit for a declaration to the effect that she is not the wife of the defendant and asking that the alleged marriage of defendant with plaintiff be cancelled. The Trial Court on the 30th July 1921, decreed the plaintiff's claim. It laid the *onus* of proving that there had been a valid *nikah* upon the defendant and found that he had not discharged it. There was an appeal in the Court of Sheikh Amir Ali, District Judge, who, after discussing the evidence on the record, came to the conclusion that, in the circumstances of the case, the *onus probandi* ought to have been laid on the plaintiff to prove that the entry in the marriage register of March 1911 was a false one. He accordingly accepted the appeal and, reversing the Trial Court's decree, remanded the case for re-trial.

The case having been re-tried the first Court again decreed the plaintiff's claim. Defendant again appealed and this time the appeal was heard by Mr. Malan, District Judge, who held that no such fraud or compulsion as alleged had been practised upon the plaintiff and stated that he had no doubt that the plaintiff was duly married to the defendant in 1911 as shown by the marriage register. He also said that some of the arguments urged on behalf of the plaintiff were not altogether devoid of force, but that it must be remembered that the plaintiff's success depended on her proving that the marriage entry of 1911 was made by fraud or compulsion. He, therefore, accepted the appeal and, setting aside the order of the first Court, dismissed the plaintiff's suit.

The plaintiff has filed a second appeal in this Court, and the main contention urged on her behalf is that Sheikh Amir Ali acted contrary to law in remanding the case and in laying the *onus* upon her. It is urged on behalf of the defendant-respondent that Sheikh Amir Ali's order of remand was one under Order XLI, rule 23, Civil Procedure Code, and was appealable under Order XLIII, rule 1 (u) of the Civil Procedure Code, and the plaint-

iff not having appealed from it was precluded now from disputing its correctness having regard to the provisions of section 105 (2) of the Civil Procedure Code. In answer to this appellant's Counsel contends that the order of remand was not one under Order XLI, rule 23 of the Code, because the Trial Court had not disposed of the case upon a preliminary point within the meaning of rule 23. He suggests that the remand must have been under section 151 of the Code; in other words, that the Court remanded the case in exercise of its inherent jurisdiction. Now, having regard to the wording of Sheikh Amir Ali's order, whereby he accepted the appeal and remanded the case to the Court of first instance for re trial, I have no doubt that he meant that the remand should be under Order XLI, rule 23, though he did not specifically say so in his order. There is no provision in the Code of Civil Procedure, other than in Order XLI, rule 23, which allows an Appellate Court to set aside the order of the lower Court and to remand a case thereto for re-trial. If it be conceded that the Trial Court did not dispose of the case on a preliminary point then it follows that Sheikh Amir Ali acted illegally in remanding the case. Now, under Order XLIII, rule 1 (*u*) an order under rule 23 of Order XLI, remanding the case is appealable where an appeal would lie from the decree of the Appellate Court. Now, there is no doubt, in my opinion, that if an Appellate Court decided an appeal upon an erroneous view of the *onus* a second appeal would lie from its decision as being contrary to law, for the question, upon which party the *onus* of proving any particular point lies, is undoubtedly a question of law, and it is, therefore, clear that Sheikh Amir Ali's order of remand was appealable under Order XLIII, rule 1 (*u*) of the Code. This being so, the plaintiff, not having appealed therefrom, is now precluded from disputing its correctness. In other words, it is not open to her in second appeal to urge that the *onus* was wrongly laid upon her. The lower Appellate Court, after considering all the evidence upon the record, has come to a clear finding that she has not discharged the *onus* and its finding appears to me to be one of fact and not open to second appeal. From Mr. Malan's judgment, moreover, I gather that, having considered the whole of the evidence upon the record, he was clearly of opinion that the plaintiff's marriage with defendant had been satisfactorily proved, and that she had failed to prove that any fraud or coercion was used to induce her to affix her thumb-mark upon the marriage register. Even had the *onus* been upon the defendant, it appears to me that he would have decided the point in his favour. The *onus*, however, was laid upon the plaintiff by the order of Sheikh Amir Ali and as that order was not objected to by an appeal lodged under Order XLIII, rule 1 (*u*), Mr. Malan was bound to proceed as if the *onus* was upon the plaintiff, and he found that that *onus* had not been discharged.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL REVISION CASE NO. 129 OF 1921.

August 19, 1921.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

HARI SADHAN ROY—JUDGMENT-DEBTOR—PETITIONER

versus

SHIB GOPAL MITRA—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 69—Execution sale taking place on date to which it was not adjourned, effect of—Material irregularity—Substantial injury.

Where an execution sale, which had been adjourned to take place on a particular date was adjourned till an another date and the sale did not take place on that adjourned day but was held on a subsequent date, to which date the sale had never been adjourned under Order XXI, rule 67, Civil Procedure Code:

Held, that there was a material irregularity in the conduct of the sale which would justify its reversal if it was established that the judgment-debtor had suffered a substantial injury by reason of the irregularity. [p. 749, col. 1.]

HARI SADHAN ROY v. SHIB GOPAL MITRA.

Jamini Mohan Nundy v. *Chandra Kumar Roy*, 6 C. W. N. 44, *Bhikari Misra* v. *Rani Surja Moni*, 6 C. W. N. 48 and *Pran Singh* v. *Janardan Singh*, 13 Ind. Cas. 337: 14 C. L. J. 541 at p 550, followed

Basharutulla v. *Uma Churn Dutt*, 16 C. 794; 8 Ind. Dec. (N. S.) 527, *Jayarama Aiyar* v. *Vridhagiri Aiyar*, 59 Ind. Cas. 167; 44 M. 35; 39 M. L. J. 188; 12 L. W. 182; (1920) M. W. N. 490, *Balkrishna* v. *Musuma Bibi*, 5 A. 142 at p. 157; 9 I. A. 182; 13 C. L. R. 232; 4 Sar P. C. J. 398; 3 Ind. Dec (N. S.) 15 P. C.), *Tasadduk Rasul Khan* v. *Ahmad Husain*, 21 C. 66; 20 I. A. 176; 17 Ind. Jur. 534 6 Sar. P. C. J. 324; Rafique and Jackson's P. C. No. 131; 10 Ind Dec. (N. S.) 676, *Gobind Lal Roy* v. *Ramjanam Misser*, 21 C. 70; 20 I. A. 165; 17 Ind. Jur 536; 6 Sar P. C. J. 356; 10 Ind. Dec. (N. S.) 679 and *Rang Lal Singh* v. *Ravaneshwar Pershad Singh*, 12 Ind. Cas. 174; 14 C. L. J. 334; 39 C. 26; (1911) 2 M. W. N. 108; 10 M. L. T. 161; 13 Bom. L. R. 823; 8 A. L. J. 1173; 16 C. W. N. 1; 38 I. A 200 (P. C.), referred to.

Rule against an order of the Court of the District Judge, Midnapur, in Miscellaneous Appeal No. 158 of 1920.

FACTS appear from the judgment.

Babu *Amarendranath Bose*, for the Petitioner.—This Rule was granted as an alternative to the connected Miscellaneous Appeal No. 42. It is directed against an order to set aside a sale held in execution of a money-decree on the 4th of November 1919 when the decree holder purchased the properties of the judgment-debtor. The decree-holder was the defendant in the suit which was dismissed with costs both by the Court of first instance as well as on appeal. The appellate decree was passed by this Court on 3rd March 19.9. On 27th May 1919 the defendant decree-holder applied for execution of the decree for costs. On 8th July 1919 the properties were attached. On 25th August 1919 the Court directed the issue of the sale proclamation and fixed 27th October 1919 for the sale. On that date we objected on the ground that no notice was served. That objection was dismissed for default on 4th November 1919. On that date the decree-holder was accorded permission to bid at the sale. There were no other bidders present and the decree-holder purchased three properties for Rs. 415. My contention was that no notice was served under Order XXI, rule 22 of the Code of Civil Procedure. On that ground, therefore, the sale would be void and the case would not be governed under Order XXI, rule 90 of the Code of Civil Procedure. It would come under section 47 of the Code. Refers to *Fuleummanessa Bibee* v. *Halamaddi Molla* (1). The lower Appellate Court has not quite appreciated my case. The sale was not fixed for the 4th November. The sale was originally fixed for 27th October 1919. On that date it was ordered to be put up on 1st November 1919. On that day again, as the Presiding Officer was on leave, the case was simply to be put up on the 4th November for order. Assuming that the sale was fixed for the 4th November it was more than seven days from the last date notified. The lower Appellate Court has wrongly applied Order XXI, rule 69 of the Code of Civil Procedure. Then they applied for substitution in the execution proceedings. The execution was for costs only. The decrees that are now being executed are of the first Court as well as of the High Court. The decree of the first Court was passed on 28th February 1910. I was the plaintiff. The suit was dismissed. The decree of the High Court was made on 3rd March 1919. The appeal was dismissed with costs. The first application for execution was on 27th May 1919 for costs. I submit there was no order for sale. It was simply ordered to be put up on 1st November 1919.

[MOOKERJEE, J.—Where is the order for issuing sale proclamation?]

There is no such order in the record. I rely on Order XXI, rule 69 (2) of the Code of Civil Procedure. The case in *Rang Lal Singh* v. *Ravaneshwar Pershad Singh* (2) has absolutely no application to the present case. Refers to High Court Rules and Circular Orders, Volume I, Chapter I, rules 94, 95 and 113; *Jamini Mohan Nundy* v. *Chandra Kumar Roy* (3), *Pran Singh* v. *Janardan Singh* (4) and *Bhikari Misra* v. *Rani Surja Moni* (5).

Babu *Sarat Chandra Roy Chaudhury* (with him, Babu *Peary Mohan Chatterjee*), for the Opposite Party.—My preliminary objection is that no second appeal lies, the application having been made under Order XXI, rule 90. In the application for setting aside sale or in the appeal there was no objection taken on the ground of notice. The Court below was, therefore, entitled to proceed on the grounds

(1) 40 Ind. Cas. 426; 25 C. L. J. 399.

(2) 12 Ind. Cas. 174; 14 C. L. J. 334; 39 C. 26; (1911) 2 M. W. N. 108; 10 M. L. T. 161; 13 Bom. L. R. 823; 8 A. L. J. 1173; 16 C. W. N. 1; 38 I. A. 200 (P. C.).

(3) 6 C. W. N. 44.

(4) 13 Ind. Cas. 337; 14 C. L. J. 541 at p. 550.

(5) 6 C. W. N. 48.

stated. The application for execution was within one year of the decree to which the appellant was a party. So far as the connected Rule is concerned, the question is whether the Judge is right in his interpretation of Order XXI, rule 69 on the Privy Council decision in *Rang Lal Singh* v. *Ravaneshwar Pershad Singh* (2). The objections now taken were never raised in the Courts below.

[MOOKERJEE, J.—Was there an adjournment of the sale at all? Look at Order XXI, rule 66.]

It is on their application that the sale was put off. I submit though the order was not explicit and happily worded its effect was to put off sale till 1st November 1919. On that date the Presiding Officer was absent and both the matters were put off till 4th November. The Privy Council case in *Rang Lal Singh* v. *Ravaneshwar Pershad Singh* (2) covers the present point. In the sale proclamation it was stated that the sale will be held in course of the monthly sales commencing on 20th November 1919. I submit there having been no particular date fixed for the sale it took place in the usual course of the monthly sales by the Court.

Babu *Amarendranath Bose*, replied briefly.

JUDGMENT.—We are invited in this Rule to set aside a sale held in execution of a money decree on the 4th November 1919, when the properties of the judgment-debtor were purchased by the decree-holder for Rs. 415. The decree-holder was defendant in the suit instituted by the judgment-debtor which was dismissed with costs by the Court of first instance as also by this Court on appeal. The decree of this Court was made on the 3rd March 1919. On the 27th May 1919 the defendant applied for execution of the decree for costs. On the 8th July 1919 the properties of the judgment-debtor were attached. On the 25th August 1919 the Court directed a sale proclamation to be issued, fixing the 27th October 1919 for the sale. On that very date, an objection to the execution was lodged by the judgment-debtor. On the 27th October 1919 two orders were recorded. The first was in the following terms: "Put it up on the 1st October (1st November?) 1919 which is the day for miscellaneous cases." The second order was in the following terms: "The decree-holder has applied for permission to bid at the sale. Let it be filed with the record and put it up on that date for orders." On the 1st November we find the following order recorded on the order-sheet:—"Opposite party is ready. Petitioner does not appear to day The Presiding Officer on leave; case be put up on the 4th November for order." On the 4th November the following order was made: "Petitioner not present and so objection is dismissed for default. Put it up for sale. Permission is given to the decree-holder to bid at sale as prayed for by him." There were no bidders present and the properties were knocked down to the decree-holder for Rs. 415. There were three properties sold and the bids offered by the decree holder were equal to the sums mentioned in the sale proclamation as the value of the different lots.

There has been some controversy as to the meaning of the order recorded on the 27th October. We are of opinion that what was intended was that the properties should be put up for sale on the 1st November, which was the date fixed for miscellaneous cases. This may be treated as an order for adjournment of sale under Order XXI, rule 69 of the Code of Civil Procedure. The order of the 1st November, however, is not capable of such an interpretation. It was clearly an order in the miscellaneous case and apparently no order for adjournment of the sale was made in the execution case. Consequently, the true position is that, although the sale was advertised to take place on the 27th October and was adjourned till the 1st November, the sale did not take place on the adjourned day but was held on the 4th November, to which date the sale had never been adjourned. This was clearly a material irregularity, as is indicated by the decisions in *Jamini Mohan Nandy* v. *Chandra Kumar Roy* (3), *Bhikari Misra* v. *Rani Surja Moni* (5) and *Paran Singh* v. *Janardan Singh* (4). The true nature of a departure of this character from the provisions of the Code was considered by this Court in *Basharutullah* v. *Uma Churn Dutt* (6), which was recently approved by the Madras High Court in *Jayarama Aiyar* v. *Vridhagiri Aiyar* (7). According to the view taken in the two cases just mentioned, a sale held under such circumstances could not be deemed a sale under

(6) 16 C. 794; 8 Ind. Dec. (N. S.) 527.
(7) 59 Ind. Cas. 167; 44 M. 35; 39 M. L. J. 183; 12 L. W. 182; (1920) M. W. N. 490.

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the Code at all. Whether such a view can be maintained in the face of the decisions of the Judicial Committee in *Balkrishna* v. *Musuma Bibi* (8), *Tasadduk Rasul Khan* v. *Ahmad Husain* (9) and *Gobind Lal Roy* v. *Ramjanam Misser* (10) may be a matter for argument. But for our present purpose, it is not necessary to adopt that extreme view, because we are clearly of opinion that there was a material irregularity in the conduct of the sale. Our attention has, however, been drawn to the case of *Rang Lal Singh* v. *Ravaneshwar Pershad Singh* (2) as an authority in support of the contrary view. In that case, the sale was directed to be held in the course of the monthly sales to commence on the 13th July. On that date the monthly sales did not commence, as the Presiding Officer was absent from the station from the 13th to the 16th July. The monthly sales began on the 17th July and, after an application for postponement had been refused, the property was sold on the 20th July, that is, within seven days from the 13th July, and consequently from the 17th July as well. In these circumstances, it was held that the sale was not an irregular sale. In the case before us, the sale was fixed for the 27th October 1919. It was not held till the 4th November 1919 though no order had been made for adjournment to that date. In fact, an adjournment to that date would have been an adjournment for a longer period than the seven days mentioned in rule 69 of Order XXI of the Code of Civil Procedure. On these facts, we are of opinion that the sale was unquestionably irregular. This alone, however, does not justify the reversal of the sale. It must be established that the judgment debtor has suffered a substantial injury by reason of the irregularity. The fact that no bidders were present except the decree-holder himself is significant. Yet that also does not show that the price paid by the decree holder is inadequate. No evidence was adduced in the Court of first instance upon the question of value and the Court proceeded apparently on the valuation made in the suit for the purpose of assessment of Court-fees on the plaint. That assessment is, no doubt, admissible in evidence between the parties. But it is not conclusive, specially if it be true that, as alleged, the property is subject to a charge which may reduce its market value.

In the circumstances, we are of opinion that the Rule should be made absolute. The order of the District Judge, as also that of the primary Court is set aside and the case is remitted to the Court, of first instance for an investigation as to the value of the properties sold upon such evidence as may be adduced by both the parties. If the Court comes to the conclusion that the judgment-debtor has suffered substantial injury by reason of the sale, the sale will be set aside. If, on the other hand, it is established that the properties have not been undersold, the sale will stand confirmed.

We make no order as to costs either here or in the Court below.

B. N. & J. P.

Rule made absolute.

(8) 5 A. 142 at p. 157; 9 I. A. 182; 13 C. L. R. 232; 4 Sar. P. C. J. 398; 3 Ind. Dec. (N. s.) 15 (P. C.).

(9) 21 C. 68; 20 I. A. 176; 17 Ind. Jur. 534; 6 Sar. P. C. J. 324; Rafique and Jackson's P. C. No. 131; 10 Ind. Dec (N. s.) 676.

(10) 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 533; 6 Sar. P. C. J. 356; 10 Ind. Dec (N. s.) 679.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 42 OF 1921.

May 26, 1921.

Present:—Syed Wazir Hasan, A. J. C.

DURGA AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM PADARATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession—Landlord and tenant—Non-payment of rent—Abandonment of possession—Constructive possession—Trespasser—Revenue Records, entries in—Presumption.

DURGA *v.* RAM PADARATH.

Where a person is entered as a tenant in the Revenue Records in respect of a plot of land, the mere fact that he has not paid any rent in respect of the plot cannot clothe him with any higher position than that which is given to him by those entries If liability for the payment of rent is fixed on such person by the entries, the non-enforcement of that liability on the part of the landlord and the non-compliance of the same obligation on the part of the tenant does not make the latter the owner of the plot in dispute. [p. 751, col. 2.]

Limitation does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the Act Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The Act applies not to want of possession by the plaintiff, but to cases where he has been out of and another in, possession for the prescribed time. [p. 752, col. 1.]

Trustees, Executors and Agency Company Limited and Templeton v. *Short*, (1888) 13 A. C. 793; 58 L. J. P. C 4: 59 L. T 677; 37 W. R 433; 53 J. P. 132, *Secretary of State for India* v. *Krishnamoni Gupta*, 29 C. 618; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 260 (P. C.), referred to.

As a general rule, possession of part is in law possession of the whole if the whole is otherwise vacant; but constructive possession of this kind can only be presumed when there is a claim based upon title. Possession by a trespasser is confined to the land actually occupied by him. [p. 752, col. 2]

Maheshwar Bakhsh Singh v. *Hon'ble Raja Pratap Bahadur Singh*, 2 Ind. Cas. 63; 12 O. C. 58, referred to.

In the absence of any evidence to the contrary, the entries in the revenue papers must be deemed to be correct. [p 751, col. 1.]

Maharaja Jagatjit Singh Bahadur v. *Suraj Bakhsh Singh*, 8 O. C. 145, referred to.

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 21st December 1920, confirming a decree of the Munsif, Musafirkhana, dated the 27th August 1920.

Mr. *S. N. Roy*, for the Appellants.

Mr. *Muhammad Wasim*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for a declaration that plot No. 1182, measuring 1 *bigha* 8 *biswas* 13 *biswansis*, situate in village Bhanauli, Pargana Musafirkhana, District Sultanpur, was owned by them; that the defendants Nos. 1 to 10 had no right therein, and that no relationship of landlord and tenant existed between the plaintiffs and those defendants. The cause of action for the suit is founded on the allegations that the plaintiffs are and have been in adverse possession of the plot in question for a period extending over more than 12 years and in consequence thereof acquired title to that plot in virtue of the rule of prescription; that up to 1315 Fasli the plot in question was entered as *bila tasfia* in the village papers but that in 1316 Fasli the Patwari of the village in collusion with the defendants entered fictitiously an amount of rent in respect of the land in suit liable to be paid by the plaintiffs to the defendants; that the plaintiffs attempted in the Revenue Court to correct the entry so made by the Patwari but they failed in their efforts to secure the correction, hence the suit for the declaration, which has already been stated. The defence, so far as it is material for the purposes of this appeal, may be stated to consist in the plea of absence of adverse possession on the part of the plaintiffs. The Courts below have granted a decree to the plaintiffs in terms of the prayer made in the plaint. The contention in second appeal is that the plaintiffs have failed to establish their title to the plot in suit by virtue of prescription.

The facts of the case are very simple. In the old Settlement (18 4) the whole of this land is shown as *maurua uftada* appertaining to the *shamilat* land of the village (Exhibit 6). The ancestor of the plaintiffs does not appear to have had any connection with this land up to that year, *i. e.*, 1864; but when we come to more recent times we find that at the revision of the Settlement of the district in the year 1891-1892 the entire area comprised in the plot was shown in the name of Ramanand who was admittedly the ancestor of the plaintiffs as a tenant *bila lagan* (Exhibit 7). Then there is again a long gap till we come to the year 1902 when we find the whole of the area entered in the name of Ramanand again as a tenant *bila tasfia*. No direct evidence of a reliable character appears to have been produced in the case, which would establish the state of things between the years 1891-1892 and 1902. At the best, the plaintiffs can ask for a presumption in the continuance of the entry as it stood in Exhibit 7. I am

prepared to make that presumption in favour of the plaintiffs' possession. It follows, therefore, that from the year 1291 up to the year 1302 the plaintiffs were continuously recorded in the village papers as tenants *bila tasfia* in respect of the plot in question. But there is again a significant change in the entry relating to this plot from the year 1310 to 1315 Fasli, both inclusive, that is, for a continuous period of six years. That alteration is marked in the village papers by an entry to the effect that out of the total area of 1 *bigha* 9 *biswas* 13 *biswansis*, 19 *biswas* 13 *biswansis* was *usar* and the remaining area of 9 *biswas* was held as tenants *bila tasfia* by the respondents or their predecessors-in-interest.

The question in the case is, whether these facts establish adverse possession so as to give title to the plaintiffs by prescription. I am of opinion that they do not. In the absence of any evidence to the contrary, the entries in the revenue papers must be deemed to be correct. This is a proposition of law which has consistently been acted upon in this Court in relation to the evidential value of the revenue papers prepared under the Land Revenue Act. There can be no question, if I may say so, that the view so held by a series of eminent Judges of this Court is perfectly correct. It finds support from several sections of the Land Revenue Act itself and is consistent also with the provisions of the Indian Evidence Act relating to public documents. I may refer only to one of such cases, which have been decided by this Court, and that is the decision in *Maharaja Jagatjit Singh Bahadur* v. *Suraj Bakhsh Singh* (1). I must, therefore, hold that *prima facie* the plaintiffs are the defendants' tenants, that no actual amount of rent has been determined as payable for the land in question either by mutual agreement of the parties or by proceedings in Court under section 127 of the Oudh Rent Act and that there is no ground upon which a higher status than that of ordinary tenants can be conceded in favour of the plaintiffs. The entries referred to above not only establish the status of the plaintiffs as that of mere tenants but they prove their liability to pay rent on a determination of it in a lawful manner. Again, the mere fact that they have not paid any rent for the plot in question cannot clothe them with any higher position than that which is given to them by the entries to which reference has already been made. If the liability for the payment of the rent is fixed on these plaintiffs by these entries, as I have held that it has been, it must be further conceded that the non enforcement of that liability on the part of the defendants and the non compliance of the same obligation on the part of the plaintiffs does not make the latter owners of the plot in dispute. It is much to be regretted that neither of the Courts below, in spite of these documents being before them, have given them any attention which they certainly deserve on the question of adverse possession, which directly arose for decision by those Courts. The judgment of the learned Subordinate Judge throws no light on the question under consideration whatsoever. He says: "The learned Pleader for the appellant has argued that in *khasras* of certain years the land is recorded as *usar* and that the possession of the superior proprietor thereon should be presumed. The contention appears to me to be unsound. The defendants claimed that the plaintiffs were their tenants and paid rent therefor Surely they cannot say that the land is *usar*." In view of the facts evidenced by these documents, to which reference has already been made, it is difficult to understand the bearing of this remark. The plea raised by the defendants that the plaintiffs paid rent since 1316 Fasli has no connection whatsoever with the period for which the land or the bulk of it stands recorded as *usar* in the Revenue Records. As I understand the judgment of the Court below, the case of adverse possession is upheld on two grounds:—(1) That "the plaintiffs have never paid any rent and they have never admitted their liability to pay rent;" (2) That "the possession of the plaintiffs from its very nature is to be taken as adverse to the superior proprietor." What essential characteristics the learned Subordinate Judge means to include within the word "nature" he nowhere describes, but so far as one can determine

(1) 8 O. C. 145.

the nature of possession as evidenced by a series of documents filed in this case its sole and only characteristic was that of possession by a tenant. As regards the non-payment of rent by the plaintiffs, I have already expressed my opinion that that fact cannot constitute an element if other elements are wanting to establish adverse possession in favour of the plaintiffs.

There is one more aspect of the case which must be considered. We have seen that, continuously, for a period of six years from 1310 to 1315 Fasli, 19 *biswas* 13 *biswansis* of the plot in question remained uncultivated and was recorded in the village papers as *usar*. Even if I hold that previous to the year 1310 Fasli it was in the actual possession of the plaintiffs or their predecessor-in-interest this long break extending over a period of six years in the possession of the plaintiffs clearly in the eyes of the law restored the original owner into the possession of that portion of the plot which remained unoccupied. This view of the law is supported by the decision of the Privy Council in *Trustees, Executors and Agency Company Limited, and Templeton* v. *Short* (2). The effect of the decision of Lord Macnaghten in this case is rightly summed up in the head note as follows :—

"The English Limitation Act (3 and 4 Will. 4, c. 27), adopted by New South Wales Act No. III of 1837, does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the Act. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The Act applies not to want of possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time." That this is also the law in India may be gathered from the decision of the Privy Council in an Indian case *Secretary of State for India* v. *Krishnamoni Gupta* (3). Their Lordships clearly referred to the Privy Council decision already referred to in support of the conclusions at which they arrived in the case.

It is also well settled law that, as a general rule, possession of part is in law possession of the whole if the whole is otherwise vacant; but that constructive possession of this kind can only be presumed when there is a claim based upon title, and that possession by a trespasser is confined to the land actually occupied by him [*Maheshwar Bakhsh Singh* v. *Hon'ble Raja Pratap Bahadur Singh* (4).]

It follows from this that the only case of adverse possession worth considering arises with reference to 9 *biswas* of land comprised in the plot in question. It must be held on the evidence that the plaintiffs have been and are in actual possession of at least that portion of the area, but as I have held already their possession, as evidenced by the Revenue Records, is that of tenants of the defendants in respect of this area as well.

I, therefore, allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiffs' suit with costs throughout.

Z. K.

Appeal allowed.

(2) (1888) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

(3) 29 C. 536; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 260 (P. C.).

(4) 2 Ind. Cas. 63; 12 O. C. 58.

EMPEROR v. BALKRISHNA GOVIND KULKARNI.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 211 OF 1921.

September 28, 1921.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

EMPEROR—APPELLANT

versus

BALKRISHNA GOVIND KULKARNI—RESPONDENT.

Contempt of Court—Newspaper charging Muffussil *Court with partiality pending proceedings—Remark, whether amounts to contempt of High Court—Bombay High Court, jurisdiction of, to deal with contempts of inferior Courts.*

Every contempt of an inferior Court will not necessarily constitute a contempt of the High Court. All such cases must be considered on their own facts. [p 758, col 2; p 766, col. 1.]

A newspaper in commenting upon a criminal trial pending against certain volunteers of a Temperance Committee in a *Muffussil* Court said, "..... there is a thick rumour that on the day on which the volunteers were arrested, the Trying Magistrate ran up the stairs of the Collector's Office and called on Mr. Painter and that some whisper took place between them. Again, Police Sahibs sit in chairs on the Magistrate's dais and wink at each other". The paper further alleged that when the Pleader for the accused observed that it was right that co-witnesses should be examined on the same day or else there was fear of the Police tutoring them, the Court adjourned the hearing one hour earlier than the hour of closing of the Court prescribed by law. The Local Government moved the High Court to take proceedings against the Editor for contempt. An objection as to jurisdiction was raised:

Held, (1) that the remarks constituted a contempt of the Court: [p 754, col. 1.]

(2) that the High Court had jurisdiction to deal with the matter for the remarks amounted to its own contempt, as they impeded the due administration of justice, for which the High Court was responsible not only as regards itself, but also as regards all the Courts which were inferior to it. [p 764, col. 2.]

Per *Macleod, C. J. (Shah, J.,* contra*)*—The High Court of Bombay has the same powers of punishing for contempt as the Court of the King's Bench by virtue of the Common Law of England Therefore, it has jurisdiction to deal with contempts of inferior Courts. [p 764, col. 2.]

Mohandas Karamchand Gandhi, In re, 58 Ind Cas. 915; 22 Bom. L. R 368; 21 Cr. L. J. 835, *Rex* v. *Davies*, (1906) 1 K. B. 32 at p 40; 75 L. J. K. B. 104; 93 L. T 772; 54 W. R. 107; 22 T. L R. 97, *Rex* v. *Parke*, (1903) 2 K. B. 432 at pp. 436, 437; 72 L. J. K. B. 839; 89 L. T. 439; 52 W R. 215 67, J. P. 421; 19 T. L. R. 627, *Hassonbhoy* v *Cowasji Jehangir Jussawalla*, 7 B. 1; 4 Ind. Dec. (N. S.) 1, *Venkat Row, In re*, 12 Ind. Cas 293; 21 M. L. J. 832; 10 M. L. T. 209; 12 Cr. L. J. 525, *Rex* v. *Almon*, (1770) 5 Burr. 2686; 98 E. R. 411, *Helmore* v. *Smith*, (1886) 35 Ch. D. 449 at p. 455; 56 L. J. Ch. 145; 56 L. T. 72; 35 W. R. 157, *Clements, In re*, (1877) 46 L. J. Ch 375 at p. 383; 36 L. T. 332, *Governor of Bengal* [*Legal Remembrancer*] v. *Moti Lal Ghose*, 20 Ind Cas. 8'; 41 C. 173 at p. 202; 14 Cr. L. J. 321; 17 C. W. N. 1253; 18 C. L. J 452, *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court*, 10 C. 109; 10 I. A. 171; 4 Sar. P. C. J. 474; 5 Ind. Dec. (N. S.) (P. C.) 76 and *Plating Co.*, v. *Farquharson*, (1881) 17 Ch. D. 49; 50 L. J. Ch. 402; 44 L. T. 389; 29 W. R. 510; 45 J. P. 568, referred to.

Any remarks reflecting on the character or impartiality of a Magistrate in the course of a trial must necessarily be contempt [p 754, col. 1.]

Reg v. *Gray*, (1900) 2 Q. B. 36 at p. 40; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R 305, referred to.

Criminal application for revision by the Government of Bombay.

Messrs. *G. N. Thakor* and *H. B. Gumaste*, for the Respondent.

Mr. *Bahadurji*, Acting Advocate-General, (with him Mr. *S. S. Patkar*, Government Pleader), for the Crown.

JUDGMENT.

MACLEOD, C. J.—This is a Rule granted at the instance of the Government of Bombay calling upon Balkrishna Govind Kulkarni, Editor and Publisher of the *Shubhodaya* newspaper, at Dharwar, to show cause why he should not be committed for contempt of Court in respect of the publication of an article commenting on the proceedings in the Court of the First Class Magistrate at Dharwar against two volunteers of the Temperance Committee who were alleged to have extorted some money from a Bhangi.

The article commences:—

"Proceedings have been instituted against two volunteers of the Temperance Committee for the alleged extortion of thirteen annas and the hearing commenced ten days back... The Police have appointed to conduct the case one of their Inspectors who merely does what he is asked to do by the Police and echoes them and earns his pay without any trouble. Every one in the town seems to be under the impression that the complainants voluntarily paid the fine and that the case owes its origin to the pressure of the liquor contractors who desire to make fortune by selling toddy. Moreover, there is a thick rumour that on the day on which the volun-

teers were arrested the Trying Magistrate ran up the stair case of the Collector's Office and called on Mr. Painter and that some whisper took place between them. Again, Police Sahibs sit in chairs on the Magistrate's dais and wink (at each other). The chief complainant is a Bhangi under the District Superintendent of Police who receives his pay from the Police Department."

There are further allegations that the District Police Superintendent was speaking in the middle when witnesses were being examined; that when the Pleader for the accused observed that it was right that co-witnesses should be examined on the same day or else there was fear of the Police tutoring, the Court adjourned the hearing one hour earlier than the hour of closing of the Court prescribed by law; that, although the evidence of the witnesses had been satisfactory, the accused were not enlarged on bail.

It can hardly be disputed that these remarks constitute a very gross contempt of Court.

In the first place, such comments, while proceedings are pending in a Court of law, tend to deprive the Court of the power of doing that which is the end for which it exists, to administer justice duly, impartially, and with reference solely to the facts brought before it. Secondly, any remarks reflecting on the character or impartiality of the Magistrate in the course of the trial must necessarily be contempt: *Reg.* v. *Gray* (1).

Now, the innuendo in the passages complained of is perfectly clear. The public are told that the general impression is that the accused are innocent; that, instead of extorting thirteen annas from the Bhangi, they received the amount as a voluntary contribution; that the liquor contractors and the Police are collaborating in the prosecution; that the Trying Magistrate is taking his orders from the Collector, and in his conduct of the trial is acting with great favouritism towards the Police and with gross partiality against the accused. It is not difficult to imagine what the result of such comments would be amongst the public in times of political excitement. They would be induced to think, if the accused were convicted, that they had been denied the essentials of a fair trial and that the Court, whose function it was to render justice to all who might appear before it, had been prostituted to procure the conviction of innocent men in order to gratify the avarice of the liquor contractors.

The respondent says in his affidavit by way of explanation:—

"In publishing the article complained of I had no desire or intention in any way to interfere with or obstruct the due course of administration of justice or in any way to prejudice the fair trial of the case. I wrote the article in the discharge of what I believe to be my duty as a journalist, believing in good faith that I was entitled to do so having regard to the fact that the case was regarded on all hands to be one of public interest and importance. I may add that I have all along believed that it is open to a journalist in the discharge of his duties to offer fair and legitimate comments on all matters affecting the public interest, and that in the publication of the article in question I was actuated by no other motive or desire whatever than that of doing my duty to the public as a journalist by offering fair comments on matters of urgent public interest...If this Hon'ble Court is, however, of opinion that even the mere publication of comments on proceedings pending in the Court of a subordinate Magistrate amounts in law to a contempt of Court of which this Hon'ble Court will be entitled to take notice, I am willing to abide by this Hon'ble Court's ruling on the point and to express my sincere regret for having published the article in ignorance of the law governing the publication of such comments."

The respondent is a Pleader of mature age and his affectation of ignorance of the law with regard to a journalist's right to comment on pending judicial proceedings can be accepted at its true value.

With regard to his allegations against the Magistrate the respondent says:—

"I fully believed in the truth of the statement when I published the same, on the strength of a thick rumour which I had myself heard and which was confirmed by information of a definite nature personally conveyed to me by a gentleman in Government service in whom I confided and whom I had

(1) (1900) 2 Q. B. 36 at p. 40; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305.

no reason to disbelieve. Being, however, a Government servant the gentleman is not *now* prepared to back me up by his affidavit and it would on my part also involve a breach of journalistic etiquette to disclose his name... Now that I find that the fact alluded to by me is denied on oath by the learned Magistrate and that the matter is not within my personal knowledge, I feel it to be the more honourable course for me to withdraw the same and also to express my sincere regret for having published the same."

The question for decision is, whether the High Court of Bombay has jurisdiction to deal with a person who has been guilty of contempt of a Court in the Mofussil subordinate to the High Court. In *Mohandas Karamchand Gandhi, In re* (2) the respondents were charged with contempt of the High Court for publishing a certain letter which formed part of the record of proceedings then pending in the High Court; but incidentally some of the comments complained of reflected on the District Judge of Ahmedabad and it appears to have been accepted by the learned Judges that the High Court could have jurisdiction to deal with contempts of the Mofussil Courts. However, the question was not seriously argued, no Indian cases were cited, and that expression of opinion cannot be considered as binding upon us. It is sufficient to say that, at that time, it did not occur to the learned Judges that such jurisdiction might be disputed.

Marten, C. J., said (page 375*):—

"It makes no difference, I think, that the alleged abuse here was of a District and not of a High Court Judge. *Rex* v. *Davies* (3) shows that in England the High Court has power to protect the Courts of inferior jurisdiction and that in a proper case it should do so. I think the same power exists in India, and that, subject to the precautions which Lord Russell mentions...[*Reg.* v. *Gray* (1)], this Court should extend its protection to all Courts in the Mofussil, over which it exercises supervision."

Hayward, J., said (page 381*):—

"A contempt of Court of a more serious nature was, in my opinion, committed in commenting in the particular manner on that letter. It amounted clearly to 'scandalising' Mr. Kennedy as District Judge...It was Mr. Kennedy's duty...to report the matter in question as District Judge for the orders of High Court...It has...become our duty to protect the proceedings of the District Judge under the powers shown by the precedents of *Rex* v. *Parke* (4) and *Rex* v. *Davies* (3) to be vested in us as Judges of the High Court."

See also *Hassonbhoy* v. *Dowasji Jehangir Jassawalla* (5), where West, J., in dealing with the powers of the High Court to commit for contempt, said at page 4,—

"Such a power indeed must exist somewhere in order to secure the administration of the law, and it can be safely restricted in the case of the lower Courts only because it is held and exercised by those to which they are subordinate."

The first direct Indian authority on the question is *Venkat Row, In re* (6). An injunction order was passed by the District Munsif of Bellary against Venkatrao, a Pleader, in a pending suit. While proceedings were pending against him for disobedience to the injunction order, the Munsif was served with notice of suit for damages in respect of the injunction proceedings. It was alleged in the notice that the Munsif had acted maliciously and without reasonable cause and in furtherance of the ill-will he bore the respondent. At the hearing of the motion for contempt, made at the instance of the Advocate-General, Counsel for the respondent tendered an apology and said he was not going to argue the question of jurisdiction. However, he was allowed to argue the question as *amicus curiæ*. The Chief Justice, in giving judgment, said (page 838*):—

"It seems to me that there are two questions for us to consider: First, have we inherent Common Law jurisdiction in the matter? And, secondly, have we statutory jurisdiction under the powers conferred on this Court by section 15 of the High Courts Act."

(2) 59 Ind. Cas 915; 22 Bom. L. R. 368; 21 Cr. L. J. 835.

(3) (1906) 1 K. B 32 at p 40; 75 L. J. K. B. 104; 93 L. T. 772; 54 W. R. 107; 22 T L. R. 97.

(4) (1903) 2 K. B. 432 at pp. 436, 437; 72 L. J. K. B. 839. 89 L. T. 439; 52 W. R. 215; 67 J. P. 421; 19 T. L. R. 627.

(5) 7 B. 1; 4 Ind. Dec. (N. s.) 1.

(6) 12 Ind. Cas. 293; 21 M. L. J. 832; 10 M. L. T. 209; 12 Cr. L. J 525

*Pages of 22 Bom. L. R.—[*Ed.*]

*Page of 21 M. L. J.—[*Ed.*]

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What was the Common Law of England with regard to the powers of the King's Bench Division of the High Court in England with reference to contempt committed of inferior Courts, has been decided in *Rex* v. *Parke* (4), and *Rex* v. *Davies* (3), and the latter decision makes it clear that the King's Bench has jurisdiction to commit for contempt of an inferior Court, even if the inferior Court was dealing with a case which would not be taken to a Tribunal which was a branch of the High Court. After discussing these cases and the argument that there might be a distinction between cases of contempt of an inferior Civil Court and contempt of an inferior Criminal Court, the Chief Justice came to the conclusion that, as the Privy Council had decided that the High Court had the inherent Common Law powers in connection with matters of contempt which were exercised by the old Court of King's Bench and now by the King's Bench Division, and as the King's Bench Division had powers to commit for contempt of an inferior Court, the High Court had the same jurisdiction. But the Chief Justice was not prepared to hold that jurisdiction was given by section 15 of the Indian High Courts Act which gave powers of superintendence with regard to subordinate Courts.

In *Rex* v. *Parke* (4) a person having been charged before the Petty Sessions with an indictable offence triable only at the assizes, matter was published in a newspaper tending to interfere with the fair trial of the charge. It was held that the High Court had jurisdiction to attach the publisher for contempt notwithstanding that, at the time of publication, the person charged had not been committed for trial. It was argued that there was no jurisdiction because at the time of publication of the articles complained of there were no proceedings actually pending in any Court but the Petty Sessional Court that the jurisdiction was confined to cases in which at the time of publication there was some cause actually pending in the High Court, and that the High Court could not deal by way of attachment for contempt with interferences with the due course of justice in any Court other than itself. On this Wills, J., said (page 436*),—

"It may be conceded that the jurisdiction to commit for contempt of Court is confined to contempt of the Court exercising the jurisdiction. Upon the wider and more general question, whether this Court will treat in this fashion inroads upon the independence of inferior Courts, we propose to say a few words towards the close of this judgment. As far as the present case is concerned, it does not seem to us to arise. By the Judicature Act...the Court of a Commissioner of Assize is made a branch of the High Court. The crime of which Dougal was accused...could not in the regular course of things be tried anywhere but at the Assizes...It has been argued,....that publication of articles of the kind in question cannot be treated as a contempt of the Assize Court unless the committal has actually taken place and a bill been found, when only, it is urged, is there a case pending in the Assize Court, and when, it is also urged, the jurisdiction ought to be exercised by that Court itself. A moment's consideration...is sufficent to dispose of such a proposition...The wrong can hardly be the less because the purpose or the tendency of the act complained of is that the Assize Court never shall have undisturbed power to fulfil its functions satisfactorily. The High Court exists always. To provide beforehand that one of its branches which although it does not at the moment exist, yet must, both according to immemorial custom, and now also by Statutes and rules having the same effect, come into existence, shall be hampered and hindered in the effectual discharge of its duties as soon as it is constituted, if called upon to try a particular case which it is, at all events, proposed to bring into that Court, is surely an offence against the High Court itself."

Then, after discussing the precedents, the learned Judge proceeded at page 442 *,—

"For what they are worth, they tell rather against than for the general jurisdiction of this Court to protect inferior Courts from attacks of this kind on their independence and usefulness. On the other hand, very serious and important considerations tend the other way. Many inferior Tribunals are not Courts of Record, and, therefore, have no means of checking practices of the kind with which we are dealing ...This Court exercises a vigilant watch over the proceedings of inferior Courts, and successfully prevents them from usurping

* Pages of (1903) 2 K. B.—[*Ed.*]

powers which they do not possess, or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interferences with their independence on the part of others...But we purposely abstain from pronouncing any opinion upon this general question and prefer to leave it entirely open when the occasion shall arise, and at the present moment confine ourselves to saying, with Wright, J., that we should hesitate long before casting any more doubt than may already exist upon the capacity of this Court to deal by proceedings for contempt with cases in which attempts are made to pollute the stream of justice, and to interfere with its proper and unfettered administration by Courts which possess no adequate means of protecting themselves."

The occasion arose in *Rex* v. *Davies* (3) where remarks had been published in a newspaper tending to interfere with the fair trial of a person charged at the Petty Sessions with an indictable offence triable either at the Assizes or at Quarter Sessions. The Court held that the decision in *Rex* v. *Parke* (4) was applicable. But as a further question of great and growing importance, namely, the jurisdiction of the High Court to treat attacks of that kind upon the independence and usefulness of inferior Courts, as offences to be dealt with *brevi manu* by the High Court in its summary jurisdiction, it was considered desirable to treat the case as if a committal had actually taken place to Quarter Sessions which was not a branch of the High Court. Wills, J., first referred to passages in Lord Coke's Institutes and Hawkins' Pleas of the Crown to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior Courts and that it was in a special manner the guardian and protector of public justice throughout the kingdom. The same may be said of this High Court with regard to the Presidency or per of Bombay. Then the learned Judge asked what was the principle which was the root of and underlay the cases in which persons had been punished for attack upon Courts and interferences with the due execution of their orders. He said at page 40*,—

"It will be found to be, not the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the Tribunal be undermined or impaired; see the judgment prepared by Wilmot, C. J. in *Rex* v. *Almon* (7) but not delivered because the case was allowed to drop: Wilmot's Opinions, page 256. The word 'authority' is used by him to express 'the deference and respect which is paid' to the Judges of a Court and their acts 'from an opinion of their justice and integrity.' These words are apt with respect to the particular case with which he was dealing. But what possible difference in principle can there be in respect of direct attacks upon Courts or Judges, and of writings, the tendency of which is to deprive the inferior Courts beforehand of the possibility of doing evenhanded and impartial justice according to the due course of law? To hold that there was a distinction would give colour to the notion which cannot be too strongly repudiated, that the offended dignity of a particular Court, or of the persons who compose it, is the subject of punishment in such a case. 'The object of the discipline enforced by the Court in cases of contempt of Court,' says Bowen, L. J., 'is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice': *Helmore* v. *Smith* (8) and a considerable part of the undelivered judgment of Wilmot, C. J., to which we have referred is devoted to showing that the real offence is the wrong done to the public by weakening the authority and influence of a Tribunal which exists for their good alone,... 'Attacks upon the Judges,' he says, 'excite in the minds of the people a general dissatisfaction with all judicial determinations...and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion

*Page of (1906) 1 K. B.—[*Ed.*]

(7) (1770) 5 Burr. 2686; 98 E. R. 411.

(8) (1886) 35 Ch. D. 449 at p. 455; 56 L. J. Ch. 145; 56 L. T. 72; 35 W. R. 157.

calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of the Judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for the giving justice that free, open, and unimpaired current which it has for many ages found all over this Kingdom:' Wilmot's Opinions, pages 255, 256. With a few verbal alterations those eloquent words will apply with at least equal force to writings the direct tendency of which is to prevent a fair and impartial trial, or at least one that can be so considered, from being had in Courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence. The public mischief is identical, and in each instance the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy."

At page 42* the learned Judge refers to the great principle, that Courts or the administration of justice exist for the benefit of the people, that for the benefit of the people their independence must be protectsd from unauthorised interference, and that the law provides effective means by which this end can be secured :

"If it is to be secured at all in the case of the inferior Courts it can only be secured by the action of this Court, for they have not the power to protect themselves; and if it be true that the King's Bench is in any sense the *custos morum* of the kingdom it must be its function to apply, with the necessary adaptations to the altered circumstances of the present day, the same great principles which it has always upheld."

The learned Judge then points out the essential difference between the jurisdiction exercised by the Court of King's Bench and that of the other Courts which possessed none of the relations with the inferior Courts which have always appertained to the King's Bench, 'whose peculiar function it was to exercise superintendence over the inferior Courts and confine them to their proper duties', and continues (page 43*),—

"This, however, as it seems to us, was only one exercise of the duty of seeing that they did impartial justice, and if and when the attainment of that end required that the misdeeds of others should be corrected as well as the misfeasances of the inferior Courts themselves, it seems to us that it is no departure from principle, but only its legitimate application to a new state of things, if others whose conduct tends to prevent the due performance of their duties by those Courts have to be corrected as well as the Courts themselves."

Then, after discussing the authorities, the learned Judge says (page 47* :

"It appears to us that the state of the authorities, such as they are, is such as to leave the question, as was pointed out in *Rex* v. *Parke* (4), entirely open for our decision. Our attention has been called to observations of Sir George Jessel, M. R., in *Clements, In re*, (9) as to the necessity of caution in dealing with a matter where the liberty of the subject is concerned. Such considerations have been fully present to our minds, and certainly needed no authority to enforce them. It is because we think that we are creating no new jurisdiction, but acting strictly in conformity with the cardinal principles upon which the jurisdiction to commit for conduct tending to improperly interfere with the administration of justice rests, that we have come to the conclusion at which we have arrived. To confine the application of such principles to facts identical with or closely resembling those of preceding cases, and to hold that, because in times long gone by, the chief, if not the only, danger to be guarded against was the illegal exercise of arbitrary power by inferior Courts and their officers, therefore, the power of this Court extends no further, and that the King's Bench cannot afford them protection as well as administer correction, would, we think, be to mistake the application of the principle for the principle itself. The mischief to be stopped is in the case of the inferior

(9) (1877) 46 L. J. Ch. 375 at p. 383; 36 L. T. 332.

*Pages of (1906) 1 K. B.—[*Ed.*]

Courts identical with that which exists when the due administration of justice in the superior Courts is improperly interfered with. The reason why the Court of King's Bench did not concern itself with contempts of the other superior Courts was that they possessed ample means and occasions for protecting themselves. Inferior Courts have not such powers, although some of them, Quarter Sessions, for example, try many more cases than are tried at Assizes, and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the superior Courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings. Thinking as we do that the application now before us asks for nothing more than the legitimate application to new circumstances of the old principles of the Common Law, we have come to the conclusion that we ought to grant the remedy invoked, and it remains only to consider the penalty that ought to be inflicted."

Davies was fined £ 100 and costs.

I need make no excuse for siting at so great a length from this judgment, as otherwise it would not have been possible to realise the foundations on which it rested. The administration of justice is for the benefit of the people, therefore, any unauthorised interference with the administration of justice is against the interests of the people. The inferior Courts cannot protect themselves against such interference, but as it is the duty of the King's Bench in exercise of its powers of superintendence to see that the inferior Courts do impartial justice and, if necessary, correct their misfeasance so it is also the duty of the King's Bench to correct the misdeeds of others which tend to prevent the due performance of their duties by the inferior Courts. And the key of the whole argument will be found when the learned Judge points out that, whether the administration of justice by the inferior Courts or by the superior Courts is interfered with, the mischief is identical,

It seems to me, moreover, that every word in that judgment is applicable to the case before us. This High Court possesses the same powers of punishing for contempt as the Court of King's Bench by virtue of the Common Law of England. It has powers of superintendence over all the Courts, Civil and Criminal, in the Presidency proper and it may be noted that in this case an application has already been made to this Court to exercise its revisional powers on behalf of the accused, and by virtue of its Charter it can withdraw to itself any case, civil or criminal, pending in any of the Courts subordinate to it. It is responsible for the administration of justice not only by itself but also by all the inferior Courts, and as it is its duty to see that those Courts do not exceed their powers, I should have thought it must also be its duty to see that there is no improper interference by others which may prevent those Courts from properly exercising their powers, and, therefore, if the duty lies at Common Law, the power to enforce its orders must also exist at Common Law.

However, the contrary view has been expressed by the High Court of Bengal in *Governor of Bengal (Legal Remembrancer)* v. *Moti Lal Ghose* (10) and it will be necessary to consider the judgments, which cover over sixty printed pages, at some length. The facts were that while proceedings in what was known as the *Barisal Conspiracy Case* were going on in the Court of the Additional District Magistrate at Barisal various articles appeared in the *Amrita Bazar Patrika*, a paper published in Calcutta, containing comments on the proceedings. It was contended that the publication of these articles tended to interfere with the due course and administration of justice, Jenkins, C. J., said,—

"Have we...jurisdiction to commit for contempt of an inferior Criminal Court? The question is one of considerable difficulty and cannot, as seemed to be supposed, be solved or even understood by a mere perusal of the decision in *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court* (11) and *Rex* v. *Davies* (3). To determine the High Court's jurisdiction in this matter involves an enquiry into its constitution and the jurisdiction, power and authority it has inherited, or may otherwise possess."

(10) 20 Ind. Cas. 81; 41 C. 173 at p. 202; 14 Cr. L. J. 321; 17 C. W. N. 1253; 18 C. L. J. 452.

(11) 10 C. 109; 10 I. A. 171; 4 Sar. P. C. J. 474; 5 Ind. Dec. (N. S.) 76 (P. C.).

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The High Court inherited all jurisdictions and every power and authority in any manner vested in the Supreme Court, the Sudder Diwani Adawlat and the Sudder Nizamut Adawlat. The Supreme Court established by Charter in 1774 was thereby constituted a Court of Record, but it had no general control or power over the Mofussil Criminal Courts. The Sudder Diwani Adawlut, whose jurisdiction was civil was, under 21 Geo. III, C. 70, section 21, constituted a Court of Record. The Sudder Nizamut Adawlut did not appear to have been even constituted a Court of Record and, therefore, it had no power to commit for contempt of an inferior Court which could only punish under Act XXX of 1841 contempts committed in the face of the Court. The Chief Justice then, after concluding that the High Court could not have inherited the jurisdiction from either of these abolished Courts, considered whether the jurisdiction could have become vested in it by the Charter Act 1861, or the Letters Patent under that Act and whether the decision in *Rex* v *Davies* (3) was applicable. Analysing the judgment in that case, the Chief Justice points out that the jurisdiction assumed was inherited from the old King's Bench and was of a special character as it rested on that Court's power to punish every kind of misdemeanour as the guardian and protector of public justice throughout the kingdom, the '*custos morum*' a dignity that reverted to it or was revived after the abolition of the Star Chamber. The helplessness of the inferior Court and its subjection to the superintendence and control of the King's Bench were not the foundations of the jurisdiction but merely the occasion and the reason for its exercise. The Court considered that the proceedings before it were the legitimate application to new circumstances of the old principle of the Comman Law, and as according to those principles the King's Bench as *custos morum* had jurisdiction to punish on a summary proceeding as well as on indictment or information all offenses in the kingdom being a contempt of Court as tending to interfere with the administration of justice, when the Court embarrassed was under the superintendence of the King's Bench and unable to protect itself. Common Law principles should be applied on a summary proceeding. Had the High Court Common Law powers to punish as an offence on a summary proceeding conduct in relation to a proceeding in a Mofussil Court which was not an offence under the Indian Penal Code, and which could only be considered as a contempt of the Mofussil Court? As superintendence did not give jurisdiction and the King's Bench powers to punish for interference with the lower Courts did not arise from its being a Court of Record but from its Common Law powers as *custos morum*, which the High Court did not possess, it followed that the High Court had not the jurisdiction which was sought for it. The learned Chief Justice refrained from commenting on the decision in *Venkat Row's case* (6) on the ground that to appreciate the *ratio decidendi* it would be necessary to possess an intimate acquaintance with the nature and limits of the jurisdiction of the High Court of Madras inherited from its predecessor or vested in it by its Charter. He had none of the materials necessary for that purpose nor could he tell how for the Common Law prevailed in the Madras Presidency outside the Presidency town. But, with all due respect, the *ratio decidendi* in *Venkat Row's case* (6) is perfectly clear for the Chief Justice of Madras did not go beyond the decision of the Privy Council in *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court* (11) to the effect that the High Courts in the presidencies were superior Courts of Record and their power of punishing for contempt was the same as in England by virtue of the Common Law of England. Then, as the King's Bench had the power to punish for contempt of Court involved in the interference with the administration of justice by an inferior Court it was inferred that the High Court of Madras had the same power. If there was jurisdiction in the High Court to deal with contempt of an inferior Court it did not much matter if the jurisdiction was exercised on the ground that the contempt of the inferior Court amounted to a contempt of the Court exercising jurisdiction. The cause of the difference of opinion between the Chief Justices of Bengal and Madras is obvious. The argument of Jenkins, C. J., is as follows:—The King's Bench had jurisdiction to punish

on a summary proceedings all contempts of Court, by virtue of its position as *custos morum*, not because it was a Court of Record. The other superior Courts were Courts of Record but had no power to punish for contempts which did not tend to interfere with the administration of justice by such Courts. The High Court of Bengal was in no better position than the English Superior Courts other than the King's Bench and, therefore, had no jurisdiction to punish for contempts of other Courts. White, C. J., on the other hand, argued, the High Court Madras is a Court of Record, it has also powers of superintendence over the inferior Courts as the King's Bench has, and, consequently, the High Court has jurisdiction to punish contempts which tend to interfere with the administration of justice whether by the inferior Court or by the High Court itself. He did not think the High Court had jurisdiction under section 15 of the Indian High Court Act. That may be so, but I do not think that the learned Chief Justice can be taken as holding that if the High Court of Madras was only a Court of Record with no powers of superintendence over the Mofussil Courts, it would have had jurisdiction to punish contempts which were directed in the first instance against the Mofussil Courts. For he especially refers to the passage in *Rex* v. *Parke* (4) to the effect that the power of guarding the inferior Courts against unlawful attacks was the natural corollary of the power of superintendence. Again, in the *Barisal* case, the contempt alleged was treated in the first instance as a contempt of the Barisal Court, and not of the High Court. White, C. J., considered that a matter of academical interest, but it is much more than that, when a question of logical accuracy is involved. For in *Rex* v. *Parke* (4) Wills, J., conceded that the jurisdiction to commit for contempt was confined to contempt of the Court exercising jurisdiction and there is nothing in the judgment in *Rex* v. *Davies* (3) delivered by the same learned Judge which would lead one to think that what had been conceded in *Rex* v. *Parke* (4) was withdrawn in *Rex* v. *Davies* (3) Jenkins, C. J., no doubt did consider the question whether the High Court could deal with the contempt alleged on the ground that the case might come before it either for original or appellate trial at one stage or another but declined to express any opinion on the point on the ground that it had not been discussed in the argument. And, after discussing the articles complained of, the Chief Justice says (page 220*),—

"The conclusion then to which I come is, that though we may have jurisdiction to commit for contempt of the High Court in a case of this class, still in the present case no contempt justifying summary action on our part has been established."

Stephen, J., after discussing *Rex* v. *Parke* (4) and *Rex* v. *Davies* (3), came to the conclusion that the latter decision depended on general powers possessed by the King's Bench to secure proper administration of justice to His Majesty's subjects which the learned Judge could not find to have been conferred upon the High Court, so that it was impossible to hold that their powers of superintendence implied any power of protection. But the learned Judge discussing what might happen if the case came before the High Court on appeal continued (page 230*),—

"As a matter of principle, it seems to me undeniable that we have a right to treat as a contempt any act committed within the local limits of our original jurisdiction that may affect its trial on appeal, and in particular any act that may tend either to taint or impair that evidence or to cause evidence that would otherwise be forthcoming to be withheld."

However, on a review of the articles complained of, the learned Judge considered that there was no contempt, however widely the law of contempt might be stated. The decision of the Madras High Court was not discussed, Mookerjee, J., considered that there was no foundation laid by the Crown for the theory that the High Court as a Court of Record had authority to punish for contempt of the Court of the Magistrate of Barisal merely because the High Court was a Court of Record which exercised powers of superintendence over that Court or because that Court was subject to its appellate and revisional jurisdiction. The hypothesis that a superior Court which exercised a power of superintendence over

*Pages of 41 C.—[*Ed.*]

a subordinate Court possessed by implication a power to afford to such Court's protection against contempts of its authority, was no doubt attractive but had no solid foundation in the history of the constitution of their Courts. In dealing with *Venkat Row's case* (6) the learned Judge said (page 248*):—

"The proposition that the High Court, in so far as it has inherited the jurisdiction of the abolished Supreme Court, possesses inherent Common Law powers in connection with matters of contempt which were exercised by the Court of King's Bench, is of no assistance in the solution of the problem now before us, namely, whether the High Court as a Court of Record can punish for contempt of a subordinate Court over which it exercises powers of superintendence and which is subject to its appellate and revisional jurisdiction. The fundamental distinctions between the two questions is easily realised from an examination of the decision in *Rex* v. *Davies* (3) upon which the Advocate-General relies as the learned Judges of the Madras High Court did in *Venkat Row, In re* (6)"

The conclusion in *Rex* v. *Davies* (3) was not based on the ground that the King's Bench Division possessed the powers merely because it was a Court of Record or because it exercised powers of surperintendence over inferior Courts, but was founded on a historical consideration of the supreme place in the judicature assigned to the Court of King's Bench which had power to correct errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subjects or any other manner of mis-government, and was in a special manner the guardian and protector of public justice throughout the Kingdom. The learned Judge thought it was obvious that those considerations of a very special character had no application to the High Court of Bengal and if they were to apply the principle which lay at the foundation of the decision in *Rex* v. *Davies* (3) they would have to hold that the Common Law of England was applicable throughout the jurisdiction of the Court even to persons other than British subjects beyond what was the territorial limits of the ordinary jurisdiction of the abolished Supreme Court. On a review of the article complained of the learned Judge thought that they did not constitute a contempt of Court of the Magistrate of Barisal much less of the High Court. The fact that none of the learned Judges considered that the articles complained of constituted a contempt had no doubt some influence on their judgments and the Chief Justice certainly refrained from holding that in no case of that class could a contempt of the High Court be committed. Although the question of the jurisdiction of the King's Bench was not decided until 1906, the effect of the decision in *Rex* v. *Davies* (3) was that, according to the Common Law of England, the King's Bench always had jurisdiction to deal with contempts of inferior Courts which by tending to interfere with the due administration of justice constituted contempts of the King's Bench. It would follow that the Supreme Court by its Charter had the same jurisdiction to the extent of its territorial limits. If those limits had been extended to the Presidency proper, its jurisdiction in matters of contempt would have extended in the same way, and because the Supreme Court was abolished and the territorial limits of the High Court which took its place were extended by the same measure which brought it into existence, there is no reason why its jurisdiction in matters of contempt should be restricted to the territorial limits of the old Supreme Court. Of course, by territorial limits I mean the limits within which the High Court exercises appellate and revisional powers and powers of superintendence. It is true that the powers of the High Courts to correct errors and misdemeanours are defined and limited by Statute, but the power to punish for contempt remains as given to it by the Common Law. I entirely agree with Mookerjee, J., when he says at page 260*,—

"The power...must be exercised with caution and only when the case is clear beyond controversy, because, as Sir George Jessel observed in *Plating Co.* v. *Farquharson* (12), it is an arbitrary jurisdiction. There is no limit to the amount of the fine which may be inflicted or to the length of the term of imprisonment which may be directed; there is no appeal as a matter of right against an order of attachment...It is the only

(12) (1881) 17 Ch. D. 49; 50 L. J. Ch. 406; 44 L. T. 334; 29 W. R. 510; 45 J. P. 568.

*Pages of 41 C.—[*Ed.*]

criminal offense summarily punishable. The Court will consequently not make an order for attachment, unless it is satisfied beyond dispute that the order is needed peremptorily in the interests of the administration of justice."

The learned Judge refers to what historians have recorded as the policy of the Emperor Augustus as in dealing with such matters; but I think that in deciding whether or not to take notice of contempts the consideration which might have influenced a Roman Emperor in exercising lenieney or passing them by unnoticed would have to be revalued by the Courts according to modern circumstances. We are not concerned with the fact that there are other Courts of highest jurisdiction in India which do not possess the Common Law powers of the King's Bench. We are only concerned to see that what jurisdiction the High Court possesses, so as to preserve the administration of justice pure and unobstructed for the benefit of the people of the Presidency proper, should be exercised as occasion demands with all due care and deliberation. We must exercise the high functions entrusted to us according to due course of law, and I venture to think there is evidence, in the words of Mr. Justice Wills, to show the very great trust reposed in this Court in respect of its control and superintendence of all inferior Courts subordinate to it, and that it is in a special manner the guardian and protector of public justice. It is by writings such as the one complained of in this case that the public mind is poisoned and their belief in the impartiality and incorruptibility of the Courts is sought to be destroyed, and we cannot fulfil that trust if the administration of justice can be interfered with without any power on our part to prevent it.

However desirable it might be that it should have that power, however attractive the hypothesis that the power of superintendense carries with it the power of protection, the High Court of Bengal can find no foundation in the history of its constitution for holding that it has that power The High Court of Madras, without considering its own history, has boldly linked to a dictum of the Privy Council a modern decision which has discovered for the King's Bench its inherent powers to punish all attempts to interfere with the administration of justice.

I see nothing in the history of the constitution of this Court which should deter me from holding that we have the same powers of punishing for contempt as the King's Bench Division. The Supreme Court had the power but its jurisdiction in this respect was limited not by its constitution but by its geographical limits consequent on its being established by the Crown within the territories of the East India Company, for certain purposes, which left the jurisdiction and powers of the Company's Courts free from all constraint or superintendence by the Supreme Court. The jurisdiction of the Supreme Court to punish for contempt in cases of this class thus lying dormant of necessity was inherited by the High Court and, although by virtue of its extended authority, occasions might have arisen for its exercise, nearly sixty years have passed before even the question of its jurisdiction has come up for decision.

It is not every contempt of an inferior Court which will necessarily constitute a contempt of this Court. That is a question which must be decided in each case as it arises. Viewed in this light, the question is not so much one of jurisdiction as one of fact, and I have sufficiently stated above the principles which I think should guide the Court in deciding the question of fact. For myself, I have no hesitation in holding that, according to those principles, in this case a contempt of this Court has been committed but I recognise that, owing to the conflict of authorities on the question at issue, the respondent may have thought that in publishing the article complained of he was in no danger of rendering himself liable to be attached in exercise of our summary powers.

SHAH, J.—This is a Rule issued on the application of the Government of Bombay against Balkrishna Govind Kulkarni, the Editor and Publisher of a paper, called the *Shubhodaya*, published at Dharwar, to show cause why he should not be committed for contempt of Court. The contempt is said to have been committed by the publication of an article written in Kanarese, on the 2nd of June 1921, in respect of certain proceedings then pending in the Court of the First Class Magistrate at Dharwar against two persons, who are described as "volunteers of the Temperance Committee," on a charge of robbery in respect of a sum of thirteen annas, punishable under section 392, Indian

EMPEROR v. BALKRISHNA GOVIND KULKARNI.

Penal Code. It is not necessary to quote the article here. But the writer attributes partiality to the Magistrate in favour of the prosecution, criticises the proceedings in his Court in a manner which cannot possibly be described as fair, and suggests that he acts under instructions of the District Magistrate and not in accordance with his own conscience.

The publication of such an article during the pendency of the proceedings is clearly improper. The effect of the article is to scandalise the Magistrate and its tendency is to interfere with an even and impartial administration of justice for which the Court is constituted. It is clear that such a publication constitutes a contempt of that Court. It is to be regretted that such an article should have appeared in a newspaper edited and published by a person, who holds a Sanad of this Court and who is expected to understand his responsibility in a matter of this kind. It is a matter of some satisfaction that the opponent has made no serious attempt to justify the article and has expressed his willingness to abide by the ruling of this Court and to express his "sincere regret" for having published it, as he says, in ignorance of the law governing the publication of such comments.

The following observations in *Reg.* v. *Gray* (1) appear to be applicable to this case (page 40*):—

'Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

In the present case the article was published while the proceedings were pending, and it is not suggested and cannot be suggested that it contains criticism of the nature indicated in the passage quoted above

The question that arise on this view of the article are, (1) whether this Court has jurisdiction to punish the opponent for contempt of the Court at Dharwar, (2) whether it constitutes a contempt of this Court, and (3) whether the opponent should be punished, having regard to the circumstances of the case as disclosed in these proceedings.

As regards the first question, at the outset I may refer to the opinions expressed in *Mohandas Karamchand Gandhi, In re* (2) on this point. If these opinions were binding upon us, without examining this somewhat difficult question, I would answer it in the affirmative in accordance with these opinions. But it appears that in that case the contempt under consideration was the contempt of this and not of a subordinate Court, and that the question of jurisdiction which arises in this case did not arise in that case. The opinions expressed there were not strictly necessary for the decision of that case. Even then, the opinions so clearly expressed are entitled to great weight. Unfortunately, however, the particular point of law was not argued on both sides and apparently there was no reference to the Indian decision on the point nor is there anything in the judgment to show that the relevant provisions of the Statutes and the Letters Patent bearing on the point were independently examined. While, therefore, I am prepared to attach great weight to these opinions, I cannot say that I am relieved from the obligation of coming to an independent conclusion on the question of jurisdiction.

The two English decisions bearing on the point are *Rex* v. *Parke* (4) and *Rex* v. *Davies* (3), and the two Indian decisions are *Venkat Row, In re* (6) and *Governor of Bengal* [*Legal Remembrancer*] v. *Moti Lal Ghose* (10). The application of the view accepted in *Rex* v. *Davies* (3) to the Indian High Courts has been considered in both the Indian cases and the difficulty of the point is reflected in the conflicting decisions of the Madras and Calcutta High Courts. I have carefully considered the point of jurisdiction in the light of the judgments in all these cases, and of the arguments urged before us. I do not think that this Court has power to punish

*Page of (1900) 2 Q. B.—[*Ed.*]

contempts of Criminal Courts subordinate to this Court as such.

This Court is undoubtedly a Court of Record. It has been so constituted by the Letters Patent of 1862 and 1865: and section 106 of the Government of India Act of 1915 contains an express provision to that effect. Having regard to its powers as defined by the Statutes and the Letters Patent it would be a superior Court of Record. Undoubtedly it would have the power to punish contempts committed against itself. The old Supreme Court, as a Court of Record, had that power, but the old Sadar Diwani Adawlat and Foujdari Adawlat had no such power to punish persons for contempts. The High Court has got all the powers which the above Courts had subject, of course, to the provisions of the Letters Patent. The High Court has also powers of superintendence over all the Courts within its appellate jurisdiction. It has been held that this Court has power to punish contempts committed against itself as the superior Courts of Record have under the Common Law of England: *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court* (11). So far there is no difficulty. But the question whether the Common Law of England is applicable so far as the punishability of contempts of subordinate Court as such is concerned, and whether the position of the High Court is the same as or similar to that of the Court of the King's Bench in England as regards the power to punish them are not free from difficulty and cannot be treated as settled by the above decision.

As regards the first point, certain contempts of Court are punishable at present under section 228, Indian Penal Code, and, apart from the usual remedy by way of trial, section 480 of the Code of Criminal Procedure provides a summary remedy for punishing them. The earliest legislation on this point, so far as I can gather, was Act XXX of 1841. A careful perusal of these provisions shows that in India while certain contempts committed "in view or the presence of the Court" are made punishable, there is no provision in the Indian Penal Code or any other Indian Act for punishing such contempts committed in the absence of the Court as in the presence case. It may be that the presiding Judge may be able to take proceedings in respect of a charge of defamation against the person concerned: but that is quite a different matter. All that I mean is, that a contempt of Court as such is not made punishable except to the limited extent indicated in section 228, Indian Penal Code or section 480, Criminal Procedure Code. Under the English Common Law such contempts are punishable as misdemeanour, and the remedy is either by way of indictment or summary proceedings before the Court if it has the power to punish it summarily. I feel a great difficulty in holding that, because a contempt of Court is punishable under the English Common Law, it is punishable as such in India even though the Indian law does not make it punishable. It would be in effect creating a new offence to hold that a contempt of a subordinate Court as such is punishable.

Further, I am unable to hold that this Court has powers which the King's Bench in England exercises under the Common Law of England, with reference to the contempts of other Courts. The provisions of the Statutes relating to the Indian High Courts, particularly sections 9 and 15 of 24 & 25 Vic. c. 104, now replaced by sections 106 and 107 of 5 & 6 Geo. V, c. 61 and of the Letters Patent of 1862 replaced by the amended Letters Patent of 1865, particularly clauses 21 to 28 relating to the criminal jurisdiction of this Court, clearly show that the jurisdiction and powers of the High Court are defined by and subject to those provisions; and it is difficult to find either in the history of this Court or in the statutory provisions defining the limitations of the powers of this Court any justification for holding that this Court has powers such as the Court of the King's Bench in England has as being the *custos morum* of all the subjects of the realm under the Common Law of the land. In the result, I agree with the conclusion reached by Jenkins, C. J., in the Calcutta case that the High Court has no such power. I need not labour the point that the mere fact that the Court has powers of superintendence over the subordinate Courts does not give to this Court any such jurisdiction, as both the Madras and Calcutta High Courts are agreed on this point.

I may add that the decision in *Rex* v. *Parke* (4) left this question open, and that the

ecision in *Rex* v. *Davies* (3) appears to me to be based upon the view that the Court of the King's Bench has power to punish *summarily* contempts of other Courts, which are punishable by the Common Law of the land, as being the *custos morum* of all the subjects of the realm. There it was merely a question of applying the remedy and not of considering the question whether the contempt was punishable by the law of the land.

The next question is, whether the publication in question amounts to a contempt of this Court. The point is not distinctly raised in the petition, but in the argument it has been urged by the learned Advocate-General that a contempt of a subordinate Court really constitutes a contempt of this Court. This question is by no means free from difficulty. On the best consideration that I can give to it, I have come to the conclusion that it is not possible to lay down any general rule one way or the other. It cannot be said that every contempt of a subordinate Court is necessarily a contempt of this Court: nor can it be said that contempt of a subordinate Court can never be a contempt of this Court. In each case it must be determined as a question of fact having regard to all the circumstances including the nature of the contempt, the nature of the proceedings with reference to which the contempt is committed, the relation of the subordinate Court to the High Court with reference to those proceedings and its probable effect upon the due administration of justice.

In the present case we are concerned with the contempt involved in the publication of the particular article in the *Shubhodaya* at Dharwar, with reference to proceedings in respect of a charge under section 392, Indian Penal Code, in the Court of the First Class Magistrate at Dharwar. The article itself is an attack on the impartiality and independence of the Court. The proceeding was in respect of a charge triable by a First Class Magistrate. The charge of robbery is also triable by a Court of Session but having regard to the description of the offences as given in the petition I should treat these proceedings as a trial before that Court on the charge of robbery. In such a case in case of acquittal the appeal would lie to this Court, and in case of conviction the appeal would lie to the Sessions Court, if the sentence be appealable; and in any event in case of conviction this Court would have the power to revise the order of the Court in question, and the responsibility of this Court would be co-extensive with its revisional powers under the Code of Criminal Procedure. In thus stating the position, I have not referred to the other powers of this Court under the Letters Patent, the exercise of which can be hardly treated as anything more than remotely possible. Looking at the article, it is undoubtedly true that it is primarily directed against the Magistrate and not against this Court and it is not unlikely that the publisher may not have been able to realise the possibility of its being treated as a contempt of this Court. At the same time, it is clear that the attack on the impartiality and independence of the Magistrate was made at a time when the proceedings were pending and tendency of such publication is to impede the due administration of justice. At the same time, without straining language, it is not easy to say that such a contempt constitutes a contempt of this Court. Generally speaking, I entirely disapprove of such attacks on the impartiality and independence of Judges, whatever their rank and position, particularly when the proceedings are pending and I desire to express my complete agreement with the observations of Jenkins, C. J., in *Governor of Bengal* [*Legal Remembrancer*] v. *Moti Lal Ghose* (10) at page 220-221* of the report relating to the impropriety of making comments on pending cases or on Judges in connection with these cases. Having regard to all the circumstances bearing on this question of fact, I am not prepared to differ from the view which my Lord the Chief Justice takes that the publication of the article in question constitutes a contempt of this Court as tending to impede the due administration of justice.

This brings me to the last question as to whether the contempt is shown to be of such a character as to demand any punishment. In connection with this point, I think it must be shown that it was probable that the publication would substantially interfere with the due adminis-

*Pages of 41 C.—[*Ed.*]

tration of justice. All the Judges, who decided the case of *Governor of Bengal* [*Legal Remembrancer*] v. *Moti Lal Ghose* (10) have emphasised this point and, having regard to the nature of this jurisdiction, it must be exercised with reserve and caution, I do not consider it necessary to elaborate this point in the present case The petition is silent on this point. While the tendency of a publication may be clear, it may not be easy to determine its probable effect on the due administration of justice, which must necessarily depend upon the surrounding circumstances. On the whole, I think, it is sufficient to warn the opponent on the ground that he has committed contempt of this Court.

Before parting with this case, I may state that, in my opinion, such defects as exist at present in the law relating to contempts of Courts other than the High Courts can be removed only by Legislature and that it is desirable to remove them.

N. H.

Rule discharged.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 117 OF 1920.

December 21, 1920.

Present :—Mr. Lindsay, J. C.

Saiyed MOHAMMAD RAZA—APPLICANT

versus

EMPEROR, THROUGH MUNICIPAL BOARD OF SANDILA—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), s 178—Public road, building abutting on—Building, alteration in.

A building situated at a distance from a public road but within a compound wall which abuts on the public road, connot be said to be abutting on a public road within the meaning of section 78 of the U P Municipalities Act, and, therefore, no notice under section 178 need be given to the Board if any addition or material alteration is made in such a building

Application against an order of the Deputy Commissioner, Hardoi, dated the 16th July 1920, confirming an order of the Bench of Honorary Magistrates, Sandila, dated the 28th May 1920.

Mr. *Ali Mohammad*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The applicant, Saiyed Mohammad Raza, was convicted by a Bench of Magistrates of an offence punishable under section 185 of the U. P. Municipalities Act (II of 1916). The charge against him was that he had made certain unauthorised erections in connection with his house and had failed to give to the Municipal Board notice which is required by section 178 of the Act. This latter section requires the person who desires to erect a new building or new part of a building or to re-erect or make a material alteration in a building to give notice of his intention to the Board. Sub-section 2 of the same section, however, says that this notice is only required in the case of a building which abuts on or is adjacent to a public street or place or property vested in His Majesty or in the Board. The Magistrates held that the erections made by the accused were made in connection with a building which either abutted on or was adjacent to two public roads—one of them a paved lane to the north of the accused's house and the other a public road which lies to the east. A reference to the map, which is to be found in the judgment of the first Court, shows that the accused's house is situated in one corner of a large compound or *ahata*. The house is at the south-west corner. On the north between the paved lane and the accused's house proper is a considerable space and on the east there is a still larger space between the accused's house and the public road.

The accused applied to the Municipal Board under section 178 for permission to erect a wall to enclose this compound. The compound admittedly abuts both on the lane and on the road. When the Municipal Commissioner who dealt with these matters, went to inspect the site he found that the accused had put up two walls in his house, which, as I have said, is situated at the south-west corner of the compound. Thereupon a case was instituted against the accused on the ground that these walls had been built on to a house which abutted on or was adjacent to a street or public place. The evidence shows that one wall so built is at least 37 feet away from the lane whilst

the other wall is some 40 feet away from the road. How, in the face of these facts, it can possibly be held that these walls are abutting on, or are adjacent to, the public street or road is more than I can say. The process of reasoning apparently by which this conclusion has been arrived at is that, because the compound wall which the accused desired to build round his compound would abut on these public places, it necessarily followed that the whole compound which was enclosed within these walls must also be taken to abut on the lane and the road, and that consequently by this process of deduction it must be held that the two walls which the accused built some 40 feet from either the lane or the road must be deemed to abut on or to be adjacent to these public places. This seems to me to be altogether absurd. By no possible interpretation can it be said that the two walls which the accused has built either abut on or adjoin these public places. The conviction is, on the face of it, wrong and must be set aside. The application is allowed and the conviction is quashed. The fine, if paid, will be refunded.

J. P.

Application allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 404 OF 1921.
(CRIMINAL REVISION PETITION NO. 398 OF 1921.)

December 20, 1921.

Present :—Mr. Justice Odgers.

K. VENKU REDDY AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR PROSECUTOR.

Criminal Procedure Code (Act V of 1898), s. 257—Prosecution witnesses summoned as defence witnesses, whether can be cross-examined

Prosecution witnesses summoned as defence witnesses under section 257, Criminal Procedure Code, do not change their character and may be cross-examined by the accused.

Mowla Bux Biswas v. *Derasatulla Sarkar*, 1 C. W. N. 19 and *Sheoprakash Singh* v. *Rawlins*, 28 C. 594, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub Divisional Magistrate, Gudur Division, in Criminal Appeal No. 19 of 1921, presented against the judgment of the Court of the Stationary Sub Magistrate, Gudur Division, in Criminal Case No. 15 of 1921.

FACTS appear from the judgment.

Mr. *A. Narasimha Iyer*, for the Petitioners:—Though summoned by the accused the prosecution witnesses do not cease to be such. Under section 257, Criminal Procedure Code, the accused has the right to cross examine them, *Mowla Bux Biswas* v. *Derasatulla Sarkar* (1), *Sheoprakash* v. *Rawlins* (2).

Mr. *N. Rajagopalan*, for the Public Prosecutor, for the Crown:—The witnesses have been independently summoned as defence witnesses and they cannot be led or cross-examined.

ORDER.—The only point is, whether the prosecution witnesses ought to have been allowed to be cross-examined. I think the point taken for the accused must succeed. The Magistrate having allowed the prosecution witnesses to be recalled as defence witnesses under section 257, Criminal Procedure Code, must clearly have allowed them to be cross-examined by the accused. There is no finding that the application should not have been allowed as vexatious or dilatory. The cases which support accused's position are *Mowla Bux Biswas* v. *Derasatulla Sarkar* (1) and *Sheoprakash Singh* v. *Rawlins* (2). Both cases decide that prosecution witnesses summoned under these circumstances, do not change their character and may be cross-examined by the accused. The convictions must be set aside and the case remitted for re-trial according to law.

K. C. P.

J. P.

Conviction set aside, case remitted for re trial.

(1) 1 C. W. N. 19.
(2) 28 C. 594.

BACHCHA SINGH v. CHANDRES SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 138 OF 1921.

June 23, 1921.

Present:—Syed Wazir Hasan, A. J. C.

BACHCHA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu SRI KAMLAPAT PRASAD—PLAINTIFF

CHANDRES SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession by trespasser—Land submerged during part of year—Constructive possession—Presumption.

A trespasser does not acquire any right by adverse possession in respect of a land which is subject to submergence for a part of every year. No presumption either of constructive possession on account of previous actual possession or on account of contiguity of the land with other land in actual possession of the trespasser can be made in his favour. [p. 770, col. 2.]

Brijraj Singh v. *Ganga Bakhsh Singh*, 28 Ind. Cas. 855; 18 O. C. 43; 2 O. L. J. 346, *Trustees, Executors and Agency Company Limited and Templeton* v. *Short*, (1888) 13 A. C. 793; 58 L. J. P. C. 21; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132 and *Secretary of State for India* v. *Krishnamoni Gupta*, 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.), referred to.

Appeal from a decree of the District Judge, Fyzabad, dated the 17th February 1921, modifying that of the Munsif, Akbarpur, dated the 15th March 1920.

Mr. *Rudra Datta Sinha*, for the Appellants.

Messrs. *Niamat Ullah* and *Jawwad Husain*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for possession of certain plots of land from which he alleged he was ejected in virtue of a certain order of the Revenue Court passed in proceedings in relation to the demarcation of boundaries between two villages. The plaintiff is the proprietor of the village Paintipur, while the defendants are the proprietors of the adjoining village, Ashrafpur. The plots in question lie somewhere on the border-land between the two villages. The plaintiff's case was that these plots formed part of the village Paintipur. The defendants, on the other hand, contended that they were portions of the lands of Ashrafpur. This was the pleading on the question of title relating to the plots in question. The defendants, however, resisted the suit of the plaintiff on the ground of limitation as well. The issue relating to title is no longer in controversy in this Court, nor was it in dispute in the lower Appellate Court. The plea of limitation was urged throughout and is repeated again before me in support of this appeal.

For the purpose of determining the issue of limitation the Court of first instance divided the plots of the lands covered by those plots into several categories. With regard to some of the plots or portion of plots it held that they were capable of actual and physical possession and, inasmuch as the plaintiff had failed to prove his possession within limitation, his suit was liable to be dismissed with respect to those plots. With regard to another set of plots, it held that no party succeeded in proving actual possession of them and, consequently, the presumption of law that possession follows title was applicable to such of the lands as were covered by those plots. In view of this finding, it held that the plaintiff was entitled to a decree in respect of those plots. With regard to a third set of plots its conclusion was that they generally remained under water and, consequently, the presumption of possession in favour of the owner was applicable to that class of land as well. It decreed the plaintiff's suit in respect of these plots also. The matter was taken in appeal to the Court of the District Judge of Fyzabad by the plaintiff, he being aggrieved from that portion of the decree of the Court of first instance, which dismissed his suit as regards some of the plots in dispute. The defendants were equally dissatisfied with that portion of the decree of the Court of first instance, which had the effect of decreeing the plaintiff's suit with regard to some plots of land. The learned Judge dealt with both these matters in his judgment dated the 17th February 1921, and the decree, which follows that judgment, is the subject-matter of appeal in this Court.

The position which the defendants took in the lower Appellate Court and the one which they have also taken in this Court is, that they are mere trespassers of the plots of land in suit of which the plaintiff is the owner. This is a factor in the case which would govern the application of the rule of law on the question of limitation. The learned

Judge also dealt with the several classes of lands in his judgment and with regard to one class of them his finding is that the land covered by those plots in tank-land. With regard to another set of plots he came to the conclusion that the defendants have "no doubt been for long past in possession when the land was capable of physical possession, but as most of the land is tank land pure and simple and the other plots are shown to have been, at least once since 1316 Fasli, either *parti* or tank-land the ruling reported as *Brijraj Singh* v. *Ganga Bakhsh Singh* (1) prevents any title accruing to the respondent." These findings of fact, when compared with the findings of the Court of first instance on the same question, are directly opposed to each other in respect of the plots of land with reference to which that Court had held that the plaintiff failed to prove his possession within limitation. The finding of the learned Judge, shortly put, comes to this that some of the lands in question are tank-lands and that other lands have been actually in the possession of the defendants now and then when they could be in such possession but these lands have also had the character of tank land or *parti* land. This being his finding, the law which he has applied in determining the question of limitation has, in my opinion, been rightly applied. Even if I had some doubt as to the finding of the learned Judge, the statements twice recorded by the Court of first instance of the Pleaders for the parties with reference to the nature of the lands in suit would undoubtedly have led me to the conclusion that the whole of the lands in dispute were, during the period of the rainy season every year, covered by water.

What, then, is the law of limitation applicable to such a condition of things? In the case of *Brijraj Singh* v. *Ganga Bukhsh Singh* (1) a learned Judge of this Court made the following observations:—"It is an axiom of the law relating to possession that where possession in fact is determined, possession in law follows the right to possess; in other words, possession follows title. Applying this principle to the case before us it follows that while the land in suit was under water possession in law was with the plaintiffs whose title or right to possess is acknowledged." If I may say so, with respect, I am in complete agreement with this statement of law. On the facts found, for a period of four months in every year, the lands in suit were subject to submergence. During that period a trespasser cannot be recognised to have been in constructive possession of the lands. In fact, no presumption either of constructive possession on account of previous actual possession or on account of contiguity of land with lands in actual possession of a trespasser can be made in his favour. In the case of *Trustees, Executors and Agency Company Limited and Templeton* v. *Short* (2), Lord Macnaghten, in delivering the judgment of His Majesty's Privy Council, observed as follows:—"Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. Their is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

The above principle of law was applied by their Lordships of the Privy Council in the case of *Secretary of State for India* v. *Krishnamoni Gupta* (3). Lord Davey, in delivering the judgment of the Privy Council, made the following observation in that case:—"For the purpose of trying the question whether limitation applies, the Government must be regarded as a trespasser and dispossessor

(1) 28 Ind. Cas. 855; 18 O. C. 43; 2 O. L. J. 346.

(2) (1888) 13 A. C. 793; 58 L. J. P. C. 21; 59 L.T. 677; 37 W. R. 433; 53 J. P. 132.

(3) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.).

of the rightful owners, and, in the opinion of their Lordships, it would be contrary both to the principle and authority to imply such constructive possession in favour of a wrong-doer, so as to enable him to obtain thereby a title by limitation... ..... The possession of the Government was in fact determined by the submergence of the land which then became derelict, and, so long as it remained in that estate, no titles could be acquired against the true owner..... ....They (their Lordships) think that on the dispossession of the Government by his *vis major* of the floods, the constructive possession of the land was (if any where) in the true owner." On these grounds, I am of opinion that the decision of the learned District Judge is substantially correct.

The appeal fails and is dismissed with costs.

N H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 75 OF 1921.

January 4, 1922.

Present:—Justice Sir P. C. Banerji, Kt.

EAST INDIAN RAILWAY AND ANOTHER—APPLICANTS

versus

FIRM INDERMAN TULSHI RAM—OPPOSITE PARTY.

Railways Act (IX of 1890), s 72—Contract Act (IX of 1872), s 151—Railway Company, duty of, to deliver goods consigned within reasonable time—Delay—Damages.

In the absence of any Risk Note or of any proof to show that the goods consigned were despatched at the risk of the consignor or consignee, or that any notice was given that the goods were to be carried subject to the rules contained in the Goods Tariff Regulations, a Railway Company is responsible under section 72 of the Railways Act, read with section 151 of the Contract Act, for delay in the delivery of goods consigned to it. [p. 772, col. 1]

Civil revision against an order of the Judge, Small Cause Court, Aligarh.

Mr. *Lalit Mohan Banerji*, for the Applicants.

Mr. *Panna Lal*, for the Opposite Party.

JUDGMENT.—The admitted facts of this case are these. A consignment of 182 bags of maize was made at Barnala Railway Station on the North Western Railway for despatch to the plaintiffs at Aligarh. The goods were despatched from that station on the 5th of January 1920, the date on which the consignment was made. They had to be carried over a part of the East Indian Railway and the goods had to pass two junction stations, namely, Allal Junction and Delhi Junction. They arrived at Aligarh on the 30th of January and were delivered to the plaintiffs on the 4th of February 1920. In the meantime, the market had fallen and the plaintiffs state that by reason of the delay in the delivery of the goods they sustained loss and accordingly they claimed damages from both the Railway Companies. It was admitted on behalf of the Railway that, ordinarily, it takes from 7 to 10 days for any consignment delivered at Barnala to arrive at Aligarh. So that, admittedly, there was a delay of at least 15 days. It was urged in the Court below on behalf of the defendants that there was no specific time agreed upon for the delivery of the goods, and that, therefore, the defendants were not responsible for any loss which may have accrued to the plaintiffs by reason of the delay in the delivery of the goods. It was also stated in the Court below that an axle had got heated and that for that reason the goods had to be detained at the Allal Junction Station and this was the cause of the delay in the arrival of the goods. On the point last mentioned no evidence was given in the Court below. That Court made a decree in the plaintiffs' favour for a part of the claim. It is contended in this Court that the goods were consigned under a Risk Note, Form A; that paragraph 9 of that Note provided that the goods were to be carried by the Railway subject to the rules contained in the Goods Tariff Regulation; that paragraph 40 of those rules provides that the Railway was not responsible for the arrival of the goods within any definite time, and that, consequently, the defendants were not responsible to the plaintiffs for any loss sustained by reason of the delay in the delivery of the goods. There is nothing on the record to show that a Risk Note in Form A was signed

by the consignor. No Risk Note was produced nor was the Railway receipt granted to the consignor filed by the defendants in the Court below. Therefore, there was no evidence before that Court to show that the goods were consigned subject to the notice alleged to be contained in Risk Note, Form A. If the goods were not despatched under a Risk Note of that description, the contract between the parties could not be said to be a contract under which goods were to be carried subject to clause 40 of the Goods Tariff Regulation. In the absence of evidence to this effect, the ordinary rule applicable to a bailee would be applicable to the present case. Under section 72 of the Railways Act, 1890, section 161 of the Contract Act would govern the liability of the Railway. Under that section the Railway would be responsible for delay in the delivery of goods at the proper time. In the present case, according to the admission made on behalf of the Railway in the Court below, the proper time for the delivery of the goods was seven to ten days from the date of the consignment of the goods. Therefore, there was a delay of about 15 days in the delivery of the goods, and if any loss was sustained by the plaintiffs by reason of this delay, the plaintiffs would be entitled to be compensated for the loss. Furthermore, under section 46 of the Contract Act the contract had ordinarily to be performed within a reasonable time. It was, therefore, necessary for the defendants in this case to prove that there were valid reasons which prevented them from delivering the goods at a time when they would ordinarily have been delivered. No such evidence was adduced. Therefore, in the absence of the alleged Risk Note or of any proof to show that the goods were despatched at the risk of the consignor or consignee, or that any notice was given that the goods were to be carried subject to the rules contained in the Goods Tariff Regulations, the Court below was justified in making a decree in favour of the plaintiffs. This application must, therefore, fail and I dismiss it with costs.

S. D.

Application rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 58 OF 1915.

June 21, 1921.

Present:—Syed Wazir Hasan, A. J. C.

RAMADHIN—DEFENDANT No. 1—APPELLANT

versus

SURAJPAL SINGH—PLAINTIFF,

SHANKAR SINGH—DEFENDANT No. 1—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), ss. 6, 9—Pre-emption—Hindu Law—Joint family—Sale by one member—Another member, whether can pre-empt.

In Oudh one member of a joint Hindu family has a right to pre-empt a sale effected by another member of the same family in favour of a stranger. [p. 775, cols. 1 & 2]

Gandharp Singh v. *Sahib Singh*, 7 A. 184; A. W. N. (1884) 326; 4 Ind. Dec. (N. S.) 394, (F. B.) followed.

Pratap Narain Singh v. *Shiam Lal*, 55 Ind. Cas. 37; 43 A. 264; 18 A. L. J. 116; 2 U. P. L. R. (A.) 32, dissented from.

Himmat Bahadur v. *Bhawani Kunwar*, 30 A. 352; 5 A. L. J. 339; A. W. N. (1908) 143, *Hazari Singh* v. *Joot Singh*, 1 O. C. 252, *Ram Dayal* v. *Bhajju Lal*, 7 O. C. 61, *Abdul Wahid Khan* v. *Shaluka Bibi*, 21 C. 496; 21 I. A. 26; 6 Sar. P. C. J. 392; Rafique and Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961 and *Rangasami Gounden* v. *Nachiappa Gounden*, 50 Ind. Cas. 492; 23 C. W. N. 777; 36 M. L. J. 492; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 642; (1919) M. W. N. 262; 42 M. 523; 25 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.), referred to.

Appeal from a decree of the Subordinate Judge, Sultanpur, dated 21st November 1914, upholding that of the Munsif, Musafirkhana, dated 6th April 1914.

Mr. *M. Wasim*, for the the Appellant.

Mr. *Niamat Ullah*, for Respondent No. 1.

JUDGMENT.—The facts of the case, which are no longer in dispute, are as follows:—Surajpal Singh, the plaintiff-respondent, and Shankar Singh, defendant No. 1, now deceased, formed a joint Hindu family possessed of some ancestral estate. In the year 1903 Shankar Singh had purchased 49 *bighas* 13 *biswas* land in the village Manikpur from Ram Sarup and others. This property on its purchase acquired the characteristic of a joint family property. By a sale deed dated the 19th September 1912 Shankar Singh sold 24 *bighas* 16 *biswas* and 10 *biswansis* out of the land which was purchased in 1903 by Ramadhin Singh, defendant

No. 2, the appellant in this Court, for a consideration of Rs. 500. Surajpal Singh brought the suit for pre emption in respect of the sale of the 19th September 1912, out of which the present appeal has arisen. He has succeeded in both the Courts below.

Two points in support of the appeal were urged before me—(1) That the suit for pre-emption is a *mala fide* one, and (2) that in a sale of joint family property by one of the members of the family no suit for pre-emption is maintainable by another member of the same family.

As regards the first point the contention is based on two facts—(1) That the vendor, Shankar Singh, brought a suit for cancellation of the sale in question, and (2) that the present suit is designed to counteract the effect of the suit for cancellation in the event of its proving unsuccessful. It is urged that the result of either suit, if successful, would be to the benefit of the whole family. I am not prepared to accept this argument. Both suits may be perfectly *bona fide* and there is nothing in the record to suggest that they are not so. There can be no objection to a party having two strings to his bow and that fact does not necessarily suggest any *mala fides* on the part of such a litigant. I reject the first ground.

The second ground is more serious. The learned Counsel for the defendant appellant cited the judgment of the Allahabad High Court in the case of *Pratap Narain Singh* v. *Shiam Lal* (1) in support of his contention. With that decision I will deal later. To determine the right of a party to claim pre-emption, I must primarily look to the provisions of the Oudh Laws Act (XVIII of 1876) by which the right of pre-emption is conferred upon persons residing in the territory of Oudh. Section 3, sub-section (*c*), of the Act says that "the law to be administered by the Courts of Oudh shall be the rules contained in this Act;" section 6 of the same Act is as follows:—"The right of pre-emption is a right of the persons, hereinafter mentioned or referred to, to acquire, in the cases hereinafter specified, immoveable property in preference to all other persons." Such persons are enumerated and classified in section 9 of the same Act. It is admitted that the plaintiff is one of such persons and it is also admitted that the appellant-vendee is not a person who has a preferential, or even an equal, right to acquire property in suit to the plaintiff. Section 13 of that Act gives a cause of action to an intending pre-emptor to bring a suit for pre-emption for the purpose of acquiring the property in preference to the person to whom it has been sold on breach of the terms laid down in sections 10, 11 and 12 and also on the ground that the price stated in the notice was not fixed in good faith, and in the case of mortgage that the amount claimed by the mortgagee was not really due on foot of the mortgage and was not claimed in good faith and that it exceeds the fair market value of the property mortgaged. It would thus appear that, on the terms of the enactment just now mentioned, the plaintiff has a perfect right to bring the suit for pre-emption which he has brought. The cause of action for such a suit arose by the fact that the vendor sold the property to the vendee without giving the due notice as required by section 10 of the Act. But it is argued that there are some general principles of law which negative the plaintiff's right of pre-emption. It is contended broadly that, when one member of a joint Hindu family sells property to a stranger another member of the same family has no right to pre-empt the same. In support of this contention resort was made to the juristic conception of a joint Hindu family and the legal relation in which the members of such a family stood to each other. In this connection, the decision in the case of *Himmat Bahadur* v. *Bhawani Kunwar* (2) was cited. I accept the analysis of the notion of a joint Hindu family so elaborately made in that judgment, but the conclusions which the learned Counsel desires to draw from that analysis do

(1) 55 Ind. Cas. 37; 42 A. 264; 18 A. L. J. 110; 2 U. P. L. R. (A.) 32.

(2) 30 A. 352; 5 A. L. J. 339; A. W. N. (1908) 143.

not follow nor can they override the statutory law to which reference has already been made. In the Full Bench case of *Gandharp Singh* v. *Sahib Singh* (3) it was held that the members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's book as a sharer in the *mahal*, are co-sharers for the purpose of pre-emption. In that case the vendees resisted the suit for pre-emption on the ground that they were co-sharers in the village and the defence was upheld by the Full Bench. The effect of such a defence being recognised as valid logically leads to the conclusion that the defendants had a right to acquire the property in preference to the pre-emptor and they could equally well enforce their right of pre-emption as co-sharers even in the capacity of plaintiffs. The Full Bench decision has been admitted by this Court as enunciating a good law. In the case of *Hazari Singh* v. *Joot Singh* (4) Mr. Blennerhassett, J. C., referred to that case with approval and held that a suit for pre-emption by a member of a joint Hindu family, who happened to be the son of the vendor in that case, was maintainable in respect of a sale made by his father with whom he formed the joint Hindu family. In that judgment Mr. Blennerhassett referred to an earlier decision of this Court in the case of *Lachmi Narain* v. *Raghunath*, No. 652 of 1885, dated the 16th September 1885, which had decided that the son was entitled to enforce his right of pre-emption in respect of the property sold by his father with whom he was joint and undivided. If on no other grounds I must overrule the contention on the ground of *stare decisis*. A reference was also made in this connection to a decision of a Bench of this Court in the case of *Ram Dayal* v. *Bhajju Lal* (5). The *ratio decidendi* of that case may be best explained in the language of the learned Judge, Macleod, A. J. C., himself who delivered the judgment of the Court: "It seems to me that Ram Bharose and Mul Narain are on the horns of a dilemma. They must either admit that the sale was a valid one or deny that it was so. If they admit that the sale was a valid one, then any interest they had in the property before the sale must have been lost to them on the sale taking place, and, therefore, they had no subsisting title at the date of the institution of their suit, while if they deny that their father had power to transfer their interest they are precluded from claiming pre emption." Now, it is perfectly clear that the title of Ram Bharose and Mul Narain to pre-empt rested on their interest in the property which was the subject-matter of the sale and apparently there was no other property besides that property in which they had interest and upon which they could found their status of co-sharers."

In the present case, apart from any other property that the family may be possessed of in which the plaintiff may have an interest as undivided co parcener, half of the property which was acquired by the family under the sale of August 1903 still remains the family property, and the plaintiff has an interest in it and in virtue of which he is a co sharer within the meaning of section 9 of the Oudh Laws Act (XVIII of 1876), and is entitled to maintain the suit for pre emption as has already been observed in an earlier portion of this judgment.

It is further argued that the plaintiff, having accepted the sale in question, becomes a vendor of the property sold and it would be anomalous to allow him to acquire the same property by the exercise of the right of pre emption. This is a reasoning which is borrowed from the decision of the Allahabad High Court in case of *Pratap Narain Singh* v. *Shiam Lal* (1) already referred to. I am not prepared to accept the argument as a sound one. My reasons are as follows:—(1) A plaintiff in a suit for pre emption is under a legal necessity to accept the validity of the sale and of the vendor's title to effect the sale. If he denies either the one or the other, according to the law in force in Oudh, he is debarred from claiming a right of pre-emption. This view is founded upon a decision of their Lordships of the Privy

(3) 7 A. 184; A. W. N. (1884) 326; 4 Ind. Dec. (N. S.) 394 (F. B.).
(4) 1 O. C. 252.
(5) 7 O. C. 61.

Council in the case of *Abdul Wahid Khan* v. *Shaluka Bibi* (6) and has consistently been acted upon. The plaintiff in this case, with a view to successfully exercise his right of pre emption, was bound to accept the sale which has given rise to this suit. (2) With due deference to the learned Judge who decided the case of *Pratap Narain Singh* v. *Shiam Lal* (1), I am (unable?) to acquiesce in the view that in such a case the plaintiff must be treated as a vendor. I am of opinion that a member of a joint Hindu family who consents to a sale of a portion of the family property by another member of the same family is not a vendor. His consent merely takes place of legal necessity on proof of which the sale could be upheld as valid against every member of the family—See the recent decision of the Privy Council in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (7). Such a consent is a substitute for evidence of legal necessity and when established merely works out as an estoppel by force of which the member giving the consent is debarred from challenging the sale on the ground open to him under the Hindu Law. Such an estoppel cannot, in my opinion, debar him of his right to exercise the claim of pre-emption which exists in his favour independently of the bargain of sale. (3) I have shown above that the right of a member of a joint Hindu family to exercise his claim of pre-emption logically follows from the decision of the Full Bench case of *Gandharp Singh* v. *Sahib Singh* (3). The statutory law of pre-emption in Oudh, to which reference has already been made, does not, in my opinion, deprive a plaintiff clothed with a character such as the present plaintiff is from his right of pre emption. On the contrary, I hold that the enactment clearly recognises the right in favour of such a person by the provisions of sections 6 and 9 of the Oudh Laws Act (XVIII of 1876). (5) The right of pre emption of a member of a joint Hindu family in respect of a sale effected by another member of the same family has been recognised and acted upon in several decisions in Oudh, to which reference has already been made.

The appeal fails and is dismissed with costs.

N. H. *Appeal dismissed.*

(6) 21 C. 496; 21 I. A. 2; 6 Sar. P. C. J. 399; Rafique and Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961.

(7) 50 Ind. Cas. 498; 23 C. W. N. 777; 36 M. L. J. 493; 17 A. L. J. 526; 29 C L. J. 539; 21 Bom. L. R. 640; (19 9. M. W. N. 263; 42 M. 52?; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

ALLAHABAD HIGH COURT.

CIVIL DIVISION. No. 67 OF 1921.

January 4, 1922.

Present:—Justice Sir P. C. Banerji, Kt.

RUKAM AND ANOTHER—DEFENDANTS—APPLICANTS

versus

TARA CHAND—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 9, O. XVII, r. 2—Dismissal of suit on merits on plaintiff's non-appearance—Restoration—Jurisdiction.

Order IX, rule 8, of the Code of Civil Procedure read with Order XVII, rule 2, does not contemplate the hearing of a suit on the merits in the absence of the plaintiff or his pleader. Therefore a suit dismissed on the merits in plaintiff's absence can be restored and re-heard. [p. 776, col. 1.]

Revision from an order of the Judge, Small Cause Court, Agra.

Mr. *Gulzari Lal*, for the Applicants.

Mr. *Narain Prasad Asthana*, for the Opposite Party.

JUDGMENT.—The facts of this case are these. The plaintiff brought a suit in the Court of Small Causes at Agra to recover money due upon a bond. The defendants admitted the bond but pleaded payment, and they produced a receipt which they alleged had been granted to them by

the plaintiff in discharge of the amount secured by the bond. On the date fixed for hearing they filed their written statement and prayed that the plaintiff and his agent might be examined. The plaintiff was not personally present nor was his agent. The Court accordingly adjourned the hearing of the case and fixed the 2nd of March 1921 for the hearing of the suit, and directed the parties to appear in person on that day. On the aforesaid date, the plaintiff was not present and his Pleader stated that he had no instructions. In spite of this, the Court proceeded to try the suit in the absence of the plaintiff and recorded evidence adduced by the defendants and decided in their favour and dismissed the suit. Two days afterwards, the plaintiff appeared and applied to the Court to restore the case, allegir g that illness had prevented his appearing on the 2nd of March 1921. This application was granted and the case was restored and heard in the presence of both parties. Evidence was taken and the Court went fully into the merits and held that the receipt produced by the defendants related to another debt due to the plaintiff and decreed the claim in part after an examination of the account-books of the plaintiff.

The present application has been made for revision of this decree mainly on the ground that the Court below was not competent to restore the suit and to re-hear it. In my opinion this contention is not valid. As the plaintiff was not present and his Pleader had no instructions there was default on the part of the plaintiff on the 2nd of March 1921, and the Court could only have dismissed the suit under Order IX, rule 8 of the Code of Civil Procedure, read with Order XVII, rule 2 it is true that the rule last mentioned provides that the Court may proceed, in circumstances like those of the present case, under Order IX, rule 8, or make any other order in the case. The other order which, according to the rule, could be made by the Court was an order postponing the hearing of the case. But the rule certainly does not contemplate a hearing of the case on the merits in the absence of the plaintiff or his Pleader. As the Pleader had no instructions and the plaintiff was not personally present, the plaintiff must be deemed not to have appeared on the date of the hearing, and the only order which the Court could have made was an order of dismissal for default. The order passed on the 2nd of March 1921, although purporting to be an order of dismissal on the merits, was in reality and in substance an order dismissing the suit for default. The Court must be taken to have done that which it could only do under the provisions of the law. Therefore, the Court below was entitled under Order IX, rule 9, to restore the case to its original number and to re-hear it on the merits. It has considered the case fully on the merits and has come to a decision in favour of the plaintiff. There has been no failure of justice in this case and I see no reason to interfere in revision. The application is dismissed with costs.

S. D.

Application dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 109 OF 1921.

June 21, 1921.

Present:—Syed Wazir Hasan, A. J. C.

RAM BODH SINGH—DEFENDANT—APPELLANT

versus

RAM NARAYAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Surrender—Alienation—Legal necessity—Consent of reversioner—Presumption—Appeal, second—Finding of fact.

The doctrine of surrender or renunciation has no application to a case where a Hindu female does not transfer the whole of the estate which descends to her from the male *propositus*. [p. 777, col. 2.]

Rangasami Gounden v. *Nachiappa Gounden*, 50 Ind. Cas. 498; 23 C. W. N 777; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L J. 539; 21 Bom. L. *R.* 640; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.), referred to.

The consent of the nearest reversioner is always presumptive proof of legal necessity which justifies an alienation on the part of a Hindu female. The question, however, whether the evidence adduced

In any particular case amounts to "a presumptive proof" or not, is a question of the sufficiency or insufficiency of evidence, and, as such, a pure question of fact. [p. 778, col. 1]

Sham Sundar Lal v. *Achhan Kunwar*, 21 A. 71; 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind Dec. (N. S.) 755 (P. C.) and *Hari Kishen Bhagat* v. *Kashi Parshad Singh*, 27 Ind. Cas. 674; 42 C. 876; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 I. A. 64 (P. C.), referred to.

The finding that consent obtained in the particular circumstances of a case is not sufficient to justify a presumption of legal necessity in favour of the vendee, is one of fact and cannot be assailed in second appeal. [p. 778, col. 2.]

Appeal from a decree of the Subordinate Judge, Fyzabad, dated 1st February 1921, reversing that of the Munsif, Akbarpur, dated 31st March 1920.

Mr. *Niamat Ullah*, for the Appellant.

Messrs. *A. P. Sen* and *N. N. Dutt*, for Respondents Nos. 1—4.

JUDGMENT.—This appeal arises out of an ordinary suit brought by a Hindu reversioner on the death of a Hindu female to recover possession of the property which belonged to a male collateral of the plaintiffs from the hands of a transferee of the female. The suit was dismissed by the Court of first instance but has been decreed by the lower Appellate Court. This is a second appeal by the transferees from the last mentioned decree.

The facts necessary for the disposal of the appeal are as follows:—

The property in suit originally belonged to one Shohrat Singh, who died childless. On his death the property devolved on his mother, *Musammat* Dilbasi. By a registered deed of sale dated the 21st August 1896 (Exhibit A 1) she conveyed the whole of the property in suit to the defendant's father, Dwarka Singh. At the time of the sale the plaintiffs' father, Ramnihal Singh, was the only presumptive reversioner of Shohrat Singh. On the 10th November 1896 Ramnihal Singh executed a document in favour of Dwarka Singh styled as *iqrarnama dastbardari*, by means of which he relinquished all his rights in the property in suit, accepted the legality of the sale of the 21st August 1896, and further covenanted that he and after him his heirs would prefer no claim to the property which was the subject-matter of the sale (Exhibit A 2). Ramnihal Singh predeceased *Musammat* Dilbasi, who died about the end of 1907. At her death the plaintiffs, who are the sons of Ramnihal Singh, are the only reversioners entitled to the estate of Shohrat Singh and the defendants are admittedly in possession of the property in suit since the date of the purchase of it by their father in 1895. These facts are no longer disputed, though in the written statement filed by the defendants the accuracy of those facts was challenged.

The simple case of the plaintiffs is, that the sale-deed of the 21st August 1896 was *ultra vires* of *Musammat* Dilbasi; that it ceased to have any effect on her death, and that the plaintiffs are entitled to the property on the termination of the interest of the lady. The plea in defence, which was urged before me on behalf of the appellant and with which alone I am concerned now, is of a two-fold character—(1). That the effect of the sale of the 21st August 1896, combined with the deed of relinquishment of the 10th November 1896, is to create a surrender of the estate by the widow to the vendee with the consent of the reversioner then in existence, and (2) that at any rate the deed of relinquishment distinctly proves the consent of the reversioner to the sale of the 21st August 1896, and consequently the sale is binding on the actual reversioners, that is, the plaintiffs, who are also the sons of the presumptive reversioner, Ramnihal Singh, who gave the consent.

As regards the first aspect of the plea, it may be mentioned that it does not seem to have been distinctly raised at any stage of the proceeding. In any event, it is untenable. It is clear from the evidence of defendant's witness No. 2 that the sale of the 21st August 1896 does not cover the entire estate which had devolved upon *Musammat* Dilbasi on the death of her son, Shohrat Singh. It is well settled law now that the doctrine of surrender or renunciation has no application to a case where a Hindu female does not transfer the whole of the estate which descends to her from the male *propositus*. Any doubt which could be entertained on this question before the decision of their Lordships of the Privy Council in the case of *Rangasami Gounden* v. *Nachiappa*

Gounden (1) is dispelled in an unmistakable language by the judgment of Lord Dunedin delivered in that case.

As to the second line of argument, the contention of the learned Pleader for the appellant crystallised at the end into one simple point to the effect that the decision of the lower Appellate Court prescribes as a rule of evidence a particular standard of the proof of the consent given by a reversioner to a transfer effected by a Hindu female and that there is no such rule of evidence. The learned Pleader consequently says that the finding of the lower Appellate Court is vitiated by an error of law and is liable to be set aside in second appeal.

On the authorities there can be no doubt whatsoever that the consent of the reversioner is always presumptive evidence of the legal necessity which justifies an alienation on the part of the Hindu female. All controversy as to the legal effect of such a consent is set at rest by the same judgment of Lord Dunedin, to which reference has already been made. It will, therefore, serve no useful purpose to examine the case law on the subject previous to the last mentioned decision of His Majesty's Privy Council. On this question Lord Dunedin makes the following pronouncement :—

"When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove enquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel, the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one." The question whether the evidence adduced in any particular case amounts to "a presumptive proof" or not must necessarily be a question of the sufficiency or insufficiency of evidence, and as such a pure question of fact. It is true that the judgment of the learned Subordinate Judge creates an impression that he intended to lay down, with reference to certain Privy Council decisions, noteably the cases of *Sham Sundar Lal* v. *Achhan Kunwar* (2) and *Hari Kishen Bhagat* v. *Kashi Parshad Singh* (3), a rule of evidence requiring a special kind of proof of consent. The learned Subordinate Judge may be wrong in that view of law but he deals with a number of circumstances emerging out of the evidence on the record and on the basis of those circumstances he finds as follows:—

"Plainly, therefore, Ramnihal Singh, though then presumptively entitled as reversioner, could in fact have had no hope of succeeding to the property now in suit. His consent is in consequence 'worth nothing' *Deputy Commissioner, Sitapur* v. *Auseri Singh* (4)'. So the existence of legal necessity cannot be inferred therefrom. In this connection, it is significant that the first appellant, who was then a major, did not join his father, Ramnihal Singh, in executing the *iqrarnama* dated the 10th November 1896 (Exhibit A 2). For these reasons, I am of opinion that there was no intelligent consent on the part of Ramnihal Singh. Consequently, the deed executed by him on the 10th November 1896 (Exhibit A 2) cannot affect the reversionery rights of the appellant." This, in my opinion, is a finding of fact which is binding on me. The use of the word "intelligent" in the above quotation is unfortunate but I have no doubt in my mind that the finding of the learned Subordinate Judge substantially amounts to the opinion that consent obtained in the particular circumstances to which he refers in detail in his judgment is not sufficient to justify a presumption of legal necessity in favour of the vendee.

I, therefore, maintain the decree of the lower Appellate Court and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 50 Ind. Cas. 498; 23 C. W. N. 777; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

(2) 21 A. 71; 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind Dec. (N. S.) 755 (P. C.).

(3) 27 Ind Cas. 674; 42 C 876; 17 M. L T. 115; 19 C. W. N 370; 13 A. L. J. 223; 2 L. W. 219; 21 C L. J. 225; 28 M. L. J. 585; 17 Bom. L. R. 426; (1915) M. W. N 511; 42 I. A. 64 (P. C.).

(4) 9 O. C. 104.

GANGA SAHAI v. BALDEO SINGH.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 100 OF 1921.
January 4, 1922.
Present:—Mr. Justice Piggott and
Mr. Justice Walsh.
GANGA SAHAI AND OTHERS—PLAINTIFFS—APPLICANTS
versus
BALDEO SINGH—DEFENDANT—OPPOSITE PARTY.

Arbitration—Private enquiry by arbitrator—Misconduct—Award, invalidity of—Construction of agreement of reference Jurisdiction—Revision - Civil Procedure Code (Act V of 1908), s. 115.

The making of private enquiries by an arbitrator, where he is not empowered to do so by the terms of the reference, amounts to legal misconduct and vitiates the award

Where a Court misinterprets the terms of an agreement of reference it does not act in the exercise of its jurisdiction either illegally or with material irregularity to entitle a High Court to interfere in revision.

Civil revision from an order of the Subordinate Judge, Moradabad.

Mr. *B. E. O'Conor*, for the Applicants.

Dr. *Surendra Nath Sen* and Mr. *Peary Lal Banerji*, for the Opposite Party.

JUDGMENT.

PIGGOTT, J.—This is an application in revision against an order superseding an arbitration and directing the trial of the suit to proceed in the ordinary course. It is based upon a finding that there had been misconduct on the part of the arbitrator and so far complies with the provisions of paragraph 15 of the Second Schedule to the Code of Civil Procedure. The misconduct attributed to the arbitrator is, that he had made "private enquiries" behind the backs of the parties. There is authority of this Court for the proposition that the making of such enquiries, where the arbitrator is not empowered to do so by the terms of the reference, amounts to legal "misconduct" on his part. The whole controversy in this case is, whether the arbitrator was or was not empowered to act as he did. For the applicants it is contended that the parties had agreed that the arbitrator might decide the case on his personal knowledge of the facts, and that this necessarily implies a right to supplement his knowledge in respect of any relevant circumstances by any kind of enquiries which he might see fit to make. To this it is replied that, while the parties were quite willing that the arbitrator should make use of such knowledge of the facts as he possessed on the date of the agreement of reference, they never agreed that he might supplement his knowledge by listening to *ex parte* statements behind the backs of either or both of the parties to the reference. The learned Subordinate Judge has applied his mind to this point and has held that the terms of the agreement did not empower the arbitrator to act as he did. I am not sure that I should have arrived at this conclusion if I had been called upon to decide the matter in his place; but the point is at least an arguable one, and the most that could be said in support of the case for the applicants, even if the matter were before us as an appeal on a point of law, would be that the Court below had misinterpreted the terms of the agreement of reference. As the Legislature has not seen fit to allow an appeal from an order of this nature, even on the grounds specified in section 100 of the Civil Procedure Code, I do not think we ought to interfere in revision. It does not seem to me possible to hold that the Court below has acted in the exercise of its jurisdiction either illegally or with material irregularity.

I would, therefore, dismiss this application with costs.

WALSH, J.—I agree.

BY THE COURT.—The application is dismissed with costs.

J. P.

Application dismissed.

LIAQAT HUSAIN v. NAROTAM DAS.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 110 OF 1921.

July 1, 1921.

Present:—Syed Wazir Hasan, A. J. C.

LIAQAT HUSAIN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

NAROTAM DAS AND OTHERS —DEFENDANTS—RESPONDENTS.

Construction of document—Patta istimrari—*Partition*—*Subordinate interest, whether affected*—*Ejectment.*

In order to construe a document the Court must ascertain its legal effect with reference to its terms. Merely calling a document by a certain name will not make it that document. [p. 781, col. 1.]

Tirugnanapal v. *Ponnammai Nadathi*, 58 Ind Cas. 228; 25 C. W. N. 511, (1920) M. W. N. 559; 28 M. L. T. 190; 12 L. W. 660 (P. C.), referred to.

A document, styled a *patta istimrari*, granted by an under-proprietor, authorised the grantee to continue in possession of the property conveyed generation after generation on payment of the Government revenue. It further provided that the grantee and his heirs shall have the same rights of ownership as the grantor had, and that the grantor and his representatives shall have no claim to and shall cause no interference in the property conveyed:

Held, that the document conferred complete under-proprietary title on the grantee in respect of the plots covered by it. [p. 781, cols. 1 & 2.]

A partition does not necessarily invest a party with a right to actual possession of lands which are allotted to him. Persons holding interests in a village of a nature subordinate to the interest which is the subject-matter of partition cannot be held to be liable to ejectment on the ground that the land which they occupied is allotted to any particular co-sharer in the partition. A person seeking to eject them must show that their interest in the plot in question is of such a nature as was legally affected by the partition proceedings. [p. 781, col. 1.]

Appeal from a decree of the Subordinate Judge, Sultanpur, dated 19th January 1921, confirming that of the Munsif, Sultanpur, dated 5th July 1920.

Messrs. *Niamatullah* and *Ehsanur Rahman*, for the Appellants.

Messrs. *A. P. Sen* and *S. N. Roy*, for Respondents Nos. 1 and 2.

JUDGMENT.—The parties are co-sharers in village Daryapur in the district of Sultanpur. The entire village is held as an under proprietary tenure under sub-settlement. One *Musammat* Sonaiti Bibi was also a co-sharer in the village. On the 14th March 1878 she sold her share in favour of Ghasi Khan and some other persons. On the 13th June 1878 the vendees executed a document in favour of *Musammat* Sonaiti Bibi, the vendor. This document is given the name of a perpetual lease. It comprises four plots, two of which are in dispute in this case that is, Nos. 118 and 174 of old Settlement. In execution of a decree against *Musammat* Sonaiti Bibi her rights under the document of the 13th June 1878 were attached and sold in respect of plots Nos. 118 and 174. The sale also included two other plots, Nos. 173 and 175, which are not covered by the lease of the 13th June 1878. This sale took place on the 1st October 1883 and the defendants' ancestor was the purchaser of these plots. In the year 1908 a partition of the entire village was effected under the provisions of the U. P. Land Revenue Act (III of 1901). Amongst others, the parties to this suit or their predecessors-in-interest were parties to the partition proceedings. Apart from the interest which the defendants' ancestor acquired in the four plots already mentioned in virtue of the purchase of the 1st October 1883, they were co-sharers in the village independently of that purchase. In that partition plots Nos. 118 and 174 as well as plots Nos. 173 and 175 were allotted to the plaintiffs' predecessor-in-interest. The plaintiffs brought the suit, out of which this appeal arises, for possession of those four plots. They based their title on the partition proceedings, to which reference has already been made. The defence to the suit which is necessary for the purpose of this appeal was to the effect that the four plots in dispute were held by the defendants in the character of a lessee and not in that of an under-proprietor. This defence naturally raised the issue as to the interpretation of the deed of the 13th June 1878 so far as plots Nos. 118 and 174 were concerned. The Courts below have held that the document in question evidenced nothing more than a mere lease-hold interest in favour of *Musammat* Sonaiti Bibi.

It is contended in appeal before me that the Courts below have erred in in-

terpreting the document of the 13th June 1878, and that the correct interpretation is that it is a complete transfer of the rights of Ghasi Khan and others in those plots. I agree with the contention of the learned Pleader for the appellants. There is no doubt that the document is given the name of *patta istimrari*, as I have already observed, but calling the document a *patta istimrari* does not make it so. We must ascertain the legal effect of the document with reference to its terms. In the case of *Tirugnanapal* v. *Ponnammai Nadathi* (1) the question was as to the interpretation of a document, which was given the name of a Will. Lord Moulton observed as follows:—"But calling a document a Will does not make it so." To construe rightly the document of the 13th June 1878 I must look to its terms. It authorises the grantee, *Musammat* Sonaiti Bibi, to continue in possession of the property conveyed thereby, generation after generation, on payment of revenue, which means the Government revenue, to the extent of Rs. 7-8-0, to the grantors. The document further says that the grantee and her heirs shall have the same rights of ownership as the grantors had and that the grantors and their representatives shall have no claim to, or cause no interference in, the property conveyed by the deed. It is admitted that the grantors possessed under-proprietary rights in the village in virtue of the sale effected in their favour by *Musammat* Sonaiti Bibi a few months before, that is, on the 14th March 1878. Indeed, the so-called perpetual lease recites the fact of the sale and the possession of the vendees thereunder.

It appears that the motive for the execution of the deed of the 13th June 1878 was the recognition of the needs for maintenance for the former owner, *Musammat* Sonaiti Bibi, on the part of her vendees. In fact the deed says that the grant is being made for the purpose of her maintenance. There was, therefore, ample consideration for the conveyance of the 13th June 1878. I am, therefore, clearly of opinion that the document confers complete under proprietary title on *Musammat* Sonaiti Bibi in respect of the plots covered by it. Amongst those plots are, as already stated, plots Nos. 118 and 174, which are in dispute in this case. The defendants were, therefore, co-sharers of the plaintiffs at the time of the partition of 1908 in regard to those plots. It follows that any title which they possessed to those plots in virtue of the deed of the 13th June 1878 was lost to them by reason of their allotment to the plaintiffs in the partition proceedings. The plaintiffs are, therefore, entitled to a decree in respect of those plots.

Now remains the question of the other two plots in dispute in this case, namely, plots Nos. 173 and 175. The defendants alleged, as I have already stated, that they were lessees of all the four plots. It is common ground that the two plots, Nos. 173 and 175, are not comprised in the document of the 13th June 1878, as I have already stated. The status of the defendants, therefore, with reference to these two plots is not that of an under-proprietor. The partition proceedings are consequently no bar to the retention of these plots by the defendants. The plaintiffs cannot be held to be entitled to actual possession of every piece of land that might have been allotted to them in the partition proceedings. The effect of the partition does not necessarily invest the party with a right to actual possession of lands which are allotted to him. Persons holding interests in a village of a nature subordinate to the interest which is the subject-matter of partition cannot be held to be liable to ejectment on the ground that the land which they occupied is allotted to any particular co-sharer in the partition. This is a suit in ejectment and the plaintiffs are under a clear obligation to establish their title to the relief which they seek in the suit; in other words, they must establish their right that they are entitled to turn the defendants out of the actual possession of the plots in question and this they can do only by showing in this particular case that the interest of the defendants in the plots in question is of such a nature as was legally affected by the partition proceedings. This the plaintiffs have not succeeded in showing. The name of the defendants in respect of these

(1) 58 Ind. Cas. 233; 25 C. W. N. 511; (1920) M. W. N. 559; 28 M. L. T. 103; 12 L. W. 630 (P. C.).

plots are entered in the revenue papers as bare lessees or in some papers as mere tenants. I am, therefore, of opinion that the plaintiffs have failed to establish their right to the actual possession of plots Nos. 173 and 175. It is not necessary for me to determine in this case what is the exact status of the defendants in relation to these plots. What is necessary to decide is, that they are not under-proprietors of these plots and this I have already done.

I, therefore, accept the appeal, modify the decree of the Court below and give the plaintiffs a decree for possession of plots Nos. 118 and 174 old Settlement. The decree of the Court below in respect of plots Nos. 173 and 175 is confirmed. The parties to bear their own costs throughout.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS No. 297 OF 1921.

January 4, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

INAYAT ULLAH KHAN—APPLICANT

versus

NISAR AHMAD KHAN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 24—Transfer of case—Plaintiff's right to chose forum—Ground of transfer—Convenience.

An applicant for transfer of a case from one Court to another must make out a strong case of the balance of convenience. [p. 785, col. 1.]

In such a case the convenience of the parties in the conduct of litigation is certainly a relevant consideration and it is rather the basis of nearly all statutory jurisdiction on the civil side. [p. 785, col. 1.]

Subba Bibi v *Maqbool Hussain*, 32 Ind. Cas. 612; 14 A. L. J. 242 and *Tula Ram* v. *Harjiwan Das*, 5 A. 60; A. W. N. (1882) 164; 3 Ind. Dec. (N. S.) 55, followed.

Madho Prasad v. *Moti Chand*, 50 Ind. Cas. 368; 17 A. L. J. 37; 41 A. 58, doubted.

A plaintiff has a *prima facie* right to decide the place of trial, but the defendant may show exceptional circumstances for trial of the case at another jurisdiction. [p. 785, col. 1.]

A suit for cancellation of a deed of gift executed in the Central Provinces by a deceased person while in the state of ill-health under undue influence was transferred from a Court within the jurisdiction of the Allahabad High Court where the parties resided to the Court in the Central Provinces on the ground that the balance of convenience was in favour of the latter Court inasmuch as all available witnesses resided at the place in the Central Provinces [p. 784, col. 2.]

Application for transfer of a suit pending in the Court of the Subordinate Judge, Shahjahanpur.

Mr. *Uma Shankar Bajpai*, for the Applicant.

Mr. *Lalit Mohan Banerji*, for the Opposite Party.

JUDGMENT.—This is an application which raises both a question of principle and a question of fact of some importance. The defendant, who is the applicant, is the son of one Abdul Jalil Khan, deceased, and the plaintiff is the cousin of the deceased man who claims to be his heir. Abdul Jalil Khan and the other members of his family were old residents of Shahjahanpur, which appears also to have been the ancestral home of the defendant. For the purposes of this case, however, it may be assumed that the deceased migrated to a place called Pusad in Yeotmal, a District of the Berars, which is now a portion of the Central Provinces, and died there in October of last year after having made, so the defendant alleges, certain gifts by deed of his property in favour of the defendant. The suit is brought by the plaintiff as heir of the deceased man to set aside these gifts, and it has been brought in the Court at Shahjahanpur, as a matter of choice, by the plaintiff who is of course in all cases *dominus litis*; probably because it is his ordinary home, the language of the Court is his language and because, as he says, some of the property is situated in that District. However, the defendant, on the ground that, having regard to the issues raised by the suit and the general convenience of the parties in view of the nature of the evidence which will have to be called on both sides in the suit, has applied to this Court to transfer the case from Shahjahanpur and altogether from these Provinces in order that it may be tried in the appropriate Court in the Yeotmal District of the Berars in the Central Provinces.

INAYATULLAH KHAN v. NISAR AHMAD KHAN.

The question of principle raised by the application was not very seriously argued, but our attention was drawn to certain reported cases which make it desirable that we should express our views definitely upon the question. No case is reported on the subject in the authorized reports, Allahabad series, since the year 1882 (I. L. R. 5 Allahabad). There have been decisions which have found their way into modern reports and we prefer to follow the decision reported in *Subba Bibi* v. *Maqbool Hussain* (1), a decision by a member of this Court sitting alone, who followed the view taken by the older case of *Tula Ram* v. *Harjiwan Das* (2), and the invariable practice as it was then established in England (that old practice has now been codified in England in the form of a special rule), namely, to insist upon any litigant applying for transfer to make out a strong case of the balance of convenience. In *Tula Ram* v. *Harjiwan Das* (2), already referred to, the Court recognised that as the real test although it decided against the transfer. There is one further material case, namely, *Madho Prasad* v. *Moti Chand* (3) (another single Judge decision) where a member of this Court declined to adopt that rule and held, without reference to any previous authority, that the mere convenience of the parties was not a good test. We come to the conclusion that that view is not a sound one. After all, the convenience of the parties in the conduct of litigation is certainly a relevant consideration, and it is, perhaps, not too much to say that it is the basis of nearly all statutory jurisdiction on the civil side.

That being the state of the law, the plaintiff in this case, as in every other, has undoubtedly a *prima facie* right to decide the place of trial. The defendant may show, as he does here, exceptional circumstances. The question is, whether those circumstances are such as to make it right to override the wish of the plaintiff and to direct the trial to take place at the most convenient Tribunal. The defendant's main contention in this application is that he has to defend the deeds made in his favour against an attack made upon them by the plaintiff, and that both the attack and the defence must in the end turn upon the local evidence in the place where the deeds were executed, the suggestion being that they were executed by the deceased man in a condition of such ill health as to make him either of not sufficiently sound disposing mind, or subject to the improper influences of some interested party so as to deprive him of the free exercise of his own volition.

To this contention the plaintiff makes several answers :—

Firstly, he alleges that his pedigree has been disputed. As to this the defendant has, by paragraph 6 of his own affidavit, sworn on the 20th of December 1921, admitted the plaintiff to be the cousin of the deceased man, and his Counsel Mr. Bajpai in this Court on this application on his behalf formally admitted the plaintiff to be the heir of the deceased man. These admissions are binding upon both parties to the suit and this issue is, therefore, out of the suit and dispenses with a considerable number of witnesses who would otherwise be necessary from Shahjahanpur.

Secondly, the plaintiff makes the point that the ancestral home of both parties is in Shahjahanpur, that the wives of the deceased Abdul Jalil Khan lived there for the greater part of the time, and that some of the property in suit is situated there. This may be so. The points are really immaterial to the suit. The main issue will be, as we have stated, the condition of health and mind of the donor for some time antecedent to the alleged execution of the deeds and during the period between such execution and his death, and also the extent and nature of the influence exercised upon him during that period. Admittedly, during this period the donor lived at Pusad, according to the plaintiff, for six months only, according to the defendant for nearly a year It, therefore, appears from the position of both parties that the *res gestæ* and the appropriate witnesses on this head are situated at Pusad. Thirdly, the plaintiff makes a point of the language question. This would be a serious if not an insuperable objection to transfer if it were likely to affect the merits or the satisfactory disposal of the

(1) 32 Ind. Cas. 613; 14 A. L. J. 242.
(2) 5 A. 60; A. W. N. (1882) 164; 3 Ind. Dec. (N. S.) 55.
(3) 50 Ind. Cas. 368; 17 A. L. J. 371; 41 A. 281.

suit. The difficulty of language is one which is common to litigation in many parts of India, particularly when the parties belong to and speak the language of one Province and the events in issue occurred in a Province where many material witnesses speak an entirely different one. In this case the difficulty to some extent cuts both ways. Moreover, inasmuch as the plaintiff has traded in Pusad for some years through a general attorney, with personal visits of his own, it is inconceivable that he has no one even in his own employ who can interpret Urdu and instruct a local lawyer in the language of the Court, particularly when a great part of the necessary instructions can only relate to the collection and preparation of local evidence from people who speak the language of the Court. This difficulty can be met by making it part of our order that any special costs of translating the record as it stands up to date, and reasonably to be incurred in employing an interpreter, if the plaintiff has none in his own employment, should be allowed as part of the costs of the suit in addition to those ordinarily allowed by the Court.

Fourthly, there is the further point of the danger of delay based evidently upon some dilatory criminal proceedings which have already taken place in the Central Provinces. We have no ground for supposing that the appropriate Civil Court in the Central Provinces, where the plaintiff will have to sue, will be less disposed to prevent avoidable delay than the Court at Shahjahanpur. We can at least make it clear that, in our view, any attempts by the defendant unduly to delay the disposal, if they appear to be made *mala fide* as the result of this order, ought to be punished in the Trial Court by special orders as to costs thrown away or unduly incurred.

On the other hand, the defendant alleges that he will have to call more than 20 local witnesses. On the question how many he proposes to call, the plaintiff only mentions Urdu speaking witnesses in Pusad but he does not allege that he proposes to call no strictly local witnesses. This is significant. It is almost certain that he will have to call some. He lays stress on 4 or 5 Urdu-speaking witnesses in Pusad but there is obviously no difficulty about these if an interpreter is present even if they cannot speak Marathi. One is said to be a medical man whom it is obviously more convenient to keep near his patients, as far as possible. The plaintiff also lays stress upon four witnesses whom he will have to call from Shahjahanpur on the question of the deceased man's illness. But as there must be some transfer of witnesses in any event, there seems no great hardship in their attending the Court in person as they attended the place where the deceased lay ill.

The question of possession of the house at Shahjahanpur on which the plaintiff also lays stress is clearly a subsidiary one. The three witnesses whom he proposes to call can be duly examined on commission and ought to be so examined, particularly on a point on which evidence of purely eye-witnesses is notoriously vague, irrelevant and unreliable.

On the whole, having regard to the attitude adopted by the defendant, and not without hesitation, we come to the conclusion that the balance of convenience is in favour of the Central Provinces, and that the case must be transferred from the jurisdiction of these Provinces to enable the plaintiff to sue at the appropriate Court in the Central Provinces, the defendant undertaking to do nothing unduly to delay the trial, to contribute Rs. 100 in any event, to the Pleaders' fees already paid by the plaintiff to his lawyers, and not to object to the reasonable costs of translation of the present record and of the interpretation of the evidence being made costs in the cause. The costs of this application will abide the event.

J. P. *Application granted.*

REOTI LAL v. MANNA KUNWAR.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 27 OF 1920.

January 5, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

REOTI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MANNA KUNWAR—PLAINTIFF—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), ss. 8, 78 - Promissory-note, who can sue upon—Beneficial owner, whether can sue.

Under section 78 of the Negotiable Instruments Act, read with section 8 of that Act, only the person who holds a promissory-note in his own name can sue upon it and a beneficial owner cannot maintain a suit.

Gurumurti v. *Sivayya*, 21 M. 391; 7 Ind. Dec. (N. S) 633, dissented from.

Dori Lal v. *Sewak Ram*, 29 Ind. Cas. 988; 13 A. L. J. 695, approved.

Ramanuja Ayyangar v. *Sadagopa Ayyangar*, 28 M. 205; 15 M. L. J. 249, *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*, 30 M. 88; 1 M. L. T. 377 (F. B.); 16 M. L. J. 508, *Subramanya Tevan* v. *Arunachala Tevan*, 18 M. L. J. 186, relied on.

Second appeal from a decree of the Subordinate Judge, Aligarh, reversing that of the Munsif, Haveli.

Mr. *Panna Lal*, for the Appellants.

Mr. *G. W. Dillon*, for the Respondent.

JUDGMENT.—The plaintiff, *Musammat* Manna Kunwar, sued to recover a sum of money due on a *ruqqa* executed by the defendants in favour of one Kishori Lal. The plaintiff's allegation was that the money was advanced by her and that Kishori Lal, in whose name it was drawn, was merely her *benamidar* as she was *parda-nashin*; Kishori Lal had died without heirs and the plaintiff was entitled to recover the money on this *ruqqa*. The defence was, so far as we are now concerned, that the plaintiff could not maintain the suit. The Trial Court found all the issues of fact in favour of the plaintiff, namely, that she had advanced the money in cash to the defendants who had executed the *ruqqa* *benami* in the name of Kishori Lal who was a near relation of the plaintiff. The Trial Court, however, dismissed the suit on the ground that under section 78 of the Negotiable Instruments Act, read with section 8 of that Act, *Musammat* Munna Kunwar could not maintain the suit. She appealed. The learned Subordinate Judge agreed with all the findings of fact found by the Trial Court but held that the suit was, nevertheless, maintainable. What he says is this:—"The *ruqqa* in question is an agreement. It provides for interest and is payable on demand. It is true that under section 78 of the Negotiable Instruments Act only the holder can sue whether the instrument is negotiable or not, but the rule does not apply to agreements. I hold that the *ruqqa* in question is an agreement and the *cestui que trust* can sue on it." He, nevertheless, calls the document a *ruqqa*. We have read the document and there is no doubt whatsoever that it falls within the definition of a promissory-note given in section 4 of the Negotiable Instruments Act. The learned Counsel who appears for the respondent does not, and indeed could not, support the reasoning of the learned Subordinate Judge, but he argues that section 78 of the Negotiable Instruments Act does not bar a suit by the person really entitled to the money payable under a promissory-note. It bars the payment out of Court, it is argued, to any one except the payment as defined in section 8 of the Act so as to get a valid discharge, and that that is all it does, and he relies on the case of *Gurumurti* v. *Sivayya* (1). That case certainly does seem to support his contention, but no reference in that case is made to the provisions of the Act. That judgment, however, has been considered in three later cases by the Madras High Court. In *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (2) a Divisional Bench of that Court dissented from it. It was, however, again considered by a Full Bench of the same High Court in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (3). It is true that that case was the converse of the present case. There it was held that a defendant could not set up the plea that the plaintiff who sued on a promissory-note and in whose name the promissory note was, was not in fact the real owner. That is true, but in the course of the judgment the case of *Gurumurti* v. *Sivayya* (1) was expressly overruled. In *Subramanya Tevan* v. *Arunachala Tevan* (4) this latter case was followed. In our own Court, in the case of *Dori Lal* v. *Sewak Ram* (5), the point was considered by a Judge sitting alone. The facts there were on all fours with the

(1) 21 M. 391; 7 Ind. Dec. (N. S.) 633.
(2) 28 M. 205; 15 M. L. J. 249.
(3) 30 M. 88; 1 M. L. T. 377 (F. B.); 16 M. L. J. 509.
(4) 18 M. L. J. 186.
(5) 29 Ind. Cas. 988; 13 A. L. J. 695.

SHEONARAIN V. NATHU.

facts here, and that learned Judge followed the view taken in the later Madras cases to which we have referred. We agree with his view. We think that the decision of the first Court was correct. The result is that we allow the appeal and, setting aside the decree of the Court below, restore that of the Court of first instance with costs.

J. P. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 41-B OF 1919.

December 20, 1920.

Present:—Mr. Hallifax, A. J. C.

February 15, 1921.

Present:—Mr. Batten, A. J. C.
and Mr. Kotval, A. J. C.

SHEONARAIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NATHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Antecedent debt—Mortgage-debt—After-born son bound.

The consideration of a mortgage executed by a Hindu when he was the sole living co-parcener is an antecedent debt for which the share of an after-born son is liable. [p. 794, col. 2.]

Appeal against the decree of the Additional District Judge, Amraoti, dated 31st July 1919, in Civil Suit No. 8 of 1917.

Mr. *G. V. Kukday* and Sir *B. K. Bose*, for the Appellants.

Messrs. *N. M. Pedgaokar* and *K. K. Gardhe*, for the Respondents.

FACTS appear from the following dissentient judgments of Kotval and Macnair, A. J. C.s, dated the 25th September 1920:

KOTVAL, A. J. C.—This appeal arises out of a suit to enforce a mortgage-deed, dated the 5th July 1912, executed by defendants Nos. 1 and 2 and by *Musammat* Yashodi who acted as the guardian of her minor sons defendants Nos. 3 and 4, their father Kisan, defendent No. 16, being insane. The mortgagor defendants' relationship appears from the following genealogical table :—

SHANKER

- Thakuram,
  - Nathu, defendant No. 1, mortgagor
    - Pundlik, defendant No. 15, minor.
- Kisan = *Musammat* Yashodi, defendant No. 16, insane
  - Bhagwan, defendant No. 2 mortgagor.
  - Moti, defendant No. 3, minor, mortgagor.
  - Deorao defendant No. 4, minor, mortgagor.

Defendants Nos. 5 to 12 are subsequent lessees of the mortgaged property under Nathu and defendants Nos. 13 and 14 are subsequent purchasers of a part of it from Bhagwan and his brothers. The mortgage-deed secures a sum of Rs. 20,000 made up as follows :—

Rs. 12,000, due to Balkrishna Ramchandra Oka on prior mortgages agreed to be paid be the mortgagees.

Rs. 7,000, due to plaintiffs on prior bonds and a balance of accounts.

Rs. 1,000, due to Balwant Sakharam Lakhe on a prior mortgage by Yashodi Bai on behalf of Bhagwan during his minority agreed to be paid by the mortgagees.

The plaintiffs stated that Rs. 4,000 out of the Rs. 7,000 due to the plaintiffs were owed by Nathu alone and Rs. 3,000 by Bhagwan

and his brothers. The lower Court held that Rs. 1,700, the amount of a bond *plus* interest thereon Rs. 324 2-0 total Rs. 2,024-2-0 were due by Bhagwan and Rs. 4,000 by Nathu. Nathu and his interest in the mortgaged property were held liable for Rs 16,000 and Bhagwan and his interest for Rs. 3,0 9 2-0. The lower Court declined to make Nathu and Bhagwan liable each for the other's debts in spite of the joint liability undertaken by them in the mortgage bond. The suit was dismissed against defendants Nos. 3, 4 on the ground that no legal necessity was proved and as against defendant No. 15, Pandlik, on the further ground that the debts were incurred by Nathu for immoral purposes. The liability of defendants Nos. 5 to 12 was made co-extensive with that of Bhagwan. Defendant No. 16, Kisan, was held to have no interest in the family property and no decree was passed against him

I do not refer to the numerous pleas raised in defence, such as the nominal nature of the transaction of mortgage, want of due attestation, minority of defendant No. 2 at the date of the execution of the mortgage, an agreement by the plaintiffs with defendant No. 2 not to recover the mortgage-debt from him or his estate, the exercise of undue influence, misrepresentation and fraud by the plaintiffs against defendant No. 2 and the penal nature of the interest claimed by the plaintiffs, or to the pleas raised by the plaintiffs that Pandlik was not entitled to contest the plaintiff's claim on the ground that he was not born at the date of the mortgage and that the debts were borrowed for legal necessity. The issues bearing on these pleas have been decided by the lower Court against the parties raising them and the findings of the lower Court thereon are not challenged before us. An issue regarding the antecedent nature of Nathu's debts and Pandlik's liability therefor was not decided in view of the finding that the debts were incurred for immoral purposes.

The plaintiffs have appealed, and only two contentions are pressed before us on their behalf,—

(1) that each of the defendants Nos. 1 and 2 should be made jointly and severally liable for the total of the amounts in respect of which they are held liable,

(2) that defendant No. 15 Pandlik's interest in the joint property should be made liable for the amount for which Nathu has been found liable, on the ground that it constituted Nathu's antecedent debts which are not proved to have been incurred for immoral purposes.

Nathu and Bhagwan have not appeared in this Court: the only contesting party here is Pandlik.

As regards the first contention, I am of opinion that it must succeed. The grounds on which the lower Court has made Nathu and Bhagwan each liable only for debts found due from himself appear in the following passages in paragraphs 28 and 40 of its judgment:—

"In view of the observations in paragraphs 19 and 20 of this judgment, it is clear that defendant No. 2 cannot be said to have executed the bond for no consideration. Mr. Oka's debt was contracted by Nathu alone. It does not appear to have been contracted for the benefit of defendant No. 2 or his brothers or their estate. But Rs. 995 were due by him and his brothers to Lakha and that sum was subsequently paid by plaintiffs to Lakha. Besides, defendant No. 2 owed at least Rs. 1,700 to plaintiffs on the bond for that sum executed by himself and that sum with about Rs. 323 for interest was due by him. He was not, of course, liable to plaintiffs for the *khata* debts shown in the account-books of plaintiffs as due by Nathu alone as all those debts were admittedly borrowed by Nathu alone after the partition. Thus the circumstances under which Bhagwan executed the deed were that he was indebted to the extent of about Rs. 3,000 and Rs. 4,000 were to be re-paid by him and his brothers under the arrangement mentioned in the deed of partition. He had just merged from minority. The elderly person in the family to whom he could look up for guidance and advice was his mother—an illiterate woman. He was dealing with Mr. Oka, a Pleader, and with plaintiffs who are and were professional money lenders; and we find him under the circumstances incurring joint and several liability to pay Rs. 20,000 when in fact he was liable to pay about Rs. 3),00) or Rs. 7,000 at the utmost and mortgaging—with his mother—the entire property belonging to him and his minor brothers. This may not be fraud, it may not have been brought about by misrepresentation or undue influence. But

it is something unfair to the minors and to defendant No. 2, Bhagwan, who though not minor was not of mature understanding. It does not appear to be an act done with free consent. At any rate, it cannot be said to be prudent.

"* * * In spite of of the admissions in the mortgage deed (Exhibit P-1) the receipt (Exhibit P-3) and the application (Exhibit P-12) I am not prepared to hold Bhagwan liable for more than Rs. 995 paid to Lakha, Rs. 1,700 for which he had executed a bond, and Rs. 324 2-0 interest on Rs. 1,700 for 9 months and 16 days. Total Rs. 3,019-2-0 and interest on this sum from the date of the mortgage deed, because plaintiff attempted to prove other items and failed to prove them and also because Bhagwan was not at all liable to pay Nathu's debts and his promise to pay them was without consideration and appears to have been secured without his free consent, taking advantage of the fact that he had just emerged from minority and was an inexperienced youth with none to advise him except his insane father and illiterate mother. Similarly, I would not hold Nathu, much less his minor son, liable for what was due not by him by the other branch of the family, as the arrangement by which his liability was to be shared by the other branch fails and the arrangement itself appears to be collusive."

The plea of defendant No. 2 was that his signature to the mortgage-deed was obtained by a representation that the document only effected a mortgage of Nathu's property and that he was not signing it as an executant but merely to secure his release from the obligation to pay his own and Nathu's debts. He did not plead that, though he agreed to pay Nathu's debt jointly with him, there was no consideration for the promise. Nathu remained absent and did not contest the suit at all. Whether there was consideration for the promise or not is a question of fact and, in the absence of any definite plea on the point, I think that the lower Court was not justified in absolving the defendants Nathu and Bhagwan from their liability under the mortgage-deed to pay the combined debts of both. As between Nathu and Bhagwan there is no doubt that there was consideration for the promise of each to be jointly liable for the other's debt. So far as the plaintiff is concerned, there was one joint promise from the two mortgagors for which there was a single consideration moving from the mortgagees, namely, the satisfaction and paying up of the debts of both and the question as to what was the consideration for the individual promise of either of them does not arise. In any case, as I have already stated, in the absence of specific pleas it is not possible to hold that there was no consideration for the individual promises of Nathu and Bhagwan.

With regard to the lower Court's remark that the promise of Bhagwan was secured without his free consent, I am unable to find any foundation for it in any fact proved or admitted. It is found that he was major at the time of the execution of the mortgage and that there was no undue influence, fraud or misrepresentation used against him. It is not complained that the burden of proving these was wrongly laid on him. It is not alleged that there was any coercion or mistake. I fail to see the force of the lower Court's remark that the arrangement for joint liability was collusive. Under these circumstances, I hold that Nathu and Bhagwan and their interest in the mortgaged property are jointly liable for the total amount found due from both of them.

The second contention of the appellants refers to the liability of Pandlik's share of the joint family property for the debts found to be due from Nathu. It is contended that these constitute antecedent debts of Nathu for which Pandlik's interest in the joint property is liable and that the finding of the lower Court that they were incurred for immoral purposes is wrong since no connection between the debts and Nathu's immoralities is established. The finding of the lower Court on this point is that Nathu was addicted to drinking, gambling and spending money on prostitutes, and that the fact that the period of these immoralities coincides with the period of his borrowings establishes a sufficient connection between the immoralities and the debts. This leads to an examination of the evidence as to the immoralities and their connection with the debts.

A number of rulings have been cited by the appellants' learned Advocate in support of his contention that it is not sufficient merely to show that the father was of immoral and extravagant habits in order to enable the son to claim exemption from the payment of his

father's antecedent debts, but it must also be shown that the money borrowed was applied to immoral purposes. In the present case, as is admitted by the learned Advocate for the respondent, Pandlik, it is not proved that any specific sum borrowed was so applied. But in my opinion such proof is not indispensible. The issue whether the debts were contracted for immoral purposes is one of fact and may be proved by inference from evidence showing that they were contracted during a period of extravagant immoral habits. But in such a case there must be definite and convincing proof that the immoral practices were co-temporary with the loans and could not have been indulged in without the use of the borrowed amounts. I am unable to hold that the evidence in this case is of that kind. That Nathu used to drink is probable, but the evidence of the defence witnesses on the point appears to exaggerate this vice of his. I am unable to attach much importance to the evidence of the ex-Tehsildar (15 D. W. 4) which amounts only to this, that he visited Nathu's village four or five times in 1912 and remembers to have seen him drunk, but how often he cannot say. Nor do I think it safe to rely on 15 D. W. 20 and 15 D. W. 7 whose evidence is adduced to prove Nathu's extravagance due to drinking. These alone are the witnesses to whom any reference is specifically made by the lower Court. The other evidence refers in general terms to Nathu's habits of drinking, gambling and spending money on shows and prostitutes The witnesses appear to be indulging in exaggeration and their statements appear to be haphazard and made without any sense of responsibility. I am not satisfied that such immoral practices have been proved as could not be indulged in without an expenditure approximating to the amount of the loans.

I note that no question regarding Nathu's immoral habits was put to defendant No. 2 Bhagwan (2 D. W. 3) or his mother Yashodi (2 D. W. 1). Nathu, as was to be expected, has kept himself out of the witness-box, though as appears from the evidence of 15 D. W. 21 he must be conducting this litigation.

The defendants' evidence does not also satisfactorily prove that the periods of the immoral habits and the loans were synchronous 15 D. W. 10 and 15 D. W. 18 make out that Nathu's vices began five or seven years before September 1918 when they were examined and 15 D. W. 7, 15 D. W. 8, 15 D. W. 11, and 15 D. W. 14 give instances of extravagance and immorality occurring within the same period. Now, though the bond in suit is dated the 5th August 1912 and Rs. 12,000 were paid on Nathu's behalf to Oka on and after that day, yet this amount was due to the latter on account of mortgage-bonds executed in 1907 and 1908 and the sum of Rs. 4,000 due to the plaintiffs from Nathu which is incorporated in the bond in suit is not altogether a new borrowing but a balance due on account of previous transactions. I am of opinion that there is not sufficient proof to enable us to arrive at a distinct finding that the debts were contracted for immoral purposes.

It is contended on behalf of Pandlik that, in any case, the amount of Rs. 12,000 does not constitute an antecedent debt as it was borrowed on the security of the joint family property. Reliance is placed in support of this contention on *Sahu Ram Chandra* v. *Bhup Singh* (1) where at page 447* their Lordships of the Privy Council observe,—

"The law was thus stated by Lord Hobhouse in *Nanoni Baburain* v. *Modhun Mohun* (2),—

'Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.'

"In their Lordships' opinion these expressions which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antece-

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom L. R. 493; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 13 C. 21 at p. 35 (P. C.); 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. s.) 510.

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dently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property."

The appellants' Advocate relies on *Arumugham Chetty* v. *Muthu Koundan* (3) where the above ruling is explained, and it is held that their Lordships of the Privy Council did not intend to lay down the proposition that the antecedent debt must be one which was not incurred on the security of the joint family property. The view taken by the Madras High Court in this case is that this question was not before their Lordships, that the statement in their judgment that the antecedent debt must be one which was not incurred on the security of joint family property is an *obiter dictum* and that, in view of the great disturbance of titles which is likely to result from the application of the principle appearing in that statement, their Lordships cannot be taken to have intended to lay down a principle for general application. It is said that the only question before their Lordships was whether there should not be a real antecedency or whether was enough that the debt was incurred contemporaneously with, or a short time before, the alienation, the conflict on which their Lordships were then settling. With due respect to this opinion it seems to me that their Lordships who were deciding the question as to the nature of an antecedent debt an alienation for which would be binding on the son, must be taken to have considered the principle governing the nature of such debt in all its aspects, and that they were not likely to have referred to an aspect which they did not intend the Subordinate Courts to be guided by.

It is true their Lordships were settling a conflict on the question whether a debt borrowed on the occasion of the grant of a mortgage was an antecedent debt, but in meeting the argument that a debt which was borrowed a short time before granting the mortgage would be *de facto* antecedent, their Lordships appear to rule that the mere lapse of time is not the sole factor in the determination of the question of antecedency, but that the intention or understanding at the time of the loan is also to be considered. If at the time the loan was borrowed there was an understanding that a mortgage of the joint family estate was to be granted, then, as I think, in their Lordships' opinion the loan would not constitute an antecedent debt binding on the son. This is what I understand is meant by their Lordships when they say at page 449*: "In truth, in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact." This principle of dissociation in fact is the principle that the debt must also be one "incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

Where a creditor has lent money to the father originally on the security of the joint family estate and later on a fresh mortgage is granted for the same money it may well be taken that the security afforded by the second mortgage is in pursuance of the original intention to make the estate security for the debt and that the debt is, therefore, not dissociated in fact from the alienation.

If a debt secured by a mortgage of the joint family property is to be treated as an antecedent debt when a second mortgage is executed in respect of it the result would be that a transaction, which was originally of no force as constituting, according to their Lordships of the Privy Council, a breach of trust, would be legalised by what really is a repetition of that breach.

I think that their Lordships did intend to lay down the rule that the antecedent debt must be one which was not incurred on the security of the joint family property and that we are bound by it. This opinion finds support in First Appeal No. 70 of 1917 decided by Mittra, A. J. C., [*Dileshwar Ram Brahman* v *Nohar Singh* (4)]

(3) 52 Ind. Cas. 525; 42 M. 711 (F. B.); 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. J. 96.

(4) 48 Ind. Cas 193.

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and Second Appeal No. 291 of 1918 decided by Finlay, A. J. C., [*Nanhusao* v. *Ganpati* (5)] and in *Brij Narain Rai* v. *Mangla Prasad* (6) and *Badagila Jogi Naidu* v. *Bendalam Papiah Naidu* (7) the case overruled in *Arumugham Chetty* v. *Muthu Koundan* (3). It is, however, contended that the debts due to Oka were not wholly borrowed on the security of the joint family property but consisted partly of previous cash advances. The lower Court has not decided the issue as to the antecedency of the debts and this point will have to be further considered.

As regards the debt of Rs. 4,000 due to the plaintiffs it is admitted by Pandlik's Advocate that it would be antecedent, but it is contended that it has not been proved as against Pandlik, and in this connection reference is made to paragraphs 38 and 39 of the lower Court's judgment. In paragraph 38, in considering the question of legal necessity for the sum of Rs. 3,000 found due by Bhagwan, the lower Court states that "the plaintiffs did not care to have their account-books proved." Paragraph 39 is as follows :—

"I have not considered in detail the legal necessity for the sums borrowed by Nathu as Pandlik's liability is to be decided on a different consideration, *viz*, if the debts borrowed were antecedent. However, I may say generally that in connection with those sums also, the account-books are not proved and legal necessity has not been established; nor have the plaintiffs proved that they advanced the sum after any inquiry regarding the evidence of a necessity. All that they appear to have cared for is whether Nathu's property was large."

I cannot accept this as a proper finding that the amount has not been proved to be advanced. The plaintiffs have filed Exhibit P-5, a bond, dated the 5th July 1911, for Rs. 2,500 the last one executed by Nathu in his favour—which has been held to be proved. They have also filed an extract from their account books, Exhibit P-8, and as P. W. No. 2 the plaintiff Sheonarain has stated how the sum of Rs. 4,000 had become due from Nathu. The Pleader for Pandlik did not cross-examine him at all on these matters, and, under the circumstances, I consider that this amount which has been admitted by Nathu in the mortgage-bond in suit and has been held proved against him has been sufficiently proved also as against Pandlik.

I propose to remand the case to the lower Court for a decision of the question (*a*) how much of the Rs. 12,000 due to Oka was borrowed from him on mortgages of the joint family property, (*b*) how much of the amount borrowed from Oka on mortgages of joint family property constituted antecedent debts at the time of the mortgages to him, and (*c*) how much of the Rs. 12,000 was on account of advances made by Oka unsecured by mortgages of joint family property at any time. Pandlik will be liable for amounts (*b*) and (*c*). Such additional pleadings and evidence as the parties desire or the Court deems necessary will be taken. After the decision of the above questions a decree will be passed in consonance with it and with the findings given in this judgment. Cost in this Court will abide the result.

MACLEAN, A. J. C.—I have fully considered the reasoning given by my learned brother for his decision that Rs. 12,000 out of the consideration has not been proved to be antecedent debt. I find myself unable to concur in this decision. The facts which require to be stated, as follows. In 1907 and 1903 Nathu executed two mortgages in favour of Oka purporting to bind the joint family estate. It is uncertain whether he received the whole of the consideration on the occasion of executing these mortgages, but for the purpose of considering this question of law it may be assumed that he received the consideration at the time the mortgages were executed. In 1912 he executed a fresh mortgage in favour of the plaintiff in order to pay off the debts incurred in 1907 and 1903.

The question for consideration is, therefore, this: a father borrowed certain sums and at the time of borrowing executed mortgages purporting to bind the joint family estate. After some years he executed a fresh mortgage in order to pay off these debts. Can a son impeach the subsequent alienation on the ground that these debts are not such antecedent debts as those

(5) 53 Ind. Cas. 211.
(6) 50 Ind. Cas. 101; 41 A. 235; 17 A. L. J. 24; 1 U. P. L. R. (A.) 43.
(7) 49 Ind. Cas 239; 35 M. L. J. 331.

to which Lord Hobhouse in *Nanomi Babuasin* v. *Modhun Mohun* (2) referred?

3. In order to appreciate the bearing of the observations of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1) quoted by my learned brother, it is necessary to consider the whole of the pages 447, 448 and 449*. The paragraph which precedes the portion quoted by my learned brother is as follows :—

"It is denied that the mortgage can be held to have been granted for an antecedent debt. Antecedent debt, it is said, there was none, and to call a borrowing made on the occasion of the grant of a mortgage an antecedent debt is to extend unduly and improperly the whole scope of the exception on that topic. As to this unfortunately there has been much difference of view in the Courts in India."

After the portion quoted, their Lordships state,—

"In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, *viz.*, that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara Law does not warrant or legalize any such transaction."

Their Lordships then say,—

"The limits of the principle of the exception have been thus set forth because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt."

In my opinion, then, there can be no doubt that their Lordships' attention was solely devoted to the settlement of the question whether borrowing made on the occasion of the grant of a mortgage could be called antecedent debt. Their remarks were intended to form a guide to the settlement of the conflict of authority in India on this subject. At the foot of page 448 their Lordships again indicate clearly by citing certain cases, what is the conflict of authorities to which they refer.

The quotation which is made by Sadhagiri Ayyar, J., in *Arumugham Chetty* v. *Muthu Koundan* (3) is extremely pertinent,—

"Dicta by Judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding."

I have, therefore, to consider whether the language of their Lordships makes it absolutely clear that they would have held that the obligations incurred by Nathu in 1907 and 1908 were not in 1912 antecedent debts.

7. In the first place, I remark that every one of their Lordships' remarks can be satisfactorily construed as referring to the question whether a borrowing made on the occasion of a grant of a mortgage can be called an antecedent debt. The words "an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate," at first sight offer a little difficulty but they clearly refer to an argument which in another shape is discussed at the end of the judgment. The obligation mentioned in the words quoted is one *de facto* antecedent in so far that it was incurred an hour, a day, or a year before the alienation took place: but one not in fact dissociated from that alienation.

In the next place, a considerable portion of the reasoning of their Lordships has not direct application to the question I am now considering. The mortgage-deeds of 1907 and 1908 did not bind the joint family estate. Nathu may be considered to have attempted to commit breaches of trusts in 1907 and 1903 but the attempt was unsuccessful since the deeds did not bind the joint family estate. To hold that the deed of 1912 is binding on the estate

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does not in effect extinguish the sound and cogent principle that no manager can be entitled for his own purposes to dispose of the estate which is under his charge; for, as soon as the law laid down in *Sahu Ram Chandra* v. *Bhup Singh* (1) becomes universally known, a mortgagor will be able to borrow only on his own estate even if he execute bonds such as those executed in 1907 and 1908 which purport to bind, but do not bind, the joint family estate.

Again, their Lordships would have been very reluctant to vary the long established practice regarding the antecedent debt. In considering the conflict of authority they laid stress on the point that the power of a father to alienate property in consideration of an antecedent debt was an exception from a general and sound principle, and remarked that this exception should not be extended. But the exception is allowed because of the settled state of the law and the case for restricting the exception by variation of the settled law is very different from the case for extending that variation in directions where there is conflict of authority. I entirely agree with the opinion of Wallis, C. J., [*Arumugham Chetty* v. *Muthu Koundan* (3)] that all Courts in India, the legal profession, and the public know of no restriction of the terms of antecedent debt such as their Lordships are supposed to have favoured. I agree also with the remarks of Sadasiva Ayyar, J., on pages 720 and 731*, regarding the inconvenience which would be caused by variation of the settled law.

I add that if the remarks of their Lordships are held to have varied the settled law it appears to me that much litigation will be necessary in order to ascertain the extent of the variation. I assume that it will be held that obligations incurred on the occasion of the grant of a mortgage purporting to bind the family estate cannot justify subsequent alienations. But the question remains whether it follows from the fact that no such mortgage was executed that the obligation was incurred wholly apart from the security supposed to be available by the joint estate. The parties to a simple bond may still have been influenced by the idea that the obligee at a future period may bind the joint estate for re-payment of the obligation.

I have perused the judgments in *Brij Narain Rai* v. *Mangla Prasad* (6), *Badagala Jogi Naidu* v. *Bendalum Papiah Naidu* (7) and the unreported ruling mentioned by my learned brother. The Judges who decided these cases had not the advantage of reading the careful judgments in the Madras Full Bench case *Arumugham Chetty* v. *Muthu Koundan* (3). With the greatest respect, I give my opinion that they did not appreciate that their Lordships' remarks were directed to the settling of the conflict of a particular matter. I remark that the Judges in *Brij Narain Rai* v. *Mangla Prasad* (6) mentioned the fact that the law was understood to support a mortgage such as that made by Nathu in the present case previous to the decision of *Sahu Ram Chandra* v. *Bhup Singh* (1). With the greatest respect, I give my opinion that the judgment of Spencer, J., in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (7) contains a fallacy. I refer to the second paragraph on page 314. It is undoubtedly open to a father to incur a debt at one time and subsequently execute a mortgage binding on the son's interest in order to pay that debt. The only restriction is that the two transactions must be dissociated in fact. The decision of the Privy Council renders of no effect a mortgage-deed executed at the time the debt was first incurred. I cannot see that if the later mortgage-deed is considered binding even if an ineffectual mortgage-deed was previously executed the sanction of law will be given to the evil which the Privy Council seek to avoid.

I hold, therefore, that the dicta of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1) do not overrule the uniform course of decisions in all High Courts. I consider, therefore, that I should follow that uniform course of decisions. I entirely agree with the findings of my learned brother on all other points in this case and consider it unnecessary to add to what he has stated.

My view renders the remand of the case to the lower Court unnecessary. I propose that the decree of the lower

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Court should be set aside and a decree be passed in accordance with the prayer in the plaint.

ORDER.

KOTVAL, A. J. C. AND MACNAIR, A. J. C.—As there is a difference of opinion amongst us it is referred under section 10 (*b*) (*ii*), Central Provinces Courts Act, to such other Judge as the Judicial Commissioner may appoint.

The point of law upon which we differ is stated in the judgment of Macnair, A. J. C.

BATTEN, OFFG. J. C.—(*September* 25, 1920.)—Hallifax, A. J. C. will kindly sit to hear this reference.

OPINION.

HALLIFAX, A. J. C.—(*December* 20, 1920). The question referred to me for decision has nowhere been definitely stated. The order of reference says that it is stated in the judgment of Macnair, A. J. C., but I can find in that judgment only a statement of the question before the Bench, in these terms: "A father borrowed certain sums and at the time of borrowing executed mortgages purporting to bind the joint family estate. After some years he executed a fresh mortgage in order to pay off these debts. Can a son impeach the subsequent alienation on the ground that these debts are not such antecedent debts as those to which Lord Hobhouse in *Nanomi Babuasin* v. *Mohun Mohun* (2) referred?" This question, as it stands, obviously cannot be answered because the data are insufficient. It appears that one Nathu borrowed certain sums of money in 1907 and 1908 and on each occasion executed a mortgage of his ancestral property. In 1912 he executed another mortgage of the same property, of which the consideration was the amount due on the two previous mortgages of 1907 and 1908. His minor son Pandlik now impeaches the mortgage of 1912, and it is pleaded by the mortgagees that the consideration of that mortgage is, therefore, binding on him and his share in the property. Kotval, A. J. C., is of opinion that the consideration of the two previous mortgages, except such portion of it as may have been due by Nathu before he executed those mortgages, cannot be held to have been in 1912 such an antecedent debt as would bind the share of his son, in view of the ruling of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1). Macnair, A. J. C., considers that the fact that Nathu secured the debts by mortgages in 1907 and 1908 does not, in the circumstances of this case, make the mortgage of 1912 any less binding on the share of the son.

The actual point of difference between my two learned brothers was the interpretation of the ruling in *Sahu Ram Chandra* v. *Bhup Singh* (1), but I take it that the question referred to me is the rather wider one, whether, in the circumstances of this case, the consideration of the mortgage of 1912 was an antecedent debt due by Nathu of such a character that the mortgage would bind the share of his son Pandlik. I have no hesitation in saying that it was, and that the difficult question of interpretation of a ruling which has been discussed does not arise at all, for this reason. When the mortgage of 1912 was executed Pandalik was in *gremio matris*. In 1907 and 1908, therefore, he was not even in that inchoate existence that would give him a vested interest in the ancestral property in the hands of Nathu. The property in which Pandlik became a co-parcener at his birth in 1912, or rather at his conception, was that originally held by Nathu *minus* what he had alienated in 1907 and 1908. In those years Nathu had no co-parceners. He was sole owner of the property and, to use the words of their Lordships in the case mentioned, this is a "case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property." My answer to the question referred is, therefore, that the consideration of the mortgage of 1912 was an antecedent debt due by Nathu of such a character as to make the mortgage binding on the share of his son Pandlik in the property.

JUDGMENT.

BATTEN & KOTVAL, A. J. Cs.—(*February* 15, 1921).—The reference to a third Judge has now been decided, and it has been held that the mortgage of 1912 is binding on the share of Pandlik. A decree must, therefore, be passed in accordance with the

judgment of Macnair, A. J. C. The last paragraph of his judgment is as follows:—

"* * * I propose that the decree of the lower Court should be set aside and a decree be passed in accordance with the prayer in the plaint."

An application has been filed on behalf of defendants-respondents Nos. 3 and 4, Moti and Deorao, urging that the claim was not pressed against them in appeal and no decree as prayed for in the plaint should be passed against them. On behalf of Pundlik it is pointed out that, although a decree for foreclosure was asked for in the plaint, the first Court passed only a decree for sale and a decree in accordance with the plaint will involve the reversal of the first Court's decision on a point not appealed against by the plaintiffs.

We have heard the appellants' Advocate and he concedes that the judgment means that a decree be passed for the claim in the plaint as modified in appeal and that the contentions on behalf of Moti, Deorao and Pundlik are correct.

A decree will now be drawn up as follows:—

The suit is dismissed as against defendants Nos. 3, 4 and 16, Moti, Deorao and Kisan. Defendants Nos. 1, 2 and 5 to 15 are ordered to pay Rs. 19,019-2-0 and interest thereon at Re. 1 per cent. per mensem from the 5th July 1912 to the 15th January 1913 and at Re. 1-8-0, per cent. per mensem from the 16th January 1913 to the 11th May 1917 and at Re. 1-4-0 per cent. per mensem from the 12th May 1917 to the 15th August 1921, the date fixed for payment, and costs in both Courts.

A preliminary decree for sale in terms of rule 4, Order XXXIV, First Schedule, Civil Procedure Code, will be drawn up. Plaintiffs will pay defendants Nos. 3 and 4 their costs in both Courts. Defendants Nos. 3 and 4's Pleader's fee in this Court Rs. 100.

K. H. *Order accordingly.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 106 OF 1921.

January 6, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

CHIMMAN LAL POSTI MAL—PLAINTIFFS—APPELLANTS

versus

PHOOL CHAND FATEH CHAND—DEFENDANTS—RESPONDENTS.

Arbitration Act (IX of 1899), s. 19—Reference by one party—Suit by other party—No application to stay suit—Waiver of right to arbitration.

Where under the terms of reference a party refers a dispute to arbitration, and the other party brings a suit but the first party having knowledge of the suit deliberately makes no application under section 19 of the Arbitration Act for stay of the suit, the first party must be taken to have waived his right to arbitration [p. 796, col. 2.]

Ram Prosad Surajmull v. *Mohan Lal Lachmi Narain*, 60 Ind. Cas. 895; 47 C. 752 and *Appavu Rowther* v. *Seeni Rowther*, 42 Ind. Cas. 514; 41 M. 115; 33 M. L. J. 177; 5 L. W. 243, referred to.

First appeal from an order of the District Judge, Cawnpore.

FACTS appear from the following judgment of the lower Court:—

"This is an application to file an award under section 11 of the Arbitration Act. The firm of Phool Chand-Fateh Chand, defendants, agreed to sell 20 bales 'dyed buk,' to the firm of Chhamman Lal-Posti Mal of Delhi by contract in writing dated the 7th August 1918. Under the terms of the said contract the parties agreed to refer all disputes arising out of the contract to arbitration. On the 16th February 1919, defendants wrote to plaintiffs complaining that the goods covered by the invoice were not those contracted for. On the 2nd April 1919 they accordingly cancelled their order. A dispute having arisen between the parties, plaintiffs on the 30th August 1919 appointed Mr. Ameer Chand Khosla as their arbitrator. Information was sent the same day to defendants asking them to nominate another arbitrator of their own. On the 17th September 1919 defendants wrote in reply that they had already filed a regular suit on the 16th of September. This intimation was sent both to plaintiffs Chhamman Lal Posti Mal as also to their arbitrator Mr. Ameer Chand Khosla. As defendants failed to appoint an arbitrator Mr. Ameer Chand Khosla gave his award on the 25th of September 1919.

"Numerous objections have been taken to the validity of the award, but the most important of them is contained in paragraph 9 which runs as follows:—

"'Because the objectors filed their suit in Court before any award was made and after service of notice on the arbitrator that no award should be made.'

"Reliance is placed by defendants' learned Pleader on a ruling reported as *Ram Prosad Surajmull* v. *Mohan Lal Lachmi Narain* (1). It has been held that where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit the award is of no effect unless the suit has been stayed pending the arbitration. In the body of the report we find the following remarks:—

"'If the Court has refused to stay an action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows that, in the latter case, the private tribunal, if it has ever come into existence, is *functus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration and that the action itself shall be referred.'

"A similar view was adopted by the Judicial Commissioner of Sind in a case reported as *Sawyer* v. *Louis Dreyfus & Co.* (2). It was held that, where a written agreement for the sale and purchase of goods contains an arbitration clause, each party is under a contractual obligation to refer any dispute which arises to arbitration. If after dispute arising, either party institutes a suit, he thereby commits a breach of contract embodied in the arbitration clause, but at the same time he submits to a competent tribunal the decision of the dispute; for, the jurisdiction of the Court is not ousted by an arbitration clause. The position of the defendants after institution of the suit, is that he can either sue for damages for breach of contract to refer, or indirectly enforce specific performance of the contract by obtaining an order staying the proceedings under section 19. In the present case plaintiffs, although they were informed that a suit had been instituted, took no action under section 19 of the Act. The award was made *ex parte* in spite of the present protest raised by the opposite party.

"The ruling reported as *Ram Prosad Surajmull* v. *Mohan Lal Lachmi Narain* (1) is applicable to the present case and the objection made by defendants appears to be well-founded. I allow the objection and set aside the award. Defendants will have their costs of this case."

Dr. *Surendra Nath Sen* (with him Mr. *Ajudhia Nath*), for the Appellants.

Mr. *G. W. Dillon* (with him Messrs. *B. E. O'Conor* and *Saila Nath Mukerji*), for the Respondents.

JUDGMENT.—We have decided to dismiss this appeal on the simple ground that the defendant having deliberately refused to utilise the machinery provided by section 19, namely, by applying for a stay, must be taken to have waived his right to arbitration. We would merely add that we are not prepared, as at present advised, to go the length of the decisions in *Ram Prosad Surajmull* v. *Mohan Lal Lachmi Narain* (1) and *Appavu Rowther* v. *Seeni Rowther* (3) and to hold that in all such cases an award must necessarily be set aside. It must be borne in mind that some of the observations of Lord Justice Fletcher Moulton relied upon were unnecessary for the decision of the case, and were not adopted by the other members of the English Court of Appeal and that the case was one in which the circumstances were peculiar. We are not prepared to adopt, without qualification, the view which the Madras High Court seems to have adopted in *Appavu Rowther* v. *Seeni Rowther* (3) referred to above, that the moment a suit is brought the arbitrators have become *functus officio* and any award made by them is without jurisdiction. That statement must be qualified by the existence of the power of stay contained in the Second Schedule to the Civil Procedure Code, or in section 19 if the arbitration is one under the Act of 1899. This power may be taken advantage of by the other party to

(1) 60 Ind. Cas. 895; 47 C. 752.
(2) 20 Ind. Cas. 504; 7 S. L. R. 1.
(3) 42 Ind. Cas. 514; 41 M. 115; 33 M. L. J. 177; 6 L. W. 243.

the suit applying for a stay of the suit brought against him.

Subject to these remarks, we dismiss this appeal with costs.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 38 OF 1921.

November 17, 1921.

Present :—Sir William Ayling, KT., Officiating Chief Justice, and Mr. Justice Venkatasubba Rao.

SITALAKSHMI AMMAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

KRISHNASWAMY IYER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144, scope of—Letters Patent Appeal—Order of abatement set aside—Restitution—Order for costs, whether also set aside.

Section 144, Civil Procedure Code, is not confined to cases where restitution is claimed on the reversal of the decree in a first or second appeal. Whenever a decree is varied or reversed the section applies, however the reversal or variance may have been effected.

Tangutur Subbarayudu v. *Yerramsetti Seshasani*, 33 Ind. Cas. 739; 40 M. 229; 3 L. W. 236; (1916) 1 M. W. N. 155; 30 M. L. J. 366; 19 M. L. T. 235, followed.

Where an order declaring the abatement of a suit awards costs to the defendant, and the order of abatement is set aside on appeal, the order as to costs is also set aside, if, apart from the abatement of the suit, there was no other conceivable reason for the award of the costs to the defendant.

Raghu Nath Das v. *Badri Prasad*, 6 A. 21; A. W. N. (1883) 177; 3 Ind. Dec. (N. S.) 574, distinguished.

Appeal against an order of the District Court, Tanjore, in Appeal Suit No. 43 of 1920, preferred against an order of the Court of the Temporary Subordinate Judge, Tanjore, (in I. A. No. 338 of 1919), in Original Suit No. 27 of 1914.

Mr. *K. Rajah Aiyar*, for the Appellants.

Mr. *K. S. Jayarama Aiyar*, for the Respondent.

JUDGMENT.—The only question for our decision in this appeal is, whether the case falls under section 144, Civil Procedure Code. Mr. Rajah Iyer has argued that it does not, because the abatement was not set aside in appeal but by means of separate proceedings. As regards this, we are content to follow the ruling in *Tangutur Subbarayudu* v. *Yerramsetti Seshasani* (1) and to hold that "section 144 is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal, provided the decree is varied or reversed the section applies, however the reversal or variance has been effected." In this case the order of abatement was undoubtedly set aside by the order of this Court in Letters Patent Appeal.

It was next argued that the order of this Court in the Letters Patent Appeal did not affect the order of the Subordinate Judge awarding costs to the defendants. This order as to costs is a necessary corollary to the order declaring the case to have abated, and, apart from it, there could be no conceivable reason for directing the payment of costs by the estate of the deceased first plaintiff who initiated the suit. Reliance was placed in this connection on the ruling in *Raghu Nath Das* v. *Badri Prasad* (2). But we think the case is easily distinguishable. That decision proceeded mainly on the ground that the Subordinate Judge who had disposed of the objection petition under section 280, Civil Procedure Code, was *functus officio* and could make no order for restitution. In the present case, the result of this Court's order in the Letters Patent Appeal has been to set aside the abatement and revive the suit as originally launched and it cannot be said that the Subordinate Judge was *functus officio*.

Then, it is contended that the second plaintiff, the son of the original first plaintiff who applied for restitution, was not a party to the suit. No doubt he now carries on the suit as reversioner in succession to the original reversioner, his father. But he enjoys a dual capacity as the representative of his father's estate, and in this capacity costs were paid by

(1) 33 Ind. Cas. 739; 40 M. 229; 3 L. W. 236; (1916) 1 M. W. N. 155; 30 M. L. J. 366; 19 M. L. T. 235.

(2) 6 A. 21; A. W. N. (1883) 177; 3 Ind. Dec. (N. S.) 574.

him and there is no reason why he should be debarred from recovering them.

Lastly, it is urged that the estate of the first plaintiff is not entitled to derive subsidiary benefit in consequence of an order obtained by second plaintiff. But we can see no reason why it should not be so entitled and in equity relief ought not to be granted. We think that the District Judge has taken a correct view of this case and we dismiss the second appeal with costs.

M. C. P.,
N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 87 OF 1921.
January 5, 1922.
Present :—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.
KASHI PRASAD SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
BALBHADDAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 177—Civil Procedure Code (Act V of 1908), s. 144—Restitution—"Court of first instance", meaning of—Order of Revenue Court refusing restitution—Appeal, maintainability of.

In a suit under the Agra Tenancy Act the "Court of first instance" referred to in section 144, Civil Procedure Code, is the Revenue Court which heard the suit and not the Civil Court which heard the appeal from the order of the Revenue Court. [p. 799, col. 1.]

An application for restitution in a suit for ejectment under the Agra Tenancy Act on the reversal of the decree for ejectment by the Civil Court on appeal must be made to the Revenue Court which tried the suit and not to the Civil Court. [p. 799, col. 1.]

An order of a Revenue Court refusing to direct restitution is not a decree and is not appealable to the Civil Court. [p. 799, col. 2.]

Zohra v. *Mangu Lal*, 28 A. 753 (F. B.); 3 A. L. J. 569; A. W. N. (1906) 223, followed.

Letters Patent Appeal from a judgment of Mr. Justice Walsh.

Messrs. *Kailas Nath Katju* and *Kamla Kant Verma*, for the Appellants.

Dr. *Surendra Nath Sen*, for the Repondents.

JUDGMENT.—The litigation appears to have had a very chequered career. In the year 1910 a suit was brought in the Revenue Court by the present appellant for the ejectment of the defendants from certain plots of land. The Court of first instance, that is the Assistant Collector of the First Class, decreed the claim and ordered ejectment. An appeal was preferred from that decree to the Commissioner and the appeal was dismissed. The case was then taken to the Board of Revenue, and the Board of Revenue held that the appeal from the decree of the Court of first instance ought to have been preferred to the District Judge. Accordingly, an appeal was preferred in the Court of the District Judge and it succeeded and the claim of the plaintiff was dismissed in 1912. A second appeal to this Court was also dismissed. Meanwhile, after the passing of the decree of the Court of first instance that decree was put into execution and the present appellant obtained possession of the holding by ejectment of the tenants. After the decree of the District Judge and the High Court, the respondent applied to the Assistant Collector under section 144 of the Code of Civil Procedure for restitution, that is, for restoration of possession to them. This application was rejected by the Assistant Collector who was of opinion that the remedy of the respondents was one under section 80 of the Agra Tenancy Act. From this order the respondents appealed to the District Judge. The District Judge considered that the decision of the Court of first instance rejecting the application was not correct but he held that the order of the Court of first instance was final and no appeal lay to him. On this ground he dismissed the appeal. A second appeal was preferred to this Court and was heard by a learned Judge of this Court. He set aside the orders of the Courts below and directed possession to be restored within a term fixed by him in his order. From this decision of the learned Judge of this Court this appeal has been preferred under the Letters Patent.

We find it difficult to agree with the reasons given by the learned Judge for his decision. Those reasons were summarised to us by Dr. Sen on behalf of the respondents and he supports them but without assigning any reasons for doing so. The

learned Judge held that 'the Court of first instance' referred to in section 144 was not a Revenue Court but the Civil Court which heard the appeal from the order of the first Court. With this view we cannot agree. In a suit under the Tenancy Act the Court of first instance is the Revenue Court which heard the suit, and not the Court of Appeal. The learned Judge says that the decree of the High Court was a decree directing possession to be restored. This is not so. The decree of this Court only dismissed the appeal preferred to it from the decree of the District Judge in the suit for ejectment. The effect of the decree of the District Judge was to entitle the respondents to be restored to possession, and for recovering possession the remedy of the respondents was to apply under section 144 of the Code of Civil Procedure, and this application for restitution is to be made to the Court of first instance under the provisions of the section. The section further provides that no separate suit will lie for recovery of possession where the decree of the Court of first instance has been reversed by a higher Court. The learned Judge's opinion that a separate suit could be brought and the application was to be deemed to be a suit cannot be supported in view of the provisions of section 144 itself, which forbids the institution of a sparate suit. The learned Judge of this Court further held that the appeal to the High Court might be deemed to be a regular suit for possession or an application for delivery of possession. As we have pointed out, an application for delivery of possession could only be made to the Court of first instance and not to this Court. This Court does not execute its own decree, and even if the decree of this Court was a decree directing possession to be restored, the application for restoration of possession could only have been made to the Court of first instance and not to this Court. Therefore, in our opinion, the learned Judge of this Court was not entitled to make an order for restitution. Dr. Sen's main contention was that the order of the Court of first instance refusing to grant the respondent's application was a decree within the meaning of section 2 of the Code of Civil Procedure, and that, therefore, an appeal lay to the District Judge. This contention is concluded by the principle of the ruling of the Full Bench in the case of *Zohra* v. *Mangu Lal* (1). That was, it is true, a case in which the question was whether an appeal lay from an order in execution of a decree, passed by an Assistant Collector of the First Class. It was held that, under the whole scheme of the Tenancy Act, a distinction was made between an "order" and a "decree," and that the word 'decree' in section 177 of that Act was a decree in a suit and did not include an order which, if the definition of a decree applied to the case, might be deemed to be a decree under the Code of Civil Procedure. The learned Judges who decided the Full Bench case made a distinction between a decree in a suit and an order. It was held that an appeal lay from a decree in a suit but an order passed by an Assistant Collector of the First Class was not a decree and was not open to appeal. The principle laid down in the Full Bench case equally applies to the present case and upon that principle we must hold that the learned District Judge was right in holding that no appeal lay to him. In this view, the appeal to this Court ought to have been dismissed. No doubt, it is a hard case, but under the provisions of the law we are unable to interfere in the matter.

We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower Appellate Court. In the circumstances of this case, we direct the parties to pay their own costs of the two appeals to this Court.

J. P. & S. D. *Appeal allowed.*

(1) 28 A. 753 (F. B.); 3 A. L. J. 539; A. W. N. (1906) 223.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 387 OF 1921.

January 23, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

DAMBAR SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

KALLYAN SINGH—DECREE HOLDER—RESPONDENT.

Execution proceedings—Res judicata—*Decree, amendment of*—*Execution Court, powers of.*

A obtained a decree for sale against *B* which was set aside on first appeal but restored on second appeal with the addition of the costs of

both the Appellate Courts. In his application for a final decree for sale, *A* omitted to include the costs of the Appellate Courts with the result that the final decree as prepared was not the final decree in the cause, but the decree as passed by the first Court. *A* applied for execution. No objection to execution was taken by *B* who rather paid up a portion of the amount under the decree and obtained further time to pay the balance. On *B's* default, *A* made another application for execution for the balance, adding this time the sum awarded as costs of the Appellate Courts. *B* objected to this inclusion, and, on matter going to High Court on appeal, raised the further point for the first time that the decree not being the final decree in the cause was not capable of execution:

Held, (1 that the Executing Court had no power to include the sum as it was not entered in the final decree; [p. 800, col. 2.]

(2) that the objection to the execution of the decree was one which *B* might and ought to have raised when the first application for execution was made, and having not done so, could not be allowed to raise it in the *later* execution proceedings. [p. 800, col. 2.]

Ram Kirpal v. *Rup Kuari*, 6 A. 269 (P. C.); 11 I. A. 37; 4 Sar. P. C. J. 489, 3 Ind. Dec. (N. S.) 718, followed.

An Execution Court can only add execution costs to a decree in the course of execution proceedings; it cannot add to or amend the decree under execution by including sums left out by the Court which passed the decree. [p. 801, col. 1.]

Execution second appeal from a decree of the District Judge.

Mr. *Uma Shankar Bajpai*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. It appears that Khub Singh and others made a usufructuary mortgage of property situate in village Gokulpur Pipraut in favour of Ausaf Ali Khan and his two brothers. Ausaf Ali's rights as mortgagee were sold in execution of a simple money decree and were purchased by Dambar Singh. Prior to this purchase Ausaf Ali had mortgaged his rights as mortgagee to Dr. Gokul Chand who transferred them to Babu Kallyan Singh, the present decree-holder. The result was that Dambar Singh was the owner of $\frac{1}{3}$rd of the mortgagee rights and Kallyan Singh was the mortgagee of $\frac{1}{3}$rd mortgagee rights. Kallyan Singh sued to recover the amount due to him as mortgagee of the mortgagee rights and obtained a decree for sale on the 30th of October 1912. This decree was set aside on appeal on the 16th of June 1913. On second appeal to this Court the decree of the First Court was restored and the time for payment was extended by six months from the date of the High Court's decree. On the 21st July 1916 Kallyan Singh applied for a final decree for sale. For some reason or other, best known to himself, he did not include the costs of the lower Appellate Court and the High Court awarded to him to be included in the final decree. The result was that the final decree as prepared was for the amount decreed thereunder and the costs of the First Court; or, in other words, for the decree passed by the First Court and not the decree of the High Court which was the final decree in the cause and which was the only decree capable of being made final. The decree holder Kallyan Singh made an application on the 27th of September 1916 to execute the final decree. No objection was taken to the execution by Dambar Singh. On the other hand, on the 16th of July 1917, he paid Rs. 1,800 and obtained further time to pay the balance. The present application in execution was made on the 30th of May 1919, after deducting the amount so paid by Dambar Singh and adding to the balance of the amount decreed under the final decree a sum of Rs. 807 odd representing the costs of the High Court and the lower Appellate Court. Dambar Singh objected to the inclusion of such costs as they were not mentioned in the final decree for sale. The learned Subordinate Judge found that the amount of Rs. 807 odd claimed by the decree-holder was incorrect but that the only amount chargeable against the property was a sum of Rs. 554-6-9 and disallowed the rest of the objection. The judgment-debtor went up in appeal and the learned Judge of the Court below has confirmed the decree of the Frst Court. The judgment debtor comes here in second appeal and, besides raising the question which was put in issue in the Court below, he has raised a further point that the final decree obtained by the decree holder is not capable of execution inasmuch as it was only the appellate decree of the High Court which was the final decree in the cause and which was the only decree which could be made final and then execution taken out. In our opinion, this contention of the judgment-debtor raised before us for the first time is barred by the rule of *res judicata*. When the first application for execution was made he did not raise this objection. He might and ought to have raised it then and as he did

not do so he cannot be allowed to take the same objection in later execution proceedings, see *Ram Kirpal* v. *Rup Kuari* (1).

As to the second objection, we think this objection is bound to succeed The amount of Rs. 554 odd is not entered in the final decree for sale and it could not be recovered. The Execution Court can only add execution costs to a decree in the course of execution proceedings and it cannot add to or amend the decree under execution which is here the final decree obtained by the decree-holder and to which no objection was taken by the judgment debtor. We, therefore, allow the appeal to the extent of the amount of Rs. 554-6-9 and modify the decree of the Court below accordingly. Execution of the decree will now be taken for the amount decreed under the final decree obtained by the decree-holder with such costs of execution as might be found due. We make no order as to costs of this appeal.

N. H.

Appeal allowed; Decree modified.

(1) 6 A. 269 (P. C.); 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 61 OF 1918.

November 23, 1921.

Present:—Mr. Justice Das and Justice Sir John Bucknill, Kt.,

Maulavi MUHAMMAD MUSA—DEFENDANT APPELLANT

versus

Babu AIDAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage, suit on—Decree satisfied by stranger under arrangement with judgment-debtor—Subrogation,

Where a person in agreement with a mortgagor judgment-debtor undertakes to relieve him from his debt to the judgment-creditor on the condition that he takes over from the judgment-creditor the security which the latter holds, the transaction constitutes a valid subrogation. [p. 804, col. 2; p. 805, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna.

Messrs. *P. N. Sinha* and *N. C. Ghose*, for the Appellant.

Messrs. *Kulwant Sahay* and *Ray Guru Saran Prasad*, for the Respondents.

JUDGMENT.

DAS, J.—I am of opinion that this appeal must be dismissed. In order to understand the point that has been argued before us, it is necessary to state the following facts. On the 28th October 1904, the mortgagor-defendant executed a mortgage-bond in favour of one Munshi Singh in respect of certain properties including a 2 annas 15 *dam* share in Mouza Deojibagh, which is the subject-matter of the present appeal. By two subsequent transactions, one dated the 22nd June 1910, the other dated the 12th November 1912, the defendant No. 17, the appellant before us, acquired a good title to 2 annas 15 *dam* share in Mouza Deojibagh subject to the mortgage in favour of Munshi Singh. In 1913 Munshi Singh sued upon his mortgage and cited defendant No. 17 as a defendant in his action. He got the usual mortgage-decree on the 22nd December 1913 and the final decree on the 28th January 1915. Defendant No. 17 it will be noticed, did not appear in the action, nor did he make any attempt to save the property which he had purchased. But the mortgagor-defendants, with a view to save the properties from sale, borrowed Rs. 13,000 from the plaintiffs and, as a security for the loan, executed a mortgage-bond in favour of the plaintiffs in respect of certain properties with which defendant No. 17 is not concerned. It was found, however, that there was a much larger sum of money then due to Munshi Singh, and Munshi Singh proceeded to sell the mortgaged properties, including the property in which defendant No. 17 was interested, in

execution of his mortgage-decree. The mortgagor-defendants then applied to have the sale set aside under Order XXI, rule 90, of the Code, but, before the application could be heard and disposed of, they raised further loans from the plaintiffs, discharged the debt due to Munshi Singh and induced the auction-purchaser to consent to have the sale set aside. These loans were raised on the 29th October 1915 and the 3rd December 1915, respectively, on the security of certain properties including 2 annas 12 *dam* share in Deojibagh in which defendant No. 17 was interested. The present suit was brought to enforce the securities of the 29th October 1914, 29th October 1915 and the 3rd December 1915 respectively.

We are in this appeal concerned only with the question whether the plaintiffs are entitled to a decree in respect of 2 annas 12 *dam* share of Deojibagh. The position taken up by the appellant is this: that his purchase being antecedent to the transaction of the 29th October 1915 and the 3rd December 1915, respectively, his interest in the property purchased by him, cannot be affected by these transactions. I am unable to agree with this contention. Defendant No. 17 was a defendant in Munshi Singh's action, and had the right and the opportunity to redeem the mortgages. He did not, however, avail himself of that opportunity, but left it to the mortgagor-defendants to redeem the mortgages. Upon such redemption, the mortgagor-defendants became subrogated to the position of Munshi Singh in relation to defendant No. 17 and became entitled to enforce the mortgage as against defendant No. 17 just as Munshi Singh could. But, in order to pay off Munshi Singh, the mortgagor-defendants had to borrow money from the plaintiffs. In my opinion, the plaintiffs stand exactly in the position of Munshi Singh or the mortgagor defendants in relation to defendant No. 17.

The proposition in the form in which I have stated it was not contested by the learned Vakil for the appellant; but he argued that neither the mortgagor-defendants nor the plaintiffs could claim the right to enforce the security as against defendant No. 17, as it must in law be considered to have been extinguished by the final decree passed in Munshi Singh's action on the 28th January 1915. If the learned Vakil be right in his contention, then, it must be conceded that the position of the plaintiffs is one of difficulty. But there is neither principle nor authority for the view which has been strenuously pressed before us by Mr. Purnendu Narain Sinha on behalf of the appellant. So far as principle is concerned, it will be found in the settled view of equity that, though a personal covenant is extinguished by a judgment upon it, the charge remains notwithstanding the judgment which does not determine the security, or put an end to the charge: See *Popple* v. *Sylvester* (1). The question is also covered by authorities: see *Bibijan Bibi* v. *Sachi Bewah*.

On the last mentioned case an ingenious argument was advanced to us by Mr. Sinha. It was argued that, however correct the decision might have been under section 89 of the Transfer of Property Act, the position now is different under the Civil Procedure Code. The only basis of the argument is, that section 89 of the Transfer of Property Act now finds its place in the Civil Procedure Code as Order XXXIV, rule 5. Section 89 of the Transfer of Property Act ran as follows:—"If in any case under section 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section 94, the defendant shall (if necessary) be put in possession of the mortgaged property, but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88; and thereupon the defendant's right to redeem and the security shall both be extinguished." The question constantly arose in the Law Courts as to whether there was any right in the mortgagor judgment-debtor to stop the sale of the mortgaged property by payment of the debt before the sale actually

(1) (1883) 22 Ch. D. 98; 52 L. J. Ch. 54; 47 L. T. 820; 31 W. R. 116.
(2) 31 C. 863; 8 C. W. N. 634.

took place, although an order absolute for sale might have already been passed. The Civil Procedure Code conceded that right to the judgment-debtors ; but it used to be argued that as the right to stop the sale by payment of the debt was in fact the right of redemption, such a right could not exist after an order absolute for sale had been passed, as section 89 of the Transfer of Property Act provided that, upon an order absolute for sale the defendant's right to redeem and the security shall both be extinguished. The difficulty in the construction of section 89 lead to a conflict of decisions ; but that conflict was put an end to by the decision of the Special Bench of the Calcutta High Court in the case already cited. The Calcutta High Court took the view that the concluding words of section 89, *viz.*, " thereupon the defendant's right to redeem and the security shall both be extinguished," related to the actual sale and distribution of the proceeds and not to the order absolute for sale. In other words, the defendants' right to redeem and the security remain in full force until the actual sale and the distribution of the proceeds.

Section 89 of the Transfer of Property Act has now been repealed and re-enacted in Order XXXIV, rule 5 of the Code ; but there is this important matter for consideration, that the concluding words of section 89, to which I have already referred, have not been re enacted. I regard the omission to re enact the concluding words of section 89 as deliberate. It marks the sense of the Legislature that those words were capable of being misunderstood as in fact they were misunderstood. In my opinion, the provision of Order XXXIV, rule 5, is far more unfavourable to the appellant than the provision of section 89 of the Transfer of Property Act.

It was, however, argued that the mortgagor judgment debtor may have the right to stop the sale by payment of the debt before the sale, but that is a right which is now conferred on him by the Code and not by the law of mortgage. In other words, the right to stop the sale is in no sense a redemption of the mortgage. In my opinion the problem is not solved by a reference to the Code ; but I do not appreciate the distinction between the right to redeem, and right to stop the sale by payment of the judgment-debt. In order to solve the problem, we must examine the view which equity took of a mortgage transaction. That view will be found in the judgment of Fry, L.J., to which I have referred. I hold that the final decree passed in Munshi Singh's action did not extinguish the security, and that the plaintiffs, by virtue of the advance made to the mortgagor-defendants who, for their own protection, were obliged to discharge the mortgage-debt of the appellant to Munshi Singh, are subrogated to the position occupied successively by Munshi Singh and the mortgagor-defendants in relation to the appellant, and are entitled to enforce the security as against the appellant. I would dismiss this appeal with costs.

BUCKNILL, J.—This was an appeal from a decision of the Subordinate Judge of the Second Court of Patna, dated the 22nd of December 1917. The circumstances under which this litigation took place were very simple; but in order to understand exactly how this appeal arises it is necessary to refer to them very shortly.

Some of the defendants in the action had borrowed money from one Munshi Singh on mortgage. After this transaction these defendants sold to one *Maulavi* Muhammad Musa, who was the 17th defendant in these proceedings and who, having since died, is here duly represented, a certain portion of the property mortgaged. It is stated that *Maulavi* Muhammad Musa did not in fact have, at the time of his purchase, any notice of the encumbrance upon the property which he bought ; whether this is really true or not, does not seem to be here very material. In 1913 Munshi Singh brought an action upon his mortgage; in that suit *Maulavi* Muhammad Musa was joined with many others, as one of the defendants ; amongst those others was the present plaintiff. Munshi Singh obtained a preliminary decree and this decree was made absolute in 1915. The properties were sold and purchased by certain persons but possession was never granted to the auction-purchasers because an agreement was come to under which Munshi Singh's claim was

satisfied. What, so far as here is material, really took place in connection with this compromise is, that the present plaintiff, Babu Aidal Singh, made arrangement primarily with the judgment-debtors to pay off the amount due to Munshi Singh, and, for the security of what he advanced for this purpose, took certain mortgages from the judgment debtors of the properties, which included that property which had been purchased by *Maulavi* Muhammad Musa, subject to Munshi Singh's prior encumbrance. In 1916 the plaintiff brought the present suit upon his mortgage-bonds; again, many persons interested were joined as defendants and, as I have stated before, *Maulavi* Muhammad Musa, and now his representative, since his death, was the 17th defendant. He obtained a decree, but *Maulavi* Muhammad Musa or his representative at the trial and here on appeal contends that the plaintiff cannot sell the property which had been purchased originally by him (Musa). I find it somewhat difficult to understand exactly what was the legal proposition put forward by the learned Vakil for the appellant. But, so far as I could gather, it seems to have been contended that the appellant was not a party to the agreement by which the plaintiff paid off the debt due to Munshi Singh and that in consequence Munshi Singh's encumbrance was by the compromise permanently taken off the property which the appellant had purchased; that, therefore, Munshi Singh's judgment debtors could not mortgage the property which the appellant had purchased from them because by the payment by the plaintiff of the judgment-debtor's debt to Munshi Singh the appellant had his title cleared of any burden. In order to see whether there is any force in this contention one must endeavour to ascertain exactly what really took place.

It must, in the first place, be admitted for both legal and equitable purposes here that the appellant's purchase was undoubtedly subject to Munshi Singh's mortgage; when Munshi Singh brought his suit the appellant was joined as a defendant, he had obviously then an opportunity of paying off the amount due in order to protect his encumbered ownership of the property which he had bought. But apparently he did nothing, for it would seem that he did not appear at the hearing of the suit and a decree was passed against him, as it was against several other defendants, *ex parte*. What was the effect of this? There was thus a decree against him which was in due course made absolute. The property was then put up for sale, and was actually sold; but, before the delivery of possession, the arrangement to which I have referred already was come to. We have not, unfortunately, got before us the full record of the execution proceedings, but it would appear that on the 1st of December 1915 the compromise petition was filed whilst on the 4th of the same month the order sheet of the Subordinate Judge reads: "The parties have filed a *Kolehnama*. The case need not be tried; the case is disposed of according to the *Kolehnama*." It is difficult to see what attitude could possibly have been taken up by the appellant with reference to this compromise which would have been effective to protect his interest unless he did come forward either at the trial of the case (which he did not) or as an auction-purchaser (which he did not) or as one who was ready to undertake the obligation undertaken by the plaintiff. I do not know whether he was actually served with the final petition for compromise which was ultimately effected. I am inclined to assume that he was and to think that, even if he was not, it makes no difference to his position. The plaintiff, to my mind, when he had paid off the judgment-debtor's indebtedness to Munshi Singh, satisfied the decree and, what is more important, the Subordinate Judge finds as a fact that it was the intention of the judgment debtors and of the plaintiff that the plaintiff should be (as he was) placed in the position in which Munshi Singh had been (and no doubt in a better position supplementarily with regard to encumbrances upon the judgment-debtors' property). It is suggested that the plaintiff cannot in equity be thus subrogated to Munshi Singh's status, but I cannot see that there is any force in this contention. Where a person in agreement with judgment-debtors undertakes to relieve them from their debt to the judgment-creditor on the condition that he takes

over from the judgment-creditor the security which that judgment-creditor possesses, it, in my opinion, constitutes a subrogation the validity of which does not allow serious argument. The appellant had his rights throughout the course of the proceedings; he never chose to exercise them in any way; he allows judgment to go against him *ex parte*; and, therefore, has permitted his right, which, after all, was no more than an equity of redemption, to be extinguished by operation of law. With the subsequent compromise, it seems to me, that he was in no way concerned and that it would be absurd to suggest that having never, when he could, availed himself of his equities, he should be now heard to say that, having not done so, his equity should be given effect to.

I think that the Subordinate Judge was correct in his view and that the appeal must fail. I, therefore, consider that the appeal should be dismissed with costs.

Z. K. & S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL NO. 79 OF 1920.

April 1, 1921.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MUKKIL MARUTHUR SANKARA MENON AND OTHERS—DEFENDANTS NOS. 1 TO 4 AND 6 TO 14—APPELLANTS

versus

MUKKIL MARUTHUR GOPALA MENON AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 15 TO 35—RESPONDENTS.

Malabar Law—Tarwad—Karnavastanam—*Succession—Family* karar *diverting succession, whether binding on future* karnavan *not party to* karar.

Under the Marummakkathayam Law, a family *karar*, not assented to by a member of a Tarwad entitled to succeed to the office of *karnavan* on the death of the present incumbent, cannot interfere with the right of that member to succeed to all the powers of *karnavan* in due course of succession, even though the *karar* is assented to by a majority of the members of the Tarwad. The fact that the *karar* provides for a larger maintenance to the dissentient member as a set-off against the deprivation of his right would not render the *karar* valid. [p. 808, col 1; p. 809, col. 2.]

Chindan Nambiar v. *Kunhi Raman Nambiar*, 45 Ind. Cas 26; 41 M. 577; 34 M. L. J. 400; (1918) M. W. N. 283; 23 M. L. T. 316; 7 L. W. 543 (F. B.), followed.

Cheria Pangi Achan v. *Unnalachan*, 38 Ind. Cas. 513; 32 M. L. J. 323 at p. 330; (1917) M. W. N. 185; 5 L. W. 392; 21 M. L. T. 329, referred to.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar, at Palghat, in Original Suit No. 38 of 1918.

This appeal came on for hearing on the 30th and 31st of March 1921.

FACTS appear from the judgment.

Mr. *O. Madhavan Nair*, for the Appellants.—The Karar is a *bona fide* family arrangement to which a large majority of the Tarwad members have assented. It is beneficial to the Tarwad and Tavazhies attached to it. The fact that it interfered with the personal birth-right of the expectant Karnavan will not render it invalid. His dissent is not of any avail. The argument that it is operative even where there is one dissentient is an antiquated notion that is repugnant to modern progressive conditions. *Chindan Nambiar* v. *Kunhi Raman Nambiar* (1) requires re consideration.

There is a provision for larger maintenance to the expectant Karnavan. The Karar is only a maintenance arrangement.

Messrs. *O. V. Anantha Krishna Aiyar*, *K. V. Krishnakrishna Menon* and *E. Sankaran Unni*, for Respondents.—There is a limitation of the succeeding Karnavan's rights and the Karar cannot interfere with his birth right to succeed to the office. Though a larger provision is made for his maintenance he is deprived of his right to management which is to rest in others. *Chindan Nambiar* v. *Kunhi Raman Nambiar* (1), the Full Bench ruling, concludes the matter.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 1 to 4 and 6 to 14 are the appellants before us. The 5th defendant died after the suit. Twenty more defendants were impleaded in the suit but they have not preferred any appeal. The appellants are thirteen of the members of a Tarwad which had four Tavazhies. One Kochara

(1) 45 Ind. Cas. 26; 41 M. 577; 34 M. L. J. 400; (1918) M. W. N. 283; 23 M. L. T. 316; 7 L. W. 543 (F. B.).

Menon was the Karnavan of the whole Tarwad till his death in January 19 8. The plaintiff succeeded by Marummakkathayam law to the Karnavastanam at Eachara Menon's death. A Karar had been executed during Eachara Menon's lifetime on the 2nd September 1916 to which the said prior Karnavan and almost all the adult members of the Tarwad were parties. Only three persons was not parties to it, that is, those who are mentioned as Nos. 7, 16 and 20 in that Karar No. 7, afterwards confirmed the Karar by a separate deed and No. 20 in the Karar (who is the 25th defendant in the present suit) had given up the world before the date of the Karar and might be ignored. The appellant's contention is that the plaintiff who was No. 16 in the Karar refused to sign it because at the last moment he wanted three further provisions to be inserted in the Karar in his favour and the other members of the Tarwad refused their consent. This is probably true. The fact, however, remains that he refused to be a party to the Karar as executed finally.

It was contended that the plaintiff had first agreed to all the terms of the Karar about a week before it was executed and then illegally refused to sign it at last. I think the evidence clearly establishes that it was intended that the mere understandings arrived at during the negotiations of the Karar should not have the force of a final agreement, and that the finality and binding nature of the agreement depended on agreement, the agreement being reduced to writing and signed by the persons intended to be bound thereby. The provision inserted in the Karar after the plaintiff refused to sign it, namely, that the plaintiff should be deprived of the benefits of maintenance given to him by the Karar till he executed a confirmation document also supports the above conclusion. The plaintiff's dishonesty in pretending ignorance of the negotiations before the execution of the Karar is irrelevant to the consideration of the question of the legally binding nature of the Karar on him.

The plaintiff's suit prays for the following reliefs :—

(1) a declaration that the Karar is not binding on the plaintiff ;

(2) that the properties described in schedule A in the possession of the 1st defendant's Tavazhi should be surrendered to him ;

(3) that certain moveable properties shown in schedule B be delivered to the plaintiff or their value be awarded to him on the personal liability of defendants Nos. 1 to 6 and on the Tavazhi of all the defendants to the extent of their Tavazhi, properties, and

(4) that the income of the properties in schedule A at the rate of 2000 Paras of paddy per year from 1094 (1918-19) be also awarded to the plaintiff (besides the other usual reliefs).

Defendants Nos. 1 to 14 alone contested the suit. On their pleas, several issues were framed of which it is necessary to set out only issues Nos. 1, 5, 7, 8, and 10, and they are as follows :—

"(1) Whether the plaint-mentioned Karar is a *bona fide* family arrangement, and whether the plaintiff withheld his signature wrongfully, or whether it was executed in the circumstances alleged in the plaint? Whether it is valid and binding upon the plaintiff ?

"(5) Whether the plaint Karar is entitled to be upheld as a maintenance arrangement for the defendants and whether the plaintiff is not entitled to recover the properties allotted for maintenance as contended by 1st defendant ?

"(7) Whether the rent of 1093 was partially discharged by payment to Eachara Menon as contended by 1st defendant ?

"(8) Is the plaintiff entitled to recover any and what rent for the plaint properties ? Is the 1st defendant liable to be treated as a tenant ? Is the letting alleged in the plaint true and are the properties held under it ?

"(10) Whether the plaintiff is entitled to personal relief against defendants Nos. 2 to 14 and relief against the Tavazhi properties ?"

The second portion of the 1st issue, namely, whether the Karar is valid and binding upon the plaintiff was decided against the defendants by the lower Court. That finding was attacked by Mr. Madhavan Nair, Counsel for the appellants, on the grounds (*a*) that a *bona fide* Karar was binding on the succeeding Karnavan even if it interfered with his personal birth-

right to succeed in the natural course of events to the power of the Karnavan and even if he had not consented to the Karar, and (*b*) that the Karar did not so interfere with his birth-right. I think this second contention is clearly untenable, having regard to the provisions found in paragraphs 14, 20, 24 of the Karar, Exhibit G. I think Exhibit G, read especially in the light of the note attached to it at the end, was clearly intended to reduce the plaintiff (mentioned as number 16 in the Karar) to the status of a mere maintenance-holder entitled, no doubt, to maintenance at a higher rate than an ordinary member of the Tarwad but deprived even of the benefit of the provision inserted in it for distribution of the surplus income after the previous Karnavan's death *per capita* among the members of 4 Tavazhies. I shall reserve the consideration of the first legal contention to the end.

Then as regards the 5th issue, this was decided against the plaintiff, in so far as the Karar makes provision for the maintenance of the Tavazhies, and there has been no appeal by the plaintiff in respect of that matter.

Coming to the 7th issue, the Karar fixes 2,000 Paras of paddy as the income of the lands left in possession of the defendants Nos. 1 to 14. It directs them to take 720 Paras of paddy thereout for the maintenance of their Tavazhi, to take another 444 Paras out of the remaining 1,280 Paras towards the interest on the loan which had been made by their Tavazhies to the Tarwad, and to pay the remaining 836 Paras into the hands of the prior Karnavan. The written statement of the 1st defendant contains a schedule of 13 items which mentions that in December 1917 the 1st defendant gave 500 Paras out of the 836 Paras due for that year into the hands of the prior Karnavan (item No. 1) and that the 1st defendant further spent for the Tarwad during the prior Karnavan's illness and after his death money and grain which when all converted into grain was the equivalent of 925 Paras and 4 Edangalies (items Nos. 2 to 13). Though the 7th issue is not specific, it might be taken that it was intended to cover the question of the true and binding nature of these alleged payments entered in the schedule to the written statement. The lower Court has dealt with this question in paragraphs 11 and 12 of its judgment. Of the 13 items in the schedule, it deals specifically only with the 1st item which relates to the 500 Paras alleged to have been given in December 1917 and for which the 1st defendant produced the receipt, Exhibit VIII. The lower Court disbelieved the genuineness of Exhibit VIII and also found the payment of 500 Paras not proved by sufficient evidence as the evidence consisted only of the statement as witness of the 1st defendant. It was not denied that for the previous year the 1st defendant paid up 836 Paras as provided for in the Karar to the prior Karnavan. Five hundred out of the 846 Paras (the said 500 Paras being about six-tenth of the amount) had to be paid in the month of September-October to the previous Karnavan according to the Karar. Exhibit 8 recites that the 500 Paras was so paid to him partly before the date of Exhibit VIII and partly on that date. I think that the truth of such a payment is highly probable and, believing the 1st defendant's evidence on this point, I would allow the appellants' credit for the payment of 500 Paras. The other items mentioned in the written statement are either not supported by any evidence worth the name or are not pressed except item No. 2 which is a sum of Rs. 20 for which Exhibit XII is produced. But it does not appear that that Rs. 20 was paid for purposes of the whole Tarwad as distinguished from the purposes of the 1st defendant's Tavazhi. I agree with the lower Court as regards these items.

Coming to the 8th issue and the 10th issue, the plaintiff did not ask for a personal relief against defendants Nos. 7 to 14 and the lower Court's decree will, therefore, be modified by confining the award of personal relief against defendants Nos. 1, 2, 3, 4 and 6, the 5th defendant (as I said before) having died. The lower Court has given a decree for 1280 Paras of paddy for 1093 without deducting 414 Paras which the defendants are entitled to deduct therefrom on account of interest on the loan due to the Tavazhi and the 500 Paras of paddy which was found above to have been paid out to the prior Karnavan. One hundred and eighty-eight Paras will, therefore, be substituted for 1,132 Paras in the decree of the lower Court as the provision for deducting 414 Paras for interest is a reasonable provision which the succeeding Karnavan is bound

to respect. So as regards M. E. 1094 and subsequent years, the 1,280 Paras mentioned in paragraph 12 of the judgment and in the decree will be reduced to 836.

As regards the liability of the defendants' Tavazhi properties, the Karnavans who were in possession *on account of the Tavazhi* are liable as such Karnavans to account to the Tarwad for surplus income. Hence, the Tavazhi also was properly made liable to the extent of the said Tavazhi properties. Of course, this will not affect the separate properties of the *individual* members of the Tavazhi as distinguished from the separate properties of the Tavazhi as a whole.

I have reserved the first contention of Mr. Madhavan Nair to the end. That contention is that a *bona fide* family Karar, even if it affects the birth-right of the succeeding Karnavan is binding on him, notwithstanding that he had refused to give his consent thereto. I think the matter is concluded by the decision in *Chindan Nambiar* v. *Kunhi Raman Nambiar* (1). The opinion which I had pronounced in *Cheria Pangi Achan* v. *Unnalachan* (2) on this question was repeated by me in *Chindan Nambiar* v. *Kunhi Raman Nambiar* (1), and was approved by my Lord the Chief Justice and by Spencer, J., who with himself formed the Full Bench which dealt with the case in *Chindan Nambiar* v. *Kunhi Raman Nambiar* (1). The above two cases have laid down that a family Karar, when not assented to by an individual member of the Tarwad and though assented to by a majority, is powerless to interfere with his personal birth-right to succeed to all the powers of a Karnavan in due course of succession. It follows, therefore, that the appellant's contention fails on this point.

Most of the rules of law governing the rights of the Karnavan and junior members of a Marumakkathayam Tarwad have undoubtedly become stale and antiquated. The Marumakkathayees belonging to both the upper and lower sections of the middle class do feel the irksomeness of most of these rules very strongly and, though I do not belong to that community, I feel with the community, if I may be allowed respectfully to say so, as strongly as if I belonged to that community, partly for the reason that I have the privilage of counting numerous individuals in that community among my very dear friends. But I have found that any attempts made (such attempts having begun long before I became a Judge of this Court) to develope that law on liberal lines through creating judicial precedents have almost invariably ended in failure (except in the single instance of the right to get maintenance when not living in the Tarwad house) and I believe that Sir Sankaran Nair was of the same pessimistic opinion. As, in the non-legal world, there are to be found among Judges and lawyers also, persons of varying temperaments, some endowed with liberal tendencies of mind, and some with conservative tendencies and a very few may have what may be called radical tendencies. But, as a rule, conservatism is the general tendency of judicial and legal minds—such conservatism is probably a failing (if it is a failing at all) on virtue's side in countries where the Legislature is reasonably active in enacting reforming legislation from time to time. The Travancore and Cochin States are moving and have moved in this matter of changing the rules of the antiquated Malabar Law so as to bring them into reasonable conformity with the altered conditions and exigencies of the times. Now that the Legislatures in British India have been strengthened by the Reforms, it is naturally expected that they would prove more active in bringing forward measures for liberalising the laws and the institutions governing those who are now subject to the Marumakkathayam Law. I have considered it not inappropriate to make the above paragraph a part of this judgment as Mr. Madhavan Nair argued with much feeling (not at all unnatural under the circumstances) that the rule of law laid down in the Full Bench case above cited (which rule was not a new rule at all but was based on a long line of precedents) had the effect of perpetuating the antiquated notion that the birth-right of a member of the Tarward was more sacred than the welfare of the majority of the Tarwad members. The same criticism might be applied to the several antiquated rules of succession now prevailing under the Mitakshara Law but the appropriate remedy is a resort to the Legislature.

In the result, subject to the modifications

(2) 38 Ind. Cas. 513; 32 M. L. J. 323 at p. 330; (1917) M. W. N. 185; 5 L. W. 992; 21 M. L. T. 329.

in the decree necessitated by the opinions already expressed in respect of the amounts due for arrears of income and claimable as future income, I would dismiss the appeal with proportionate costs.

NAPIER, J.—I agree generally on the question of consent and the other issues, but I only wish to say a word on the question of law raised by the appellants as to the extent to which effect can be given to a Karar like this against a succeeding Karnavan who was not a party to it. It is unnecessary for me to say more than that I have no means of knowledge of the conditions of life in Malabar and, therefore, I will not express any opinion of mine as to the necessity or otherwise of alteration in that law. I can only take the law as I find it, and I find it stated by my learned brother in a decision reported as *Cheria Pangi Achan* v. *Unnalachan* (2). Some of the words used in that decision have been quoted and relied on by the Subordinate Judge but the definite statement of the law is found in a passage a little higher up than the one quoted by the Subordinate Judge. My learned brother, speaking about a family Karar and the extent to which it would be binding on dissentient members, says as follows:—"it may not be binding on a dissentient member so far as it seeks to restrict his right to succeed to the full powers of a Karnavan in the natural course of events or if it interferes with his right to reasonable provision for maintenance." Now, it is contended by Mr. Madhavan Nair that where a Karar is upheld in so far as it makes arrangements of a certainly somewhat permanent character for the maintenance of the various Tavazhies, it does thereby restrict the right of a succeeding Karnavan to succeed to his full powers if such provisions for maintenance are upheld and, that, therefore, this proposition is stated too widely. The answer to that seems to be this, that there is nothing in the fact that the provision for maintenance, however elaborate or however much it affects the division of property, is made in a Karar; its real origin arises in the power of a Karnavan to make suitable provision for the maintenance of the members of the family which provision must naturally be continued, at all events, until circumstances require its alternation. This so-called limitation of the rights and powers of the succeeding Karnavan rests on the necessity for upholding arrangements which would otherwise have to be upset on the death of every Karnavan. It is analogous to the accepted rule of law that leases granted, under certain conditions, by a Karnavan enure after his death and are binding on the succeeding Karnavan and I, therefore, think that it is no limitation of the proposition that a Karar is not binding on a dissentient member in so far as it restricts his right to succeed to the full powers of a Karnavan, to say that the arrangements made for maintenance must be upheld. Then, Mr. Madhavan Nair has endeavoured to satisfy us that this Karar is only an arrangement for maintenance. We have examined its various provisions with great minuteness and I agree with the Subordinate Judge that it goes far beyond that. One of the objects of this Karar was undoubtedly to oust the present plaintiff from his right to succeed to the status of Karnavan. That was attempted to be done by giving him, as senior Anindravan, a large maintenance and promising him to arrange for a still larger maintenance when he became Karnavan. Other terms distinctly provide that all the general management of the Tarwad after the death of the existing Karnavan was to be vested in Nos. 2 and 18 who were the heads of their respective Tavazhies. There can be no doubt that this is a limitation of the right of the 1st defendant to succeed to the full powers of a Karnavan and I have no doubt that the other members of the Tarwad who were at variance with the plaintiff believed that by giving him this increased maintenance during the lifetime of the then existing Karnavan they would get him eventually to agree to the Karar. Unfortunately for them, the then Karnavan died soon afterwards with the result that the plaintiff has now brought this suit to recover all his full rights. In my opinion he is entitled to succeed on this point of law and, therefore, this appeal must be dismissed except to the extent which has been allowed in the judgment of my learned brother.

M. C. P.,
S. D.

Appeal dismissed subject to modification.

ATUL CHANDRA BASU v. ARIP SHAIKH.

CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 424 OF 1920.
December 5, 1921.
Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.
ATUL CHANDRA BASU—DECREE-HOLDER—APPELLANT
versus
ARIP SHAIKH—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Objection by judgment-debtor that decree cannot be executed as rent-decree, competency of—Bengal Tenancy Act (VIII of 1885), Ch. XIV.

A tenant judgment-debtor can raise an objection in execution proceedings that a decree obtained against him for arrears of rent cannot be executed under the special procedure prescribed by Chapter XIV of the Bengal Tenancy Act, but he cannot object to the decree being executed against him as a decree for money under the Code of Civil Procedure.

Appeal against an order of the Subordinate Judge, Second Court, Pabna, in Pabna and Bogra, dated the 10th of September 1920, affirming that of the Munsif, Second Court, at Serajgunj, dated the 19th of May 1920.

FACTS appear from the judgment.

Babu *Bhupendra Chandra Guha*, for the Appellant.—The decree-holder is the appellant. The appeal arises out of certain execution proceedings. In course of these proceedings the tenant judgment-debtor for the first time objected to the sale on various grounds. I contended that those objections were not maintainable at that stage of the proceedings. Both Courts have overruled my objection. Their objection is, that the sale cannot proceed inasmuch as other co-sharers have not been made parties, my contention is that they were no parties to the decree at all. Hence that objection is not tenable. There was a decree for rent against one Ariff Sheikh, at the hearing of the suit he did not set up the plea that the other co sharers were no parties to the suit. I submit he cannot now turn round and say that the decree is not executable on that ground.

[CHATTERJEA, J.—The question is whether the decree is to be executed as a money decree.]

On the face of the decree there is a tenure. The other co-sharers objected under Order XXI, rule 58, of the Civil Procedure Code. That application was rejected. As soon as the decree was passed Ariff could not any longer object on the ground of non-joinder of parties. This decree does not affect the interests of his co-sharers. Assuming that the decree was a money-decree, the Courts below were wrong in dismissing my application. The decree is good and valid against Ariff. So it has got to be executed for the realisation of the money.

Babu *Troylokhya Nath Ghose*, for the Respondent.—We are not debarred from raising the objections in these proceedings. They have applied for execution under the Bengal Tenancy Act which he cannot do. I will be entitled to costs if he is allowed to amend the application now.

Babu *Bhupendra Chandra Guha*, briefly replied.

JUDGMENT.—It is contended on behalf of the appellant in this case that the judgment-debtor is not entitled to raise the objection to the execution of the decree.

There is no doubt that the decree which has been obtained against the judgment-debtor is binding upon him and that in execution proceedings he cannot go behind the decree. But the objection raised by him was that the decree could not be executed under the special procedure prescribed by Chapter XIV of the Bengal Tenancy Act. It was competent to the judgment-debtor to raise such objection.

The decree, however, can be executed as a decree for money under the Civil Procedure Code and the right, title and interest of the judgment-debtor in the lands can be put up to sale. The judgment-debtor cannot object to such a course being adopted.

We think, in these circumstances, that the order of the Court below, in so far as it dismissed the application for execution entirely, should be set aside and the case sent back to the Court of first instance in order that the decree-holder may make an application for amendment of the application for execution of the decree by praying for attachment and sale of the right, title and interest of the judgment-debtor as under a decree for money, and upon this being done, the Court will proceed to execute the decree in the ordinary

course of law. This, however must be on terms.

We accordingly direct that, upon the decree-holder paying to the judgment-debtor costs of both the lower Courts and of this Court—the costs of this Court being assessed at one gold *mohur*—within a fortnight of the arrival of this order in the Court of first instance, the orders in the Courts below be set aside, the application for execution amended, and the decree executed according to law.

If the above costs are not paid within the time specified, the appeal will stand dismissed with costs.

B. N. & J. P. *Order accordingly.*

ALLAHABAD HIGH COURT.
FULL BENCH.

CIVIL MISCELLANEOUS No. 195 OF 1921.

January 20, 1922.

Present:—Mr. Justice Piggott Mr. Justice Lindsay and Mr. Justice Gokul Prasad.

In the matter of MUHAMMAD MUZAFFAR ALI.

Stamp Act (II of 1899), s. 64, Sch. I, Art. 33—Gift, deed of—No valuation given—Stamp, if necessary—Collector, whether can ascertain value—Omission or under-valuation, prosecution for—"As set forth in such instrument," applicability of.

A deed of gift which contains no statement of the value of the property thereby conveyed, does not require any stamp under the Stamp Act and a Collector is not authorised to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value thus ascertained.

If a person executing a deed of gift omits to state the value of the property conveyed with intent to defraud the Government, or if there is an intentional under-valuation, a prosecution will lie against him under section 64 of the Stamp Act.

The words "as set forth in such instrument" in Article 33 to Schedule I to the Limitation Act refer back to the word "value" and not to the word "property."

Reference under section 57 (1) of the Stamp Act by the Board of Revenue, U. P.

JUDGMENT.—This is a reference from the Chief Controlling Revenue Authority under section 57, clause (1) of the Indian Stamp Act, No. II of 1899. The point referred to is a simple one. A deed of gift was executed which contains no statement of the value of the property thereby conveyed. The officer before whom the document was produced impounded it and referred it to the Deputy Commissioner of Bahraich, as Collector of the District, for necessary action. The question referred to us is, first of all, whether this instrument requires any stamp under the Indian Stamp Act. According to Article 33 of the Schedule an instrument of gift, such as the one before us, should be stamped with the same duty as a conveyance, for a consideration equal to the value of the property set forth in such instrument. We are satisfied that the words "as set forth in such instrument" refer back to the word "value," and not to the word "property." We are confirmed in this view by the authority quoted in the reference before us, reported as *Reference under Stamp Act, s.* 46 (1). In the present instance there is no "value" seth forth in the said instrument. No doubt, this is a contravention of section 27 of the Indian Stamp Act and, if it be found that the omission to state the value of the property conveyed was done with intent to defraud the Government, a prosecution will lie against the person who executed the instrument under section 64 of the Indian Stamp Act. The case seems to us strictly analogous to one which would arise if the executer of a deed of gift chose to set a purely nominal value on the property conveyed and to stamp the instrument accordingly. For the purposes of the Stamp Law, the valuation given in the instrument would have to be accepted. If there was an intentional under-valuation, then a prosecution would protect the Government against the attempted fraud. There is no provision in the law authorising the Collector to do what he has done in the present instance, namely, to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value thus ascertained. Our answer, therefore, to the first question referred to us is, that the instrument, as it stands,

(1) 8 M. 453 (F. B.); 3 Ind. Dec. (N. S.) 310.

does not require any stamp under the Stamp Act. The second question, except in so far as it has been incidentally answered, does not arise, and the third question does not arise at all. Let this answer be returned accordingly.

J. P.

Reference answered.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 493 OF 1920.

December 7, 1921.

Present:—Mr. Justice Coutts and Justice Sir John Bucknill, KT.

Babu MATHURA PRASAD SINGH—DEFENDANT—APPELLANT

versus

Babu SATYA NARAYAN PRASAD SAHI—PLAINTIFF—RESPONDENT.

Marriage contract—Breach of contract—Damages—Jurisdiction—Contract Act (IX of 1872), s. 63—Civil Procedure Code (Act V of 1908), s. 20—Limitation Act (IX of 1908), Sch. I, Art 36.

The plaintiff, a resident of Muzaffarpur, arranged to marry his daughter to the defendant a resident of Patna and agreed to pay Rs. 1,500 in cash and Rs. 300 worth of articles to the defendant at the Tilak ceremony. The cash and articles were delivered on the Tilak day to the defendant at Patna and it was arranged that the marriage should be performed on a certain date. A week before the date of marriage the defendant refused to perform the marriage and returned a portion of the Tilak money. In a suit for the balance and loss in connection with marriage arrangements it was pleaded that as the plaint showed that the defendant returned a part of the Tilak money and promised to pay the balance shortly, a new contract was entered into subsequent to the original contract:

Held, that as whole of the cash and articles were not returned section 63 of the Contract Act did not apply in the case and that as the plaintiff never intended to accept the mere promise which the defendant had not fulfilled, the parties were relegated to their original position and that the plaintiff was, therefore, entitled to balance and costs with interest. [p. 812, col. 2; p. 813, col. 1.]

Held, also, that the Court at Muzaffarpur, within whose jurisdiction the marriage was to be performed, had jurisdiction to try the case although the contract was made and cash and articles were delivered at Patna outside that jurisdiction. [p. 813, col. 1.]

Held, further, that the suit was not governed by Article 36 of the Limitation Act as the suit was simply a suit for damages on breach of contract. [p. 813, col. 1.]

Appeal from a decision of the District Judge, Mozuffrpur.

Messrs. *Kulwant Sahay, S. N. Rai* and *Jalgobind Prasad Sinha*, for the Appellant.

Mr. *Lakshmi Narayan Singh*, for the Respondent.

JUDGMENT.

COUTTS, J.—This appeal arises out of a suit for damages on breach of contract. The facts of the case are, that the plaintiff arranged to marry his daughter to the defendant, and it was agreed that the plaintiff should pay Rs. 1,500 in cash and Rs. 300 worth of articles to the defendant at the time of the Tilak ceremony. The cash and the articles were delivered in accordance with the argeement and it was arranged that the marriage should take place on the 23rd of May 1915. All necessary arrangements were made for the marriage but a week before the date fixed the defendant sent a message to say that the marriage would not take place. There was a subsequent definite refusal and, when the plaintiff demanded back his money and the articles that had been sent, only a portion was sent and according to the plaintiff Rs. 961 in cash and Rs. 44 as value of the articles remained unreturned. Rs. 1,025 on account of cash and ornaments and Rs. 513 for loss in connection with the marriage arrangements with interest at 6 per cent. per annum were claimed in this suit. The suit was decreed for Rs. 1,500 (?) and Rs. 513 as principal and half the interest claimed was also allowed making the total up to Rs. 1,891·5 6. On appeal by the defendant to the District Judge the decision of the first Court has been upheld and it is against this decision that the present appeal has been filed to this Court.

The first point argued in the appeal is, that paragraph 6 of the plaint shows that a new contract was entered into subsequent to the original contract and that, accordingly, section 63 of the Contract Act will not apply. Paragraph 6 of the plaint runs as follow: "That, since in the month of Asarh 1322 Fasli, the defendant altogether refused to perform the marriage, the plaintiff several times sent word to the defendant and wanted back the money and articles taken by him at Faldan and Tilak ceremonies but the defendant always put off the matter. Ultimately, in the month of Cheyt 1323 Fasli when the plaintiff sent his family

priest, Sisman Pandey, the defendant returned the articles and cash as specified in Schedule 2 below promising to pay the balance shortly." If it had been that the defendant had returned the whole of the cash and articles it is possible that section 63 of the Contract Act might have applied, but it certainly does not apply in the present case. It is clear that the plaintiff never intended to accept the mere promise, that the defendant has not carried out his part of the bargain and that this being so, there is, in my opinion, not the sligtest doubt that the parties are relegated to their original position. I am supported in this view by the decision in *Manohur Koyal* v. *Thakur Das Naskar* (1).

The next point urged is, that the Court at Muzaffarpur had no jurisdiction. It is pointed out by the learnad Vakil for the appellant that the plaintiff resides in Muzaffarpur and that the defendant lives in Patna; that the agreement was entered into in Patna and that the money and articles were given at Patna; but as against this it has been admitted throughout the case that the performance of the contract was to be in Muzaffarpur and, consequently, section 20 (*c*) of the Code of Civil Procedure applies and the Muzaffarpur Court has jurisdiction.

The last point urged is, that the suit is barred by limitation inasmuch as it comes within the purview of Article 36 of the Limitation Act. Article 36 runs as follows: "For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein especially provided for." Obviously, the present case does not come within the provisions of this Article. It is purely and simply a suit for damages on breach of contract.

In the result, then, in my opinion, the appeal has been rightly decided and I would dismiss this appeal with costs. The cross-objection is not pressed and is dismissed. The Court fee has been paid.

BUCKHILL, J.—I agree.

J. P.

Appeal dismissed.

(1) 15 C. 319; 7 Ind. Dec. (N. S.) 796.

ALLAHABAD HIGH COURT.

FULL BENCH.

FIRST APPEAL FROM ORDER No. 94 OF 1921.

January 3, 1922.

Present :—Mr. Justice Piggott, Mr. Justice Walsh, and Mr. Justice Lindsay.

SITA RAM—DECREE HOLDER—APPELLANT

versus

JANKI RAM—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr 71, 84—Auction-sale—Failure of purchaser to deposit 25 per cent. of purchase-money—Re-sale—Damages—Purchaser, liability of—Decision, whether appealable.

Certain property belonging to judgment-debtor was put up for sale in execution of a Civil Court decree. In the execution-sale the appellant was the highest bidder and was declared to be the purchaser but he failed to pay the deposit of Rs. 25 per cent. of the purchase-money as required by Order XXI, rule 84 (1) of the Civil Procedure Code. The sale Officer announced that the property would be re-sold next morning and it was re-sold On the second sale the price fetched was much less. The judgment-debtor made an application under Order XXI, rule 71 to make the first purchaser liable for the difference in price:

Held, that the first purchaser was liable for the difference in price inasmuch as there was a re-sale within the meaning of Order XXI, rule 84, Civil Procedure Code, and as under Order XXI, rule 71 a purchaser was liable for a default both in the making of the original deposit and in the subsequent payment of the balance due. [p. 815, col. 1.]

Amir Begam v. *Bank of Upper India Limited*, 10 A. 273; A. W. N. (1905) 107; 5 A. L. J. 336, not followed.

Held, also, that the adjudication in the matter amounted to a decree and that an appeal lay from that decree. [p. 816, col. 1.]

Deoki Nandan Rai v. *Tapesri Lal*, 14 A. 201; A. W. N. (1892) 74 (F. B.); 7 Ind. Dec. (N. S.) 499, overruled.

Ram Dial v. *Ram Das*, 1 A. 181 (F. B.); 1 Ind. Dec. (N. S.) 122, approved.

Amir Baksh Sahib v. *Venkatachala Mudali*, 18 M. 439; 5 M. L. J. 206; 6 Ind. Dec. (N. S.) 656, *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul*, 25 C. 99; 2 C. W. N. 408; 13 Ind. Dec. N. S.) 68, *Gangadas Dahyabhai* v. *Bai Suraj*, 14 Ind. Cas. 777; 36 B. 329; 14 Bom. L. R. 250, *Deokinandan Rai* v. *Tapesri Lal*, 14 A. 201; A. W. N. (1892) 74 (F. B.); 7 Ind. Dec. (N. S.) 499, referred to.

Per *Walsh, J.*—*Quære.*—Whether a suit for the difference of the sale price consequent on the failure of the first purchaser is expressly excluded by the provisions of Order XXI, rule 71 of the Civil Procedure Code. [p. 816, col. 2.]

First appeal from an order of the District Judge, Ghazipur.

Mr. *S. C. Dass*, for Mr. *Sital Prasad Ghosh*, for the Appellant.

Messrs. *M. L. Agarwala* and *Ramla Kant Verma*, for the Respondent.

SITA RAM v. JANKI RAM.

JUDGMENT.

PIGGOTT, J.—The case before us, whether it be described as a first appeal from order or as an application in revision, arises under the following circumstances :—

Janki Ram and others were the judgment-debtors under a certain decree. Certain house property, belonging either to Janki Ram or to all the judgment-debtors, was taken in execution of the decree and put up for sale. One Sita Ram took part in the auction-sale and bid up to a sum of Rs. 5,030. This being the highest bid offered, it was accepted by the sale officer. Sita Ram then failed to make the deposit of 25 per cent. of the purchase-money which he was required to make by the rules. It being then late in the day, the sale officer informed all the parties concerned, including any other bidders who were present at the time, that he would put up the property for sale again on the following morning. He did so, and that same property was purchased for a sum of Rs. 2,850. This was more than sufficient to satisfy the decree, so that the decree-holder ceased to have any further interest in the matter. Janki Ram subsequently applied to the Court to make Sita Ram liable for the difference in price between the sum of Rs. 5,060 bid by him and the sum of Rs. 2,850 eventually realised at the sale which took place on the second morning. There has been some argument regarding the precise form of the application made by Janki Ram to the Court, but no substantial question turns upon this. In effect, Janki Ram asked the Court to enforce in his favour the right recognised by Order XXI, rule 71 of the Code of Civil Procedure. Sita Ram entered an appearance and raised a number of objections. One was to the effect that Janki Ram alone was not entitled to maintain such an applicantion without the concurrence of the other prsons who had been judgment-debtors along with him. Another point taken was that the re sale had not taken place "forthwith" within the meaning of Order XXI, rule 84 of the Code. There had also been a claim on the part of Janki Ram for interest on the deficiency and his right to claim interest was contested by Sita Ram. A point was also taken that the application was not maintainable at all because there had been no certificate by the sale officer. The Court before which this application was made dealt with two of the points raised only. It held, on the strength of a reported decision of this Court, that the absence of a formal certificate did not make Janki Ram's application any-the-less maintainable. It would seem that, whether or not there was any formal certificate, the sale officer did report to the Court the fact that there had been a sale at which Sita Ram had bid up to the sum of Rs. 5,060 and a subsequent sale at which the price realised was only Rs. 2,850. There does not seem to be any substance in this objection. The questions raised regarding Janki Ram's right to maintain the application without the concurrence of the other judgment-debtors and with regard to the claim for interest were not determined at all. The Court held, however, that there had not been a re-sale "forthwith," as required by the rule, and on this ground alone proceeded to dismiss Janki Ram's application. The latter appealed to the District Judge. In that Court two questions were argued and determined. The District Judge held that the re-sale had taken place "forthwith" within the meaning of the rule. He was, however, faced with a further argument based upon a decision of this Court, *Amir Begam* v. *Bank of Upper India Limited* (1). It was there held that, under the analogous provisions of the Civil Procedure Code of 1882, a second auction sale held by reason of a former purchaser's failure to make the prescribed deposit was not a "re sale" within the meaning of section 293, of that Code, corresponding with Order XXI, rule 71 of Act No. V of 1908, and that, consequently, neither the decree-holder nor the judgment-debtor had any remedy against a purchaser who made no deposit at all. In effect, this Court limited the application of that rule to cases in which a purchaser, after making the 25 per cent. deposit, failed to pay the balance of the purchase-money. It has been pointed out to us in argument that the view taken

(1) 30 A. 273; A. W. N. (1903) 107; 5 A. L. J. 836.

by this Court has not been accepted by the High Courts of Calcutta, Madras or Bombay, but we do not propose to discuss the state of the law as it stood under the Code of 1882. We agree with the learned District Judge that the position is changed by reason of an alteration made in Order XXI, rule 84 of the present Code. Section 306 of the Code of 1882 provided that, in default of the required deposit of 25 per cent., "the property shall forthwith be put up again and sold." In Order XXI, rule 84 of the present Code the words are: "in default of such deposit the property shall forthwith be re-sold." It seems to us that the only possible reason for this change in the wording of the Code was to affirm the law in the sense in which it had been interpreted by other High Courts, as against the decision of this Court in *Amir Begam* v. *Bank of Upper India Limited* (1). As the Code now stands, the opening words of Order XXI, rule 71, namely, "any deficiency of price which may happen on a re-sale by reason of the purchaser's default," are obviously wide enough to cover a default both in the making of the original deposit and in the subsequent payment of the balance due. We think, therefore, that the ruling in *Amir Begam* v. *Bank of Upper India Limited* (1), whether that case was rightly or wrongly decided on the law as it then stood, is no longer applicable to the law as defined in the present Code of Civil Procedure. This was the view taken by the learned District Judge in the present case. He, consequently, overruled the decision of the first Court on the one ground upon which that Court had proceeded in rejecting the application of Janki Ram. As there remained other matters for determination he passed an order of remand under Order XLI, rule 23 of the Civil Procedure Code, sending the case back to the first Court in order that the matter might be disposed of on the merits. Sita Ram has brought the matter before this Court. He does not seem to have raised any question in the Court below as to the right of the District Judge to entertain the appeal made to him by the judgment-debtor Janki Ram. In this Court he desires to raise the contention that no appeal lay from the decision of the first Court, that of the Munsif of Rasra. In order to avoid any technical difficulty in the way of his raising this contention, he has described his application to this Court both as a first appeal from order and as an application in revision. If his contention is sound as to the absence of any right of appeal, then the learned District Judge in entertaining the appeal was exercising a jurisdiction not vested in him by law. We have thought it proper, therefore, to allow this question to be raised before us and to be argued out, although the point was not taken in the Court below. Treating Sita Ram as an appellant in an ordinary first appeal from order, we may say that he has one decision in his favour, and that is a decision by a Full Bench of this Court. The case in question is that of *Deoki Nandan Rai* v. *Tapesri Lal* (2). The decision was by a majority of three Judges out of four constituting the Full Bench, and one of the learned Judges who formed the majority concurred with the other two upon grounds which scarcely touched the main question in controversy. That decision expressly overruled a previous Full Bench decision of this Court in the case of *Ram Dial* v. *Ram Das* (3). It has since been considered by two other High Courts in India and expressly dissented from, *vide Amir Baksh Sahib* v. *Venkatachala Mudali* (4) and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (5). It seems to us also that in the Bombay High Court the view that an appeal lies in such cases as the present has been adopted without any question. It was assumed that both an appeal and a second appeal did lie in the reported case of *Ganga Das Dahyabhai* v. *Bai Suraj* (6). In order, therefore, that the decision of this Court in *Deoki Nandan Rai* v. *Tapesri Lal* (2) might be further considered, this appeal was referred to a Full Bench of three Judges for consideration. We have come to the conclusion that the older decision of this Court was correct and

(2) 14 A. 201; A. W. N. (1892) 74 (F. B.); 7 Ind. Dec. (N. S.) 499.

(3) 1 A. 181 (F. B.); 1 Ind. Dec. (N. S.) 122.

(4) 18 M. 439; 5 M. L. J. 208; 6 Ind. Dec. (N. S.) 656.

(5) 25 C. 99; 2 C. W. N. 408; 13 Ind. Dec. (N. S.) 68.

(6) 14 Ind. Cas. 777; 36 B. 329; 14 Bom. L. R. 250.

that there is no adequate reason why this Court should continue, upon this question, to dissent from the view taken by the High Courts in Calcutta, Madras and Bombay. The reasons in favour of the view that an appeal lies can scarcely be stated better than they were by the learned Judges who pronounced the decision of this Court in *Ram Dial* v. *Ram Das* (3). Dealing with the analogous provisions of the Civil Procedure Code of 1859, as amended by Act No. XXIII of 1861, the learned Judges held that there seemed no real difficulty about applying the rules governing executions of decrees, *mutatis mutandis* to any proceeding taken against the defaulting purchaser, whether at the instance of the holder of the original decree holder or of the judgment debtor. They went on to say:—"The judgment-debtor and (if his claim be not satisfied out of the proceeds of the re-sale) the original decree-holder stand in the position of decree-holders who have obtained judgment, against the defaulting purchaser for damages occasioned by his default. The defaulting purchaser stands in the position of a judgment debtor against whom a decree for such damages has passed. They are parties to the proceeding which is substituted for the suit..... .....and the rule relating to appeals must be applied *mutatis mutandis* equally with any other of the rules governing executions of decrees." In effect, the view taken was that the adjudication, in a case like the present, between the judgment-debtor and the defaulting purchaser, amounts to a decree and that appeals lie under the provisions governing regular appeals from decrees. The position does not seem to be altered by any changes which have since been made in the law; if anything, the case in favour of the maintainability of an appeal is made a little stronger by the definition of the word "decree" in the Code of 1908, where it is expressly made to include the determination of any question within section 47 or section 144 of the said Code. In *Amir Baksh Sahib* v. *Venkatachala Mudali* (4) the learned Judges of the Madras High Court virtually based their decision upon the same line of reasoning, and it seems to us correct. We are of opinion, therefore, that an appeal lay to the learned District Judge in this case and that his decision on the points determined by him was correct. The order of remand was, therefore, justified under the circumstances and it will be for the Court of first instance finally and completely to determine as between the parties all the points raised by the application of Janki Ram and the objections preferred thereto on the part of Sita Ram.

We dismiss this appeal with costs.

WALSH, J.—I entirely agree. If I were free so to hold, I should hold that a suit was expressly excluded by the provisions of Order XXI, rule 71. I am unable to frame satisfactorily to my own mind, any cause of action as between a judgment debtor and a defaulting purchaser. There is certainly no contractual relationship upon which a suit can be founded and I am unable to see what the cause of action really is or could be. To suggest that it was intended by this rule to provide machinery for passing an order to meet the justice of the case which any party could immediately afterwards bring a suit to set aside, seems to me to pay rather an extravagant compliment to the subtlety of the compilers of the Code.

J. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 281 OF 1917.

July 31, 1918.

Present:—Mr. Batten A. J. C.

Raja RAGHOJIRAO—PLAINTIFF—APPELLANT

versus

RAJESHWAR—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 41 (2)—Notice by tenant to Malguzar*—Intention to mortgage—Details of holding not given—Notice, validity of.*

A notice under section 41 (2) of the C. P. Tenancy Act given by a tenant to his *Malguzar* intimating an intention to mortgage his holding on the terms mentioned in the request contained in it for a loan unless the *Malguzar* himself is

RAGHOJIRAO v. RAJESHWAR.

willing to advance a loan on mortgage, need not be worded with the accuracy of a plea and a failure to give the details of holdings when the details are within the landlord's knowledge, or are available to him with ordinary diligence, does not invalidate the notice. [p. 818, cols. 1 & 2.]

Second appeal against a decree of the District Judge, Bhandara.

Mr. *V. R. Pandit*, R. B., for the Appellant.

Mr. *V. D. Kolte*, for the Respondent.

JUDGMENT.—Appeal by the plaintiff. The respondents Nos. 2 to 5 Pandia, Gondia, Bholia and Chindia are brothers, Chindia being a minor, and are the tenants of an absolute occupancy holding comprising seven fields in the village of Garada, Bhandara District. The appellant is the Malguzar of this and several other villages. A notice, dated 17th July 1915, of which the following is a translation, was sent by registered post to the Malguzar at his residence in Nagpur by the tenants; it purports to be signed by Gondia on behalf of himself and the minor Chindia, and by the other two brothers,

"Notice to Raje Raghojirao Bhonsle, Malguzar of Garada Bazruck, Tahsil and District Bhandara. The undersigned are the absolute occupancy tenants of Mouza Garada Bazruck, Tahsil and District Bhandara. We are in need of Rs. 1,000. Hence advance us money taking mortgage of our absolute occupancy land. We shall pay interest at Re. 1 per cent. per mensem. We shall satisfy the amount by paying Rs. 100 besides interest every year. If you intend to do so, inform us within eight days. If you do not intend to do so, inform us accordingly. We have persuaded another *Shaukar*. Dated 17th July 1915."

The Manager of the appellant's estate sent a reply, dated the 3rd August 1915, of which the following is a translation:—

"To Gondia and Chindia, sons of Sakharam Kunbi, residents of Garada, Pargana and Tahsil Bhandara.

"The undersigned gives a reply to the notice as follows:—

"1. Nobody can even read or make out the contents of your notice. The number, area and *jama* and tenure of the field have not been given. It is not also stated what *Malkana* you are going to pay.

"2. The notice given by you is not legal. Hence I cannot give any consent to the mortgage."

On the 25th September 1915 the tenants mortgaged the holding to the first respondent Rajeshwar Shridhar, a *Shaukar*, for the consideration of Rs. 1,000—re-payment to be made in annual instalments of Rs. 100—besides interest. The mortgage was one with a condition of foreclosure on the 28th April 1916. The appellant filed the suit out of which this appeal arises, praying for the declaration that the mortgage is void against the plaintiff, having been made without his consent. In the plaint no mention is made of the notice or of the reply thereto. The defendants pleaded that a notice having been given to the landlord under sub-section (2) of section 41 of the Tenancy Act and the landlord not having made a claim under sub-section (4) the suit was not maintainable; the plaintiff admitted the receipt of the notice, but pleaded:—

"It is quite unintelligible and it could not be known as to who signed it. From the envelope it was found that the notice was given by Gondia. The plaintiff gave a reply asking Gondia as to what he meant by the notice. But the plaintiff received no answer. The notice is of no effect since it is quite vague in its terms and the Survey numbers have not been mentioned, the rental, too, not being specified and hence nothing could be made out of it." It was admitted that the defendants Nos. 2 to 5 have no other absolute occupancy field in Garada or elsewhere, though they have occupancy and ordinary holdings.

Both the lower Courts have held that the notice was an adequate notice under section 41 (2) of the Tenancy Act and was not so vague and unintelligible as to be ineffectual as such a notice, it is not argued for the appellant in this Court that the notice was illegible, for the translators in this Court have been able to read it without difficulty. Two grounds are urged by the learned Counsel for the appellant of those the first is that the notice was not signed by all the tenants but only by Gondia on his own behalf and on behalf of the minor Chindia and is, therefore, not

a legal notice. This ground is not pressed as it was based on a misapprehension. The notice purports to be signed by all the tenants.

The ground which is pressed is that the notice given by the tenants is, for various reasons, not a sufficient notice and does not comply with the requirements of section 41 (2) of the Tenancy Act. It is first contended that the notice does not clearly express the intention of mortgaging to another, since it mainly consists of a request for a loan, and the reference to the *Shaukar* at the end is very vague and indefinite.

I entirely concur with the lower Courts in thinking that the notice clearly intimates an intention to mortgage the holding to a *Shaukar* on the terms mentioned in the request for a loan, unless the Malguzar himself was willing to advance a loan on mortgage. The manager's reply clearly shows that the notice was so understood for it refuses assent to a mortgage.

It is next argued that the notice did not describe the land proposed to be mortgaged with sufficient clearness to enable the landlord to know what land was meant, and even whether it was proposed to mortgage the entire holding or only part. It is admitted that the tenants had only one absolute occupancy holding, which was in Mouza Garada; the landlord is also addressed in the notice as Malguzar of Garada. I agree with the lower Courts that as it was in the landlord's knowledge that the persons giving the notice had only one absolute occupancy holding and as the notice refers to absolute occupancy land, the landlord must have known to what land the notice referred to. The notice also clearly conveys the intention of mortgaging all the absolute occupancy land.

It is contended that by his reply the manager asked for further information which the tenants did not furnish. This is not the case; the reply was a categorical refusal and closed the correspondence. It is argued that full particulars as to rent acreage, etc., should have been given in the notice so as to enable the landlord to decide whether to exercise his option without going to the trouble of getting the detail from his office. I see no force in this argument. The details were within the landlord's knowledge, that is to say, they were available to him with ordinary diligence.

It has been held in *Bharatsingh* v. *Dhansingh* (1), followed in *Kodubakhsh* v. *Bishnu* (2), that a notice under section 41 (2) of the Tenancy Act need not be worded with the accuracy of a plea. The information given in the notice was amply sufficient to inform the landlord of the tenant's intention to mortgage the whole of their absolute occupancy holding, and the lower Courts were right in so deciding.

It is finally argued that a notice must by law contain the particulars specified in section 41 (2), at any rate, as regards the rent. The sub section, however, does not say, that these particulars should be given in the notice, it merely states the circumstances under which the tenant must give notice, and presupposes a knowledge on the part of both landlord and tenant as to the particulars of the tenant's holding. The learned Counsel for the appellant does not support the appeal on the ground that the landlord was entitled to consider the notice invalid because, as stated in his reply, the notice did not say what *Malkana* the tenants were going to pay. The terms of the reply, however, cannot be disregarded. It seems obvious that the landlord's object was to ignore the provisions of section 41, and to try and get a premium to induce him to consent to the mortgage. The lower Courts were right in holding the notice to be a valid one, and the appeal is dismissed with costs.

J. P. *Appeal dismissed.*

(1) 14 C. P. L. R. 162.
(2) 2 N. L. R. 27.

ULFAT RAI v. KANHAIYA LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1327 OF 1919.

December 17, 1921.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

ULFAT RAI—PLAINTIFF—APPELLANT

versus

KANHAIYA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Usufructuary and simple mortgages executed at one time—Tacking—Payment of both necessary at redemption—Interest, deficiency in, to be recovered every year—Entire deficiency, whether can be recovered at redemption.

Where two mortgages, one usufructuary and the other simple, were executed of the same property on the same date in favour of the same mortgagee with a condition that the money secured by the simple mortgage was to be paid along with that of the usufructuary mortgage at the time of redemption, the simple mortgage is tacked to the usufructuary mortgage and its payment is necessary before the property can be redeemed. [p. 819, col. 2.]

The mere fact that a usufructuary mortgagee is given an option of recovering from the mortgagor at the end of every year any deficiency in the interest provided for by the mortgage, does not make the interest cease to be a part of the mortgage-money and a mortgagor at the time of redemption must pay the principal and interest due at that time. [p. 820, col. 1.]

Second appeal from a decree of the Second Additional Judge, Aligarh, confirming a decree of the Munsif, Kasganj.

Mr. *Panna Lal*, for the Appellant.

Messrs. *A. Sanyal* and *Kirpa Ram Dang*, for the Respondents.

JUDGMENT.—These two appeals are by the plaintiff in a redemption suit. The suit was by the plaintiff to redeem a usufructuary mortgage of the 22nd of November 1884 for Rs. 1,500, and for recovery of surplus profits. There was another simple mortgage of the same date which was to be paid along with the usufructuary mortgage. These mortgages were in favour of one Daulat Ram. He sold his rights as mortgagee to Srikishen Das and Tika on the 10th of April 1835. On the 20th of June 1912 the mortgagors sold the mortgaged property to Tika Ram. The result was that Tika Ram became the sole owner of half the mortgaged property and had the equity of redemption only in the other half.

The plaintiff, who is the son of Tika Ram, sues to redeem half the mortgage on payment of half the amount due under the usufructuary mortgage only, but does not want to pay the second mortgage which was contracted to be paid along with the usufructuary mortgage. The defendants pleaded in defense that the plaintiff was bound to pay the amount due on the second mortgage also and that there had been a deficiency in the interest due on the first mortgage which the plaintiff was also liable to pay before he could get a decree for redemption.

The First Court held that the principal mortgage-money was due on the first mortgage but that there had been no deficiency in interest and that, in any case, interest could not be recovered for more than 12 years. On the second mortgage, which was a simple mortgage, the Court held that the plaintiff was bound to redeem it along with the usufructuary mortgage. Both the parties appealed. The plaintiff's appeal was about his non-liability to pay the second mortgage. The defendants in their appeal claimed the deficiency in interest up to the time of redemption. The lower Appellate Court dismissed the plaintiff's appeal, holding that the simple mortgage was also to be paid along with the usufructuary mortgage, and decreed that of the defendants, holding that the defendants were entitled to recover the deficiency in interest for the whole period of the mortgage and not for two years only as decreed by the First Court. Hence these two appeals by the plaintiff.

The first point argued with great vigour by Mr. Panna Lal, the learned Vakil for the plaintiff, was that the mortgagees having been given the option of recovering the deficiency in interest at the end of each year, could not go on adding it to the mortgage-money and thus increasing the amount payable at the time of the redemption of the mortgage. He also contended that the second mortgage, which was a simple one, being barred by time the defendants-mortgagees had no right left to claim the money due on that mortgage in addition to that due on the usufructuary mortgage. The second contention may be disposed of very shortly. It is quite clear that the second mortgage was in clear terms tacked to the first and its payment was necessary before the property could be redeemed. No ques-

tion of limitation arises in the case. As to the next point, namely, that the defendants could not get the deficiency in interest for the whole term of the mortgage, we are of opinion that this contention must also fail. This case is governed by the principle of law laid down in the cases of *Ohintaman* v. *Dulari* (1) and *Nathamuni Fillai* v. *Vengammal* (2). The mere fact that a mortgagee was given an option, if he so chose, of realising the deficiency by a suit directed against the person of the mortgagor did not make the interest cease to be a part of the mortgage-money. Before the plaintiff can succeed in a suit for redemption he must pay the mortgage money, which includes the principal and interest due at the time of redemption. The cases of *Kesar Kunwar* v. *Kashi Ram* (3) and *Ali Ahmad* v. *Kalka Prasad* (4) do not apply to the present case. These two points dispose of the two appeals of the plaintiff. There are, however, cross-objections by the defendants, by which they claim deficiency in interest up to the date fixed for payment. This they are entitled to get. It is, however, stated by Mr. Panna Lal for the plaintiff that the money found by the lower Appellate Court as due from the plaintiff has been deposited in Court for payment to the defendants in February 1920. If that is so, the decree of the Court below will be modified by adding thereto the deficiency in interest from June 1919 to February 1920 at the same rate at which it has been calculated in the account prepared in the Munsif's Court after issues were remitted to him by the lower Appellate Court. If the amount has not been so deposited, the defendants-mortgagees will get their deficiency in interest up to six months from the date of this decree which will be the date fixed for payment. The result, therefore, is that we dismiss the two appeals and allow the cross-objections with costs in all Courts.

J. P.

Appeal dismissed.

(1) 8 Ind. Cas. 570; 33 A. 107; 7 A. L. J. 1087.
(2) 40 Ind. Cas. 358; 5 L. W. 593.
(3) 30 Ind. Cas. 777; 13 A. L. J. 889; 37 A. 634.
(4) 37 Ind. Cas. 95; 14 A. L. J. 986.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2123 OF 1917,
November 2, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Campbell.

SUNDAR LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

KULLU RAM AND ANOTHER—PLAINTIFFS AND *Musammat* BACHAWAN DEVI—DEFENDANT—RESPONDENTS

*Hindu Law—Will, construction of—Uncertainty—Charitable bequest—*Cy-pres, *doctrine of, applicability of—Reversioner, remote—Right to challenge—Will.*

In construing a Will the Court must bear in mind who the testator is and the language used by him for expressing his wishes which may or may not be adapted for legal precision, and the primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new Will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view, that object must be given effect to [p. 822, col. 2]

If the Court can ascertain that there is a general charitable intention expressed in a Will the fact that the particular object for which the charity is intended does not exist or that the fund intended for that charity cannot exhaust the whole income will not be any reason for holding that the bequest fails either wholly or in part. [p. 823, col. 1.]

The doctrine of *cy-pres* should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance, and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated. [p. 823, col. 1.]

A Hindu testator made a Will in which he said, "I want the entire residue of my estate to be applied by my executors in some manner from which my brotherhood will derive benefit My executors should sell my house property and add the sale-proceeds to the cash balance and in this manner apply the total in work of public good, but whatever is done the benefit of my brotherhood is to be kept in view. What I mean is this. They are to give assistance in the construction by the brotherhood of any temple, etc., at any holy place, etc., or they are to give scholarships in any school to students belonging to the brotherhood":

Held, that the clause was not void for uncertainty. [p. 823, col 1.]

A suit to contest a Will must be brought by the immediate reversionary heir of the testator, but if the nearest reversionary heir refuses without sufficient cause to institute proceedings or has precluded himself by his own act or conduct from suing or has colluded with the opposite party or has accepted the Will, and the next presumable heir states in the plaint the circumstances under which

he claims to sue, a Court would exercise a judicial discretion in determining whether he is or is not competent to sue. [p. 821, col. 2; p 822, col. 1]

Rani Anand Kunwar v. *Court of Wards*, 6 C. 764; 8 C. L. R. 381; 8 I. A. 14; 4 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 63; 3 Ind. Dec. (N. S.) 495 (P. C.), followed.

First appeal from a decree of the Senior Subordinate Judge, Ferozepore, dated the 3rd July 1917.

Pandit *Sheo Narain*, R. B., and Pandit *Kanwar Narain*, for the Appellants.

Lalas *Jaggan Nath* and *Mehr Chand Mahajan*, for the Plaintiffs-Respondents.

JUDGMENT.—This is a first appeal against a decree of the Senior Subordinate Judge, Ferozepore, decreeing a claim for a declaration that a certain passage in the Will of one Bhola Nath Kalal, deceased, is void for uncertainty.

The plaintiffs are Kallu Ram and Bahadur Lal, sons of Parshadi Lal, the brother of the testator and his nearest surviving relative. Bhola Nath died in 1916 without issue but leaving a widow *Musammat* Bachawan Devi. The Will is dated 4th June 1913 and there is no dispute about its due execution.

Parshadi Lal was practically disinherited by the Will. He was left a sum of Rs. 35 per mensem to be paid by the executors for his lifetime on condition that he did not dispute the Will on the testator's death. There were certain cash legacies including Rs. 500 to each of the plaintiffs. Provision was made for the widow and she was enjoined to adopt a son to whom the bulk of the testator's property was eventually to be conveyed on terms which need not be detailed, by four executors and trustees Lalas Sundar Lal, Behari Lal, Shankar Lal, and Basant Lal.

Then follows the passage which is the subject of suit.

Agar koi mutbanna muqarrir na hua ho ya lawald faut ho jaue ya shadi hone ke bad bewa chhor mare to Committee mazkur ko ikhtiyar hoga kih bad intizam guzara bewa ke (agar bewa ho) wa bad mujrai digar akhrajat mutaalka ke baki rcqm sar-i-nakd wa sud wa kiraya makanat waghaira jis qadr kih ho kisi aise kam men legate rahe jis se apni baradri ko aram pahuchhe. *Our jumla makanat.....firokht karke qimat firokht shamil naqd sarmaya kar dewe* aur isi tarah kam rafa-i-am men istimal kare, magar har surat men apni baradri ka aram malhuz rakha jawe, yane agar koi mandar waghaira baradri ki taraf se kisi tirath waghaira par zer temir ho to usmen imdad di jawe ya kisi skul men apni baradri ke tulba ko wazifajat de jawen.

The words underlined (in roman) have been held by the learned Subordinate Judge to render the bequest vague and uncertain and, applying the test of feasibility of control by a Court laid down by the Privy Council in *Runchordas Vandravandas* v. *Parvatibai* (1), he has found it would be impossible for the Court to have any control over the administration of the objects of the bequest and that it would be open to the trustees to devote the money to objects over the administration of which the Court could have no possible control.

As stated already, the Subordinate Judge decreed in favour of the plaintiffs declaring that the portion of the Will above quoted be cancelled and ordered that the costs of the plaintiffs be paid from the estate. The defendants were the four trustees, the widow, *Musammat* Bachawan, and the father of the plaintiffs, Parshadi Lal, who is now said to have died a few days after delivery of the lower Court's judgment.

The trustees have appealed and two points have been urged in their behalf; firstly, that the plaintiffs are not entitled to maintain the action, and, secondly, that there is no such indefiniteness and vagueness as justifies the cancellation from the Will of the passage in dispute.

On the first point the learned Advocate for the appellants relies on the Privy Council decision in *Rani Anand Kunwar* v. *Court of Wards* (2) which was a case of contest by a reversionary heir of the adoption of a son by a Hindu widow and where it was laid down that the right to sue must be limited; that, as a general rule, the suit must be brought by the presumptive reversionary heir, but that if the nearest heir had refused, without sufficient cause, to institute proceedings or had precluded himself by his own act

(1) 23 B. 725; 1 Bom L. R. 607; 3 C. W. N. 621; 26 I. A. 71; 7 Sar. P. C. J. 743; 12 Ind. Dec. (N. S.) 485 (P. C.).

(2) 6 C. 764; 8 C. L. R. 381; 8 I. A. 14; 4 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 63; 3 Ind. Dec. (N. S.) 495 (P. C.).

or conduct from suing or had colluded with the widow or had concurred in the act alleged to be wrongful and, if the next presumable heir stated in the plaint the circumstances under which he claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent to sue.

It has been argued that there is no evidence that the widow and Parshadi Lal have refused to join in the suit or have precluded themselves from suing to set aside the portion of the Will impugned by the plaintiffs.

We think, however, that the plaintiff are entitled to maintain the suit. The position of a Hindu widow is that of a life tenant not that of a full heir and, ordinarily, she is not competent to challenge any disposition of property by her husband. Further, in this particular case, *Musammat* Bachawan Devi is not interested in the provisions of the Will which are sought to be set aside since they are to become effective only in the event of her dying without adopting a son. As regards Parshadi Lal, the plaintiffs' plaint asserts that he and *Musammat* Bachawan Devi had refused to join in the suit "out of greedy motives," they were joined as defendants, and they did not plead that they had not so refused. Under the terms of the Will, moreover, Parshadi Lal was to lose his monthly allowance of Rs. 35 in the event of his raising any dispute after the testator's death, and by accepting the bequest, as he is admitted to have done, he bound himself not to contest in any way the disposition by Bhola Nath of his property. In our opinion Parshadi Lal had precluded himself from suing and his sons, the next reversionary heirs, were competent to bring the suit.

In regard to the second question of whether the provision under consideration is void on the ground of uncertainty, it is obvious that if a testator legally has the power to dispose of his property by Will his wishes should be given effect to if they are expressed in language which makes it clear what they are and how they should be carried out. When a testator creates a trust it must be for a definite and lawful object.

The Privy Council ruling reported as *Runchordas Vandravandas* v. *Parvatibai* (1) that a bequest by a Hindu testator of property to trustees for "*dharm*" is void for uncertainty has been followed in a large number of cases [*e. g. Shahab-ud-din* v. *Sohan Lal* (3), and *Gurdit Singh* v. *Sher Singh* (4),] but is not exactly in point in the present case except as laying down what the learned Subordinate Judge has pointed out correctly to be the proper test to apply whether a trust by bequest is of such a nature that it can be under the control of the Court. The decision of their Lordships was based upon a leading English case, *Morice* v. *Bishop of Durham* (5), which was also followed in the decision of the Bombay High Court *Trikumdas Damodhar* v. *Haridas* (6), that the bequest of a residue to executors for making use of as they might think proper for purposes of popular usefulness or for purposes of charity was bad for uncertainty.

In *Parbati Bibee* v. *Ram Barun Upadhya* (7) the bequest of a residuary estate for expenditure by an executor in "religious and charitable purposes" was held to be valid, and it is pointed out in a judgment of the Madras High Court, *Muthukrishna Naicken* v. *Ramchandra Naicken* (8), by Mr. Justice Sheshagiri Aiyar that in English cases more recent than those which are the basis of the Indian rulings regarding bequests for "*dharm*" or "*dharma*" bequests to charities have been treated by the Courts with less disfavour than formerly. He cites three such cases in which bequests to unspecified charitable institutions have been held to be good and goes on to say,—

"The primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new Will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view and that he intended the funds left by him should be appropriated to that object, Courts are bound to see that the persons appointed

(3) 75 P. R. 1907; 168 P. L. R. 1908; 139 P. W. R. 1907.

(4) 14 Ind. Cas. 247; 78 P. R. 1912; 63 P. W. R. 1912; 106 P L. R. 1912.

(5) (1805) 9 Ves. 399; 10 Ves. 522; 32 E. R. 947; 7 R. R. 232.

(6) 31 B. 683; 9 Bom. L. R. 560.

(7) 31 C. 895; 8 C. W. N. 653.

(8) 47 Ind. Cas. 611; 37 M. L. J. 489.

by the testator do not misappropriate the funds."

Continuing, the same learned Judge deduced from certain other English decisions which he cites,

"that if the Court can ascertain that there was a general charitable intention, the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income will not be any reason for holding that the bequest failed either wholly or in part."

And, again, later on, speaking of the powers of Indian Courts to give directions towards the application of trust income, Mr. Justice Sheshagiri Aiyar remarked,

"The doctrine of *cy-pres* should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance, and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated."

With these observations we are in complete accord and we consider it important in dealing with a case like the present to bear in mind who the testator was and the medium used by him for expressing his wishes, which here was not a language adopted for legal precision. Bhola Nath possibly had never heard the English word charity and his use of the word "*rafa-i-am*" cannot be presumed to indicate an intention either to distinguish his disposition from or identify it with those which the English Courts have recognised as charitable bequests.

The learned Subordinate Judge, we consider, has been misled by his conception of the meaning of the word "*yane*" which he interprets "for instance." He translates the passage beginning with that word "for instance they might contribute towards the construction of some *mandir* being built at some place of pilgrimage, etc., or establish scholarships at certain schools for the boys of the brotherhood." He refers to this passage more than once as containing the suggestions of the testator.

In our opinion the contents are very much more definite than suggestions. The proper meaning of the word "*yane*" is "that is to say" and we think that the succeeding words specify with very fair precision the actual purpose of the trust as intended by the testator.

The two preceding phrases "*kisi aise kam men lagate rahe jis se apni baradri ko aram paunche*," and "*aur isi tarah kam rafa-i-am men istimal kare. Magar har surat men apni baradari ka aram malhuz rakha jawe*," are introductory and are meant to lead up to the final specific declaration. They are, so to speak, an expression on paper of the working of the testator's mind showing the birth of an idea and how it was developed.

The meaning of the clause of the Will in question seems to us to be as follows:— "If my scheme for adoption falls through I want the entire residue of my estate to be applied by my executors in some manner from which my brotherhood will derive benefit. In that event my executors should sell my house property and add the sale proceeds to the cash balance and in this manner apply the total in work of public good, but whatever is done the benefit of my brotherhood is to be kept in view. What I mean is this. They are to give assistance in the construction by the brotherhood of any temple, etc., at any holy place, etc., or they are to give scholarships in any school to students belonging to the brotherhood."

In other words, the trustees were directed to apply the money to charitable objects of two specified descriptions. As regards the scholarships there can be no ambiguity. The executors are given an absolutely unfettered choice of schools but this, the wording shows, was the testator's deliberate intention. The occurrence of the word "*waghaira*" (et cetera) twice in the preceding sentence was thought by the Subordinate Judge to render the whole phrase vague and indefinite. We do not consider that there is any such vagueness as would justify the direction being declared void for uncertainty. As regards "*mandar waghaira*" the word *temir* shows that it is to be a work of construction and the previous word *aram* that it is to conduce to the comfort and convenience of Kalals. *Tirath* means, according to Fallon's Dictionary, a holy spot; a place of pilgrimage (especially

sacred waters)" and "*tirath waghaira*" read in conjunction with the rest of the sentence would in its widest sense be any place to which Kalals resort for the purpose of religious observances. It is noticeable that the trustees are restricted and the estate protected by the words "*baradri ki taraf se.*" The trustees are not to act independently in constructing temples, bathing *ghats* or the like but are to work in concert with other members of the Kalal community. The purpose of the trust, in our opinion, is expressed with sufficient clarity, it will always be open to the trustees to seek the help of the Court in cases of doubt, and we do not apprehend that the Court will find any difficulty in guiding them.

For these reasons we hold that the decree of the learned Subordinate Judge must be reversed. We accept the appeal set aside that decree and order that the plaintiffs' suit be dismissed with costs in both Courts.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 600 OF 1920.

February 1, 1922.

Present:—Mr. Justice Gokul Prasad and Mr. Justice Stuart.

MANPAL SINGH—DEFENDANT—APPELLANT

versus

RAJ PARTAB SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—Occupancy holding—Succession—Widow succeeding to her husband in 18 —Widow's death after 1901—Succession, how governed—Bengal Rent Act (X of 1859), s. 6—N. W. P. Rent Act (XVIII of 1873).

The right of an occupancy tenant was created for the first time by the provisions of section 6 of Act X of 1859 and that right was neither transferable nor heritable. Until the passing of Act XVIII of 1873 there was no rule of succession provided for occupancy holdings and succession was governed by custom which varied in different villages. [p. 825, col. 2.]

One *N*, an occupancy tenant, died about 1868. On his death his widow entered into possession of the occupancy holding. In 1893 the widow made a gift of the property to the defendant. The widow died in 1915 and the plaintiffs, her reversioners, sued for possession:

Held, that as the widow was permitted to continue cultivation of the holding after her husband's death she acquired in her own right after twelve years the right of an occupancy tenant and that, consequently, succession was governed by section 22 of the Agra Tenancy Act, 1901, and that as the plaintiffs did not share in the cultivation at the widow's death they could not succeed. [p. 825, col. 2.]

Second appeal from a decree of the District Judge, Allahabad, confirming a decree of the Subordinate Judge.

Mr. *Pearl Lal Banerji*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.

GOKUL PRASAD, J.—This appeal arises out of a suit for possession of a certain cultivatory holding. The plaintiffs came to Court on the allegations that one Nanhe Singh who owned a large area of occupancy holding and fixed-rate holding, died about 1863, that after him his widow *Musammat* Nankai entered into possession of the occupancy holding as a life tenant with limited rights only, that she made a gift of the said property to Manpal Singh, defendant, and his wife in the year, 1893, that she being only a life-tenant had no right to make the gift, that the gift was, therefore, invalid, that she died in the year 1915 and that, thereupon, they, the plaintiffs now sued as her next reversioner for possession which was postponed till her death. The original tenant Nanhe Singh having died before the Tenancy Act of 1873 was passed, the question is, was there a succession to his holding at the time of his death and, if so, to whom. We have not been able to find any provision of law regulating the devolution of succession to an occupancy tenancy at that time. The right of an occupancy tenant was first created by Act X of 1859. Section 6 of that Act runs as follows:—"Every *Raiyat*, who has cultivated or held land for a period of twelve years, has a right of occupancy in the land so cultivated or held by him, whether it be held under *pottah* or not, so long as he pays the rent payable on account of the same, but this rule does not apply to *khomar*, *nijjote*, or *sir* land belonging to the proprietor of the estate or tenure and let by

him on lease for a term or year by year, not (as respects the actual cultivator) to lands sub-let for a term or year by year by a *Raiyat* having a right of occupancy. The holding of the father or other person from whom a *Raiyat* inherits, shall be deemed to be the holding of the *Raiyat* within the meaning of this section."

In the case of *Ajoodhya Pershad* v. *Imam Bandi* (1) a Full Bench of the Calcutta High Court held that such a right was not transferable, and Sir Barnes Peacock stated in his judgment, 'speaking for myself I am not at all sure that a right of occupancy gained under section 6, Act X of 1859, is necessarily heritable.'

In *Nurendro Narain* v. *Ishan Chunder Sen* (2) a Full Bench of the Calcutta High Court decided that such a right was not transferable.

In *Doorga Pershad* v. *Dochur Pershad* (3) this Court held that the ordinary Hindu Law did not of necessity apply to the succession of an occupancy holding, and appeared to lay down a principle that in certain circumstances a co-cultivator, closely related to the occupancy tenant, such as a son et-cetra, might succeed to the holding. At page 188 they are reported to have said :— "It is assumed in the judgment appealed from, that upon the death of a *Raiyat* having a right of occupancy, his heirs, however remote, may claim to succeed to his holding as their inheritance. No authority is cited except that the Hindu Law of Inheritance is referred to ; and the defendants being found to be heirs by Hindu Law are declared entitled to the right of occupancy by inheritance. On the death of a *Raiyat* having a right of occupancy his son or other immediate heir residing with him in the village usually succeeds. Remote heirs residing elsewhere and coming to the village after an interval have not been allowed to take possession of his holding as a part of their inheritance. In the case the grandson of the *Raiyat* (his daughter's son) who, it is stated, would presumably inherit his own father's cultivation, was not allowed to succeed to the holding of his grandfather. It may be inferred that he resided with his father elsewhere than in the deceased *Raiyat's* village.'

In a subsequent decision, *Pem Koer* v. *Ooper Bulee Singh* (4), the same Court held that it was not correct to say that the ordinary Hindu Law would apply. The learned Judges in their judgment had referred to paragraph 125 of 'The Directions to Settlement Officers'. Those observations referred to tenants at fixed-rate and not to tenants in general.

However, leaving this matter aside, it is quite clear that we cannot, in the face of these authorities, come to the conclusion that the right of an occupancy tenant devolved according to the ordinary rule of succession of Hindu Law as in the case of other estate. Until the passing of Act XVIII of 1873 there was no rule of succession provided for occupancy holdings. They were apparently governed by custom which varied in different villages. No custom is found here.

Under these circumstances, there are two ways of looking at the case. The point in short, is, what was the nature of the right which *Musammut* Nankai obtained by virtue of taking possession of the occupancy tenancy? After the death of her husband she continued in undisturbed possession thereof up to the time of her death. If she was in possession, as alleged by the plaintiffs, by inheritance the defendants could acquire no rights from her by virtue of the gift in their favour because she had no such rights to pass, and, further, the plaintiffs whose rights of enjoyment could be said at the best to have been postponed during her life, could not have possibly been co-sharers in the cultivation of the *sir* as they were not in existence at the time of her husband's death and, therefore, their suit was bound to fail. If, on the other hand, by such continuous possession she obtained an occupancy right in herself then the succession opened on her death and the plaintiffs did not fulfil the conditions prescribed under section 22 of the Tenancy Act now in force to come in as her heirs. In either view of the case, the plaintiffs' claim was bound to fail and the Courts below have erred in decreeing the claim. I would, therefore, allow

(1) 7 W. R. 529; B. L. R. Sup. Vol. 725.
(2) 18 B. L. R. 274 22 W. R. 22 (F. B.).
(3) 3 Agra H. C. R. 186.
(4) 2 N. W. P. H. C. R. 86.

the appeal and modify the decrees of the Courts below by decreeing the plaintiffs' claim only in respect of the fixed rate tenancy and dismissing the rest of the claim with proportionate costs.

STUART, J.—I concur in the order proposed. I have to add very little to it. As I understand the law, the right of an occupancy tenant was created for the first time by the provisons of section 6 of Act X of 1859 except under special customs which are not shown to have existed in the village in which the land in dispute is situated. In order to decide the question whether on the death of an occupancy tenant whose rights were created by Act X of 1859 and who died before Act XVIII of 1873 came into force, such rights were heritable or not, it would appear to be necessary only to examine the words of section 6, and after examining these words to decide whether this section created in the occupancy tenant an estate such as is known to the law of England as an 'estate of inheritance.' Apart from anything which may have been decided by this Court, it appears to me that on the wording of the section it is impossible to hold that an 'estate of inheritance' was so created, An occupancy tenant under that section obtained, in my opinion, a non-heritable right to retain the cultivation of his occupancy holding so long as he paid his rent, and such right was created by the Act of 1859 for the first time, where it had not previously existed by custom. Act XVIII of 1873 undoubtedly created an estate of inheritance, but I agree with the view that was taken as long ago as 1876 by Sir Barnes Peacock that the right created by Act X of 1859 was neither transferable nor heritable. So, when Nanhe Singh died, the rights of occupancy came to an end. His widow Nankai being permitted to continue cultivation of the holding after her husband's death acquired in her own right after twelve years the right of an occupancy tenant. Now that she is dead, the question is, how is succession to her governed? It is clearly governed by the provisions of section 22 of the present Tenancy Act (Local Act No. II of 1901) and the plaintiffs cannot claim the right to succeed her as they did not (whatever be their title in other respects) share in the cultivation of the holding at the time of her death.

BY THE COURT.—The order of the Court is that the appeal is allowed and the decrees of the Courts below are modified, the claim of the plaintiffs to the occupancy holding only being dismissed. Costs are to be in proportion to failure and success and the costs in this Court will include fees on the higher scale.

J. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2609 OF 1904.

February 15, 1907.

Present:—Mr. Justice Mitra and Mr. Justice Caspersz.

PROMOTHA NATH RAY CHAUDHURI AND OTHERS—DEFENDANTS—APPELLANTS

versus

DINAMANI CHAUDHURANI—PLAINTIFF—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Arts. 140, 142, 144—*Suit for recovery of possession—Estate not falling into possession of plaintiff until termination of limited estate—Deed of doubtful import, construction of.*

A deed of doubtful import is best construed by evidence of the conduct of the parties to it—*optimus interpres rerum usus.* [p. 827, col. 2.]

Article 140 of the Second Schedule of the Limitation Act of 1877 contemplates a suit by a remainderman or reversioner for possession of immoveable property, when his estate falls into possession. [p. 828, col. 1.]

There is no bar to the application of Article 140 of the Second Schedule of the Limitation Act of 1877 to a suit for recovery of possession of a land of an estate which did not fall into possession of the plaintiff until after the death of a person who was in possession of the estate as a limited owner under an *ekrarnama*. It is immaterial whether the *ekrarnama*, conferred a life-estate properly so called and whether the plaintiff was a remainderman or reversioner, taking after the lapse of a life-estate in its strict sense. To such a suit Articles 142 and 144 cannot apply. [p. 828, cols. 1 & 2.]

Appeal against a decree of the Additional Subordinate Judge, Mymensingh, dated the 10th August 1904, affirming that

of the Munsif, Third Court, Atia, dated the 31st March 1903.

Dr. *Rash Behary Ghosh*, Babus *Joges Chunder Roy* and *Mukund Nath Roy*, for the Appellants.

Mr. *Hill*, Babus *Basant Coomar Bose*, *Dwarka Nath Chuckerbutty*, *Kritanta Coomar Bose* and *Umes Chandra Ghosh*, for the Respondent.

JUDGMENT.—The questions raised before us in these appeals relate to the plea of limitation.

Golaknath Ray was the owner of the lands in controversy. He died many years ago leaving him surviving a widow Jahnavi Chaudhurani and after giving her an authority to adopt a son or three sons in succession. In pursuance of the authority to adopt Jahnavi adopted Baikuntnath Ray, but when the latter had attained the age of majority, disputes arose between them as to the management of the estate left by Golaknath. Jahnavi sought to keep the management and control to the exclusion of Baikuntnath. These disputes, however, were settled by an *ekrarnama* executed on the 22nd Bhadra 1272 B. S., corresponding with 6th September 1865. Baikuntnath married the plaintiff Dinamani Chaudhurani and on his death, without male issue in 1887, Dinamani, as his widow, became his heiress. Jahnavi, however, continued to be in possession in the same way as before Baikuntnath's death. She died in 1900, and then Dinamani took possession of the estate left by her father-in-law Golaknath and her husband Baikuntnath. During the lifetime of Jahnavi the defendants or their predecessors-in-title had taken possession of the disputed lands and their possession had lasted for more than twelve years before the institution of the suits under appeal.

If Jahnavi had an estate for life under the *ekrarnama* of 1865, and if Baikuntnath was the remainderman or reversioner, the death of Jahnavi would be the starting point for calculating the period of limitation under Article 140 of the Second Schedule of the Limitation Act. The lower Courts have construed the deed as giving Jahnavi an estate for life and have decided the question of limitation in favour of the plaintiff. The contention on behalf of the defendants is, that the *ekrarnama* did not create an estate for life, but that it merely empowered her to manage during her natural life, that it was only an irrevocable power-of-attorney, the estate continuing to be vested in Baikantnath in the same way as before the execution of the deed. The further contention on their behalf is that, even if the deed be not an irrevocable power-of-attorney, the estate created by it was not strictly a life-estate, and Baikuntnath was neither the remainderman nor the reversioner, and his heiress is not entitled to the benefit of Article 140. The case admittedly does not come under Article 141, as Jahnavi was not in possession as a Hindu widow or mother. The contention of the defendants, therefore, is that the plaintiff is barred either under Article 142 or 144 of the Second Schedule.

The question of the construction of this deed is not *res integra*. In 1897 it was construed in this Court at the instance of some of the defendants who, in a suit instituted by Jahnavi for possession of land, pleaded that she had no real right entitling her to sue for possession but that she was merely a manager under the deed. The Court held that the deed gave Jahnavi an estate for life. In two other appeals *Dinamoni* v. *Elahudad Khan* (1) and *Dinamoni* v. *Elahadut Khan* (2) in which the present plaintiff was appellant and one Elahudad Khan was the respondent, it was held that the deed gave Jahnavi an estate for life.

The conduct of the parties to the deed also tends to show that they thought that Jahnavi was not merely a manager, that she had an estate which entitled her to possession and enjoyment of the profits during her lifetime, and that Baikuntnath was not entitled to re-enter until after her death. A deed of doubtful import is best construed by evidence of the conduct of the parties to it—*optimus interpres rerum usus*.

We have carefully examined the document both in the vernacular and the translation in English, and our conclusion is substantially the same as that arrived at by the learned Judges who had to deal with it. The *Anumati-patra* under which Jahnavi obtained her power to adopt a son gave her authority to manage or preserve her husband's estate but without prescribing any period or extent. It created no estate in her. The *ekrarnamah*, however, executed by her son, distinctly

(1) 7 C. W. N. 678.
(2) 8 C. W. N. 843.

gave her the power to possess and enjoy the property for her life(*Bhogbanodahhalikar*). The son thereby withdrew all claims to possession of the property covered by the instrument except as to certain villages specified in it. Jahnavi was to perform all acts of possession, to sue and be sued as owner during her life and to appropriate to her own use the profits, conditionally on her paying household and marriage expenses, etc. The son reserved the right to enter into possession only after her death and thereby created in himself the right of a remainderman. He could not exercise any acts of possession or sue for possession a wrong-doer against Jahnavi during the latter's lifetime. These are indicia of an estate for life strictly so-called.

But there are other expressions and conditions in the *ekrarnama* which appear to be anomalous. Jahnavi had not the power of alienation, even of her life-estate, and any accretions and accumulations made during her lifetime were not to go to her heirs or heiresses of *stridhan* but to her son and his heirs. It would seem that the deed was merely intended to give the rights and impose the obligations of a Hindu widow and to postpone the period of the adopted son's possession until his mother's death. The estate was not a life estate and Baikuntrath was not a remainderman strictly so called; Jahnavi's right to possession under the *ekrarnamah* was also materially different from what right she had under the words in the power of adoption.

It is, however, immaterial whether the deed conferred on Jahnavi a life-estate properly so called, and whether Baikanta was a remainderman or reversioner, taking after the lapse of a life-estate in its strict sense. Article 140 of the Second Schedule of the Limitation Act contemplates a suit by a remainderman or reversioner for possession of immoveable property, when his estate falls into possession. Baikantanath, and on his death, during Jahnavi's lifetime, his widow Dinamani, were entitled to possession only after the determination of the limited or particular estate held by Jahnavi, whatever its precise nature may have been. The estate did not fall into possession until Jahnavi's death, and we see no bar to the application of Article 140 to the facts of the case, and if that Article applies, the plaintiff's suit is not time-barred.

Articles 142 and 144 cannot apply as the plaintiff [which word, according to the interpretation clause (section 3) includes also any person from or through whom a plaintiff derives his right to sue] was not dispossessed and the possession of the defendants did not become adverse to her until Jahnavi's death.

No other question has been argued before us, and, the plea of limitation failing, the appeal must be dismissed with costs.

B. N.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 287 OF 1919.
February 15, 1922.
Present:—Mr. Justice Rafique and
Mr. Justice Lindsay.
DHARAM SINGH AND ANOTHER
—PLAINTIFFS—APPELLANTS
versus
HIRA AND OTHERS—DEFENDANTS
—RESPONDENTS.

Hindu Law—Succession—Custom—Jats—Collaterals take per stirpes.

The custom prevailing among *Jats*, who have migrated to Meerut from the Punjab, as to the succession of collaterals, is that reversioners irrespective of degree, that is, whether near or remote, inherit equally, *i.e.*, each branch takes its share *per stirpes*. [p. 830, col. 1.]

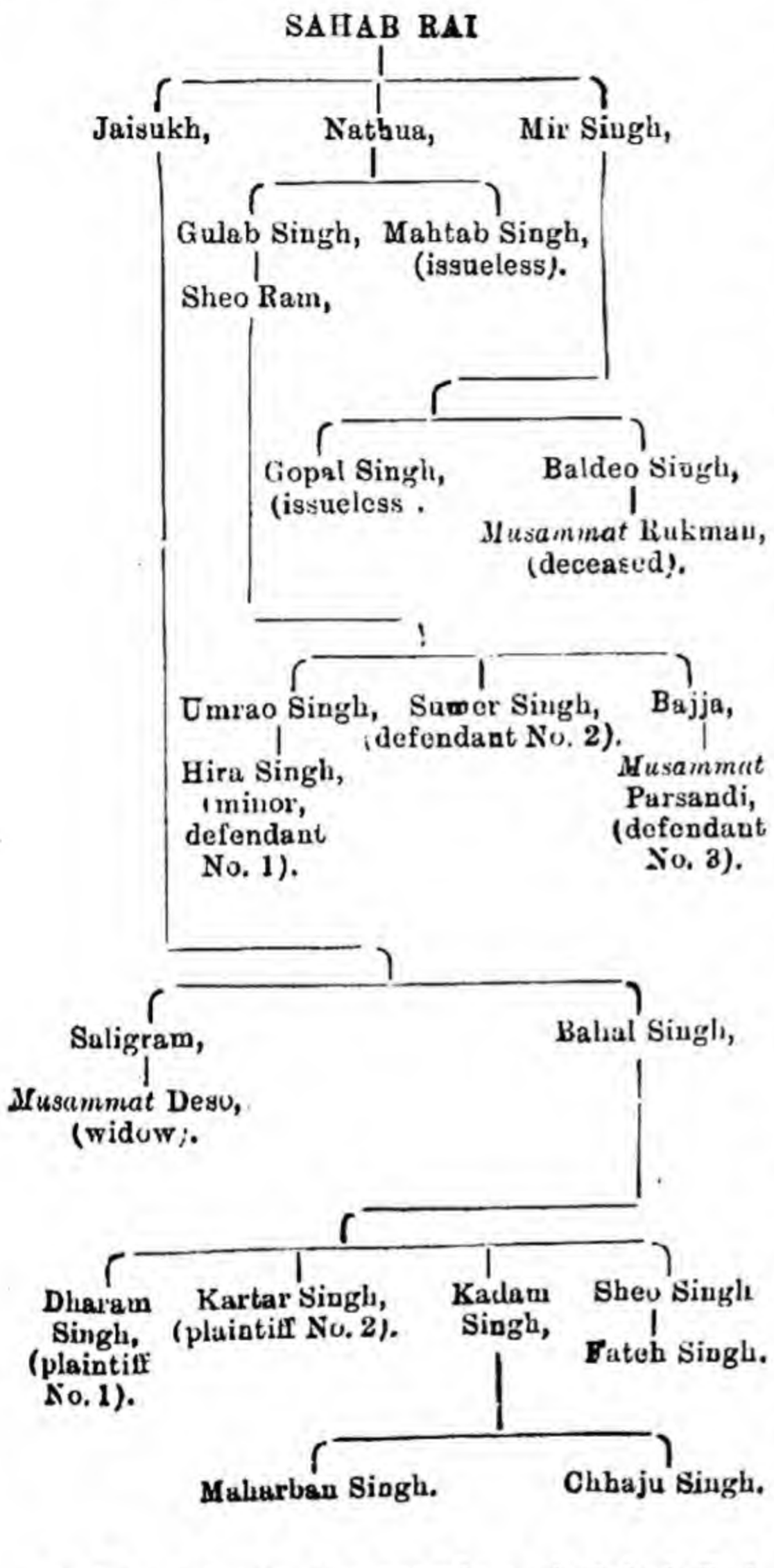
First appeal from a decree of the First Additional Subordinate Judge, Meerut.

Dr. *Kailas Nath Katju* and Mr. *Panna Lal*, for the Appellants.

Mr. *N.C. Vaish* and Dr. *Surendro Nath Sen*, for the Respondents.

DHARAM SINGH *v.* HIRA.

JUDGMENT.—The following pedigree will show the right under which the parties to the suit are litigating:—



Baldeo Singh, the grandson of Sahab Rai, is stated to have died long ago, leaving him surviving his brother Gopal Singh and his widow *Musammat* Rukman. She, after the death of her husband, lived with Gopal Singh as his wife by Karao marriage. The parties are *Jats*, and such a form of marriage is permissible in their community. Gopal Singh died about forty years ago. After the death of Gopal Singh, the name of *Musammat* Rukman was entered in the revenue papers in respect of the immoveable property of the two brothers. She died on the 10th of July 1915 without leaving any issue. After her death, there was a dispute in the Revenue Court between the descendants of Jaisukh and those of Nathua as to whose names should be entered in respect of the property which at one time belonged to Gopal Singh and Baldeo. The Revenue Court decided in favour of the descendants of Sheo Ram, and their names were accordingly mutated. Thereupon, on the 19th of September 1917, the suit out of which this appeal has arisen was instituted by Dharam Singh and Kartar Singh, two of the grandsons of Jaisukh, for the recovery of the possession of the entire property of Gopal Singh and Baldeo Singh as the nearest reversioners. The claim was brought against the descendants of Sheo Ram who had been successful in the Revenue Court. The defendants resisted the suit on various pleas, two of which were that under an arrangement entered into between the descendants of Nathua and Jaisukh on the death of Baldeo Singh half of the property of the two brothers had been allotted to the descendants of Jaisukh and the other half was to go to the descendants of Nathua after the death of Gopal Singh and *Musammat* Rukman, and, secondly, that under a custom obtaining in the family to which the parties belonged, all the collaterals irrespective of their degree succeed equally to the last male holder. Both parties gave evidence. The Court of first instance found that the family arrangement set up by the defence had not been proved. The custom advanced on behalf of the defence, however, was accepted by the Court and a decree in favour of the plaintiffs to the extent of 1·4th in the property in suit was passed. The plaintiffs have come up in appeal before us and challenge the finding of the Court below on the question of custom, while the defendants have filed cross-objections impeaching the finding of the lower Court with regard to the alleged family arrangement stated in the written statement for the defence. It is contended on behalf of the plaintiffs-appellants that the evidence on the record does not establish the custom upon which the defence relies for the

proposition that all collaterals irrespective of degree succeed equally to the last male holder. The learned Counsel for the appellants has read to us the evidence on behalf of the defence and has criticised it at length. We find that eleven witnesses were examined on behalf of the defence, all of whom with one voice say that the custom prevailing among the *Jats*, who have migrated to Meerut from the Punjab, as to the succession of collaterals, is that reversioners irrespective of degree, that is, whether near or remote, inherit. They go on to explain in their evidence that when they say that reversioners succeed equally to the last male holder, they mean that each branch takes its share *per stirpes*. They also give instances, most of which are borne out by the *khewats* that have been tendered in evidence by the defence. One of the plaintiffs, Dharam Singh, himself had deposed in support of this custom in another case. In the present case he went into the witness-box and tried to explain his previous statement away but he failed. One of the witnesses for the plaintiffs, namely, Phul Singh, also supports the case for the defence. On the evidence as it stands on the record, we find that the custom stated by the defence stands proved. The oral evidence for the plaintiffs is quite unsatisfactory and does not rebut the evidence for the defence. Moreover, we find that the custom deposed to by the defence witnesses is borne out by the customary law as enunciated in paragraph 25 of Mr. Rattigan's book "Digest of Customary Law for the Punjab." We are, therefore, of opinion that the finding of the lower Court on this point is correct.

As to the cross-objections the arrangement set up on behalf of the defence is not borne out by any evidence worth the name.

The result is that both the appeal and the cross-objections fail, and we dismiss both of them with costs including, in this Court, fees on the higher scale, if any.

J. P.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 511 OF 1920.

December 20, 1921.

Present:—Mr. Justice Ramesam.

R. M. A. R A. R M. ARUNACHALA CHETTIAR, BY AGENT SUBRAMANIAM CHETTIAR, ATTACHING CREDITOR —PETITIONER

versus

PANCHALI PADAYACHI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (3)—Execution—Decree, satisfaction of, not certified to Court, cannot be recognised.

Under Order XXI, rule 2 (3) of the Civil Procedure Code a payment or adjustment of a decree which has not been certified or recorded cannot be recognised by any Court executing the decree. [p. 831, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise an order of the Court of the Subordinate Judge, Mayavaram, in Execution Petition Revision No. 8 of 1920, in Small Cause Suit No. 752 of 1916, dated 17th of March 1920.

FACTS appear from the judgment.

Mr. *K. Rajah Aiyar*, for the Petitioner.—This is an application to revise the order of the Subordinate Judge of Mayavaram who dismissed my execution application, holding that the decree which I attached had already been satisfied. My point is that under Order XXI, rule 2 (3), the Executing Court cannot recognise a payment which is not certified. Here the satisfaction of the decree has not been certified. I am supported by the decisions in *Budrudeen* v. *Gulam Mohideen* (1), *Mathar Dravia Sahaya Ela Nidhi Co.* v. *Subramania Pillai* (2), *Anantha Rama Aiyar* v. *Kumaraswami Pandaram* (3), *Krishna Aiyar* v. *Savurimuthu Pillai* (4). So I am entitled to succeed.

Mr. *T. S. Ramaswami Aiyar*, for the Respondent.—Here the satisfaction of the decree was intimated to the Tiruvalur Court. The following cases support me in showing that such a payment could be pleaded. *Rama Ayyan* v. *Sreenivasa Pattar* (5), *Trimbak Ramkrishna* v. *Hari Laxman* (6), *Subbia*

(1) 12 Ind. Cas. 562; 36 M. 357; 10 M. L. T. 393; (1911) 2 M. W. N. 473; 24 M. L. J. 541.

(2) 40 Ind. Cas. 889; 5 L. W. 644.

(3) 54 Ind. Cas. 922; 10 L. W. 179.

(4) 50 Ind. Cas. 584; 42 M. 338; 36 M, L. J. 376; 9 L. W. 443; (1919) M. W. N. 248.

(5) 19 M. 230; 5 M. L. J. 218; 6 Ind. Dec. (N. S.) 865.

(6) 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 636.

Pillai v. *Alliar Routher* (7), *Lodd Govinda Doss* v. *Rajah of Karvetnagar* (8) and *Nagu Reddiar* v. *Veerappa Mudaliar* (9).

Mr. *K. Rajah Aiyar*, in reply.—The cases quoted by my friend are all distinguishable. The satisfaction could not be pleaded before the Executing Court.

JUDGMENT.—The petition was filed under section 115, Civil Procedure Code. This is a mistake. I have allowed it to be amended into a revision petition under section 25 of the Provincial Small Cause Courts Act.

Under Order XXI, rule 2 (3) of the Civil Procedure Code a payment or adjustment which has not been certified or recorded shall not be recognised by any Court executing the decree. It is admitted in this case that the satisfaction of the decree in April 1917, as now pleaded by the respondent, was neither certified to, nor recorded by, the Court of the Subordinate Judge of Mayavaram which passed the decree. But it is said that both the original decree-holder and the judgment-debtor intimated to the District Munsif of Tiruvalur in reply to the notice issued by him by way of attaching the Mayavaram decree, that the decree was satisfied. Obviously, this does not satisfy the requirements of Order XXI, rule 2 and ought not to have been considered by the Subordinate Judge. The respondent relies on *Rama Ayyan* v. *Sreenivasa Pattar* (5), *Trimback Ramkrishna* v. *Hari Laxman* (6), *Subbia Pillai* v. *Alliar Rowthar* (7), *Ponnusami Nadar* v. *Letchmanan Chettiar* (10), *Lodd Govinda Doss* v. *Rajah of Karvetnagar* (8), *Nagu Reddiar* v. *Veerappa Mudaliar* (9). The first case has been dissented from by Abdur Rahim, J., in *Ponnusami Nadar* v. *Letchmanan Chettiar* (10) whose view is against the respondent's contention. The other learned Judge in *Ponnusami Nadar* v. *Letchmanan Chettiar* (10) Sundara Aiyar, J., held that the arrangement in that case could be pleaded not as an adjustment or satisfaction of the decree but merely to show that the assignment of the decree was a sham. The decision in *Budrudeen* v. *Gulam Mohideen* (1) shows that the views of Sundara Aiyar, J., are equally inconsistent with *Rama Ayyan* v. *Sreenivasa Pattar* (5). The decision in *Trimback Ramkrishna* v. *Hari Laxman* (6), so far as Heaton, J., is concerned, was disapproved in *Budrudeen* v. *Gulam Mohideen* (1). In *Lodd Govinda Doss* v. *Rajah of Karvetnagar* (8) the learned Judges held that the decree-holder did, in fact, intimate to the Court an adjustment but the Court had to enquire into the extent of the adjustment. In *Subbia Pillai* v. *Alliar Rowther* (7) there was a record of satisfaction before the attachment of the decree. In *Nagu Reddiar* v. *Veerappa Mudaliar* (9) there was an application for recording satisfaction by the judgment-debtor in time to the Court which passed the decree though after the application for attachment but before actual attachment. In the case before me there was no application by the respondent to the Court of the Subordinate Judge of Mayavaram until the present counter petition (8th March 1920), three years after the actual attachment.

The cases in *Mathar Dravia Sahaya Ela Nidhi Co.* v. *Subramania Pillai* (2), *Anantha Rama Aiyar* v. *Kumaraswami Pandaram* (3), *Krishna Aiyar* v. *Sovurimuthu Pillai* (4) show that the decision in *Budrudeen* v. *Gulam Mohideen* (1) is good law. That Order XXI, rule 2 equally applies to a plea by way of defence is shown by *Budrudeen* v. *Gulam Mohideen* (1). The cases relied on by the respondent *Sri Kishan Lal* v. *Kashmiro* (11), *Deodhari* v. *Dayanand* (12), do not bear on Order XXI, rule 2 of the Civil Procedure Code. I, therefore, reverse the order of the Subordinate Judge holding the alleged satisfaction cannot be recognised and direct that the execution petition of the petitioner be taken up and disposed of according to law.

The petitioner will get the costs of the petition from the respondent.

M. C. P.

Petition allowed.

(7) 2 Ind. Cas. 523; 5 M. L. T. 72.
(8) 30 Ind. Cas. 357; 29 M. L. J. 219.
(9) 61 Ind. Cas. 815; 13 L. W. 34.
(10) 12 Ind. Cas. 657; 35 M. 559; 22 M. L. J. 170; 10 M. L. T. 443; (1911) 2 M. W. N. 563.
(11) 34 Ind. Cas. 37; 31 M. L. J. 362; 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 523; 14 A. L. J. 1236 (P. C.).
(12) 35 Ind. Cas. 610.

JOKHAN SINGH *v.* SABHAJEET SINGH.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 642 OF 1920.
February 17, 1922.
Present:—Mr. Justice Rafique and
Mr. Justice Piggott.
JOKHAN SINGH—PLAINTIFF—APPELLANT
versus
SABHAJEET SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Custom—Co-sharers in same mahal *entitled to right of pre-emption—Partition of* mahal, *effect of, on custom.*

Where there is a custom giving a right of pre-emption to co-sharers in one and the same *mahal* as against persons who are not co-sharers in that *mahal* the same custom, in the absence of evidence to the contrary, would continue after the partition of the *mahal*. [p. 833, col. 2.]

Pem Singh v. *Dharam Singh*, 12 Ind. Cas. 177; 8 A. L. J. 1013, followed.

Second appeal from a decree of the Additional Subordinate Judge, Azamgarh.

Mr. *Pearl Lal Banerjee*, for the Appellant.

Dr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—This is a second appeal in a suit for pre-emption. The plaintiff claims as a co-sharer under a custom recorded in the *wajib-ul-arz* of the year 1874 A. D. It is admitted that according to this *wajib-ul-arz* a co-sharer in the same *mahal* with the vendor would have a right of pre-emption against another person resident in the same village, even though that other person might be a co-sharer in a different *mahal*. Since this *wajib ul-arz* was drawn up, however, there has been a partition. The former *mahals* were broken up and new *mahals* formed. Before the partition the vendees and the vendor were in the same *mahal*. Since the partition the vendor and the plaintiff are in the same *mahal* and the vendees are not.

The Courts below have held themselves bound by the decision in *Daria* v. *Harkhial* (1). They understand that decision as meaning that the effect of a partition under circumstances like the present is to put an end to any custom of pre-emption that might exist as between co sharers in the same *mahal* and to place all co-sharers in the village on one and the same footing.

(1) 2 Ind. Cas. 208; 6 A. L. J. 180; 31 A. 274.

In that case the decision seems to have been that the vendees and the plaintiff who claimed pre-emption, were both in the position of mere co sharers in the village, so that neither had a preferential right against the other. This case was considered by the Pre-emption Bench of this Court in *Pem Singh* v. *Dharam Singh* (2). The learned Judges did not in terms dissent from *Daria* v. *Harkhial* (1) but they distinguished against it upon a statement of the facts found which it is not easy to verify from the published report of the case. There does not, however, seem to be any room for doubt regarding the principle which the learned Judges intended to lay down in *Pem Singh* v. *Dharam Singh* (2). They held in effect that, in the absence of evidence to the contrary, the old custom regarding pre-emption, whatever that custom might be, would continue after the partition. The point to be determined would always remain as to what that custom was. But in the present case, as in the case of *Pem Singh* v. *Dharam Singh* (2), there is no doubt that there was a right of pre-emption in favour of co-sharers in one and the same *mahal* as against persons who were not co-sharers in that *mahal*. According to this principle, therefore, the plaintiff, from the moment when he became a co sharer in the same *mahal* with the defendant-vendor, became entitled, by virtue of the custom, to a right of pre-emption in case of a sale by the said defendant-vendor to any person other than a co-sharer in the same *mahal*. This ruling does not seem to have been brought to the notice of the Courts below. Granting, for the sake of argument, that the principles laid down in the two rulings above referred to are not to be easily reconciled, the later ruling seems preferable, as being a decision by the Pre-emption Bench and also because the facts of the case are more precisely on all fours with those of the present case.

Before, however, we could dispose of the appeal on this ground, it was necessary for us to consider a further plea on the part of the defendants vendees, in respect

(2) 12 Ind. Cas. 177; 8 A. L. J. 1013.

of which an issue was framed but not decided in the Court of first instance. The said vendees pleaded, as an alternative case, that they had a preferential right as against the plaintiff under the very custom recorded in the old *wajib ul-arz*, because they were *qarabat mandan qaribi* of the vendor. To this Jokhan Singh, the plaintiff, seems to have pleaded by way of re-joinder that he was himself a nearer relative of the vendor than were the vendees, if the question of relationship arose at all. We have examined the evidence but, in any case, we think that the relationship set up by the defendants-vendees was too distant to entitle them to succeed as *qarabat mandan qaribi*, even if we came to a finding that the evidence in support of the pedigree set up by them was to be preferred to the evidence produced on behalf of the plaintiff.

The only other possible question is that of the sale consideration; but, under the circumstances, and in order to put an end to the litigation, we think it best to adopt the finding of the first Court which was accepted by the plaintiff-pre emptor. The result is, that we set aside the decrees of both the Courts below and in lieu thereof direct that the plaintiff be given a decree for pre emption in the usual form, subject to his paying into Court for the benefit of the vendees, within three months, the sum of Rs. 920. In the event of his so doing, his claim for pre-emption will stand decreed with costs throughout. If payment is not made within the prescribed period, the suit will stand dismissed with costs.

Decree set aside.

J. P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 144 OF 1919.

March 2, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

MIDNAPUR ZEMINDARY CO., LD.—DEFENDANTS—APPELLANTS.

versus

Kumar NARESH NARAIN ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 18, 21—Jurisdiction, territorial—Objection in appeal—Failure of justice—Suit for possession of land re-formed in situ—Settlement—Limitation Act (IX of 1908), Sch. I, Art. 45, applicability of—Partition by Civil Court.

In view of the provisions of sections 18 and 21 of the Code of Civil Procedure, unless there has been a failure of justice, a decree of a Trial Court cannot be set aside by the Appellate Court on the ground that it is doubtful whether the subject-matter of the litigation lay within the territorial jurisdiction of the Trial Court. [p. 834, col. 2.]

A person can sue for declaration of title to, and possession with mesne profits of, a land re-formed *in situ* without in the first instance obtaining a settlement of the same from the Revenue Authorities. [p. 835, col. 1.]

Maharaja Rajendur Pertab v. *Lalljee Sahoo*, 20 W. R. 427 and *Rughoobur Dyal* v. *Kishen Pertab*, 6 I. A. 211; 5 C. L. R. 418; Bald. P. C. C. 297; 4 Sar. P. C. J. 65 (P. C.), followed.

When the object of a suit is not to set aside an award made by the Revenue Authorities but to recover possession of a land, section 45 of the First Schedule to the Limitation Act has no application. [p. 835, col. 2.]

Abdul Kadir v. *Hamdu Miah*, 12 C. W. N. 910, distinguished.

Where the title of a plaintiff seeking for possession and partition of a property has not been made precarious, by virtue of its periodical Settlement for the assessment of revenue in favour of the defendant, there is nothing to prevent a Civil Court from effecting its partition. [p. 835, col. 2.]

Hemadri Nath v. *Ramani Kanta*, 24 C. 575; 1 C. W. N. 406; 12 Ind. Dec. (N. S.) 1052 (F. B.), followed.

Bepin Behari v. *Bhagwat Sahai*, 9 C. W. N. 699, distinguished.

Appeal against a decision of the Subordinate Judge of Rajshahi, dated the 29th May 1918.

Mr. *U. N. Sen Gupta* and Babu *Probodh Kumar Das*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty*, *Jatindra Nath Lahari*, *Hira Lal Sanyal* (for Babu *Bireswar Bagchi*) and Babu *Manidra Nath Roy*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in this appeal is a tract of land, 1,700 *bighas* in area, formed by the recession of the river, Padma. The case for the plaintiff was that the disputed land was re formation *in situ of* an estate wherein he had a share of 5-annas 16-*gundas* 2 *kara* and 2 *krant*. He alleged that, although his title to the property was declared in a previous litigation and he was placed in possession in execution of the decree made

therein he was subsequently dispossessed by virtue of an order made under section 145 of the Criminal Procedure Code. He, consequently, asked for declaration of his title as well as a decree for possession and mesne profits. The contesting defendants resisted the claim on a variety of grounds, namely, *first*, that the Court had no jurisdiction over the subject-matter of the litigation; *secondly*, that whatever title of the plaintiff might be, he could have no cause of action till the expiry of the Settlement already obtained by the defendants from the Revenue Authorities; *thirdly*, that the suit was barred by limitation; *fourthly*, that no partition could be effected by the Civil Court, and *fifthly*, that, in any event, the plaintiff was not entitled to a decree for mesne profits, inasmuch as the defendants did not exceed their rights as co-parceners. The Subordinate Judge overruled these contentions and gave the plaintiff a decree for possession and mesne profits.

On the present appeal, the decree of the Subordinate Judge has been assailed on five grounds; *viz*, *first*, that the Trial Court had no jurisdiction over the subject-matter of the litigaition; *secondly*, that as the plaintiff had not obtained a Settlement from the Revenue Authorities, he had no enforceable cause of action; *thirdly*, that the claim was barred under Article 45 of the Schedule to the Indian Limitation Act inasmuch as it had not been instituted within three years from the date of the last Settlement with the defendants; *fourthly*, that in view of the nature of the property, no partition thereof could be effected by the Civil Court, and *fifthly*, that no decree for mesne profits could be made in favour of the plaintiff. In our opinion, none of these contentions can be sustained.

As regards the first point, it appears that on the 10th March 1875 a notification was issued by the Government of Bengal which defined the river Padma as the boundary between the Districts of Rajshahi and Nadia. The case for the plaintiff is that at the date of the institution of the suit, *i.e.*, on the 22nd March 1916, the disputed property lay towards the north of the main channel of the Padma and was, consequently, within the jurisdiction of the District Court at Rajshahi. The case for the contesting defendants, on the other hand, is that the property lay towards south of the main channel and was, consequently, within the jurisdiction of the District Court at Nadia. The Subordinate Judge has found that, although the property lay towards the south of one of the channels of the Padma, that channel was not the main but only a subsidiary channel and that, consequently the Trial Court had jurisdiction over the subject-matter of the litigation. No materials have been placed before us to show that the conclusion of the Court below was in fact erroneous. Indeed, as no map has been prepared in this case it is impossible for us to say whether the channel which lay towards the north of the disputed land was the main channel or a subsidiary channel of the river. We are therefore, not in a position to dissent from the view taken by the Subordinate Judge. It may further be observed that, in view of the provisions of sections 18 and 21 of the Civil Procedure Code, the contention of the defendants cannot possibly prevail; even if it be assumed that it is doubtful whether the property lay within the jurisdiction of the Rajshahi Court or the Nadia Court, the decree of the Subordinate Judge cannot be set aside, as it has been neither suggested nor established that there has been a failure of justice. The first contention must, consequently, be overruled.

As regards the second point, it is based on the assumption that the plaintiff can have no enforceable cause of action till he obtains a Settlement of the disputed land from the Revenue Authorities. There is, in our opinion, no foundation for this argument. In 1899, a suit was instituted by the plaintiff against the defendants as also the Secretary of State for India in Council, for declaration of his title to the disputed property and for recovery of possession with mesne profits. At that time, the property was under Settlement with the contesting defendants for a term of ten years which had commenced in 1894 and was to terminate in 1904. Notwithstanding the fact that the plaintiff at that time held no Settlement from the Revenue Authorities, he was awarded a decree by the Subordinate Judge for declaration of title as also for recovery of possession with mesne profits. That decree was ultimately confirmed by this Court

subject to variation in one respect not material for the purpose of the present litigation. The view then taken was unquestionably right and, at any rate, cannot be challenged in this suit between the same parties. After the expiry of the Settlements then current, there were two successive annual Settlements with the defendants followed by a quinquennial Settlment in 1906 which was to expire in 1911, and this was followed by a Settlement for ten years, to expire on the 31st March 1921. In our opinion, the plaintiff had an enforceable cause of action, even though at the date of the institution of the suit he had no Settlement from the Revenue Authorities. This view is supported by a principle enunciated by the Judicial Committee in a well known case which was heard by them on two occasions: *Maharajah Rajendur Pertab* v. *Lalliee Sahoo* (1) and *Rughoobur Dyal* v. *Kishen Pertab* (2). On the second occasion, Sir Barnes Peacock pointed out that the nature of the title to a property is not affected by the circumstances that it is held from the Crown under a periodical Settlement, and that, although the amount of the revenue payable to the Crown may be periodically varied in view of the varying quantity and quality of the land, the nature of the title thereto remains unaffected. In the case before us, the property is claimed by the plaintiff as re-formation *in situ* of an estate held by him under the Government. This title was established in the litigation of 1899 in the presence not only of the Secretary of State but also of the present contesting defendants. It is worthy of notice that in that litigation, the plaintiff obtained possession and mesne profits. The decree made by this Court on the 13th December, 1905 was subsequently executed and the plaintiff was plased in possession on the 15th June 1907. Thereafter, the plaintiff was dispossessed on the 31st March 1913 by virtue of an order under section 145, Criminal Procedure Code, which held in substance that the defendants and their tenants were in occupation of the disputed tract. It is unquestionably open to the plaintiff to maintain this suit and so seek recovery of possession as he did in the previous litigation. The second contention of the defendants must, consequently, be overruled.

As regards the third point, it has been urged that the suit is barred under Article 45 of the Schedule to the Limitation Act, inasmuch as it has not been instituted within three years from the date of the last Settlement with the defendants. There is no force in this contention, as the object of the suit is not to set aside an award made by the Revenue Authorities. This is a suit to recover possession, and, if the plaintiff succeeds, the Settlement made by the Revenue Authorities, in so far as it determines the amount of revenue payable in respect of the disputed property by the holder thereof will in no way be affected. The substance of the matter is, that the plaintiff seeks to obtain the benefit of the Settlement obtained by the defendants, notwithstanding the decision in the previous litigation. The decision in *Abdul Kadir* v. *Hamdu Miah* (3) has no application as this is not a suit to set aside an order of the Revenue Authorities refusing to make a Settlement of *khas mahal* lands with the plaintiff. There is, therefore, no force in the contention that the suit is barred by limitation.

As regards the fourth point, it has been urged that, in view of the nature of the property, partition thereof cannot be effected by a Civil Court; and in support of this contention reference has been made to the decision of this Court in *Bepin Behari* v. *Bhagwat Sahai* (4), which is clearly distinguishable. In the present case, as already stated, the title of the plaintiff has not been made precarious by virtue of the periodical Settlement for the assessment of revenue made by the Revenue Authorities. Consequently, there is nothing in the nature of the property which makes it impossible for partition by the Civil Court and the case is governed by the decision of the Full Bench in *Hemadri Nath* v. *Ramani Kanta* (5). The fourth contention accordingly fails.

As regards the fifth point, the contention is that the plaintiff should not have been allowed a decree for mesne profits, inasmuch

(1) 20 W. R. 427.
(2) 6 I. A. 211; 5 C. L. R. 418; Bald. P. C. C. 297; 4 Sar. P. C. J. 65 (P. C.)

(3) 12 C. W. N. 910.
(4) 9 C. W. N. 699.
(5) 24 C. 575; 1 C. W. N. 406; 12 Ind. Dec. (N. S.) 1052.

as he has not been ousted by the defendants. The Subordinate Judge has dealt with this matter at full length. He has pointed out that the defendants are in exclusive possession of the property through their tenants, and that the effect of the order under section 145, Criminal Procedure Code, has been to dispossess the plaintiff. There can be no question that since the date of that order the defendants have been in exclusive possession. This is also in accord with the attitude taken up by the defendants throughout this litigation, for they have strenuously maintained, even up to this Court, that the plaintiff is not entitled to possession till after the expiry of the current term of the Settlement with them. We are of opinion that the Subordinate Judge has rightly allowed the plaintiff mesne profits.

As all the contentions urged by the appellants fail, the appeal must be dismissed with costs including reserved costs. We assess the hearing fee at Rs. 300.

BUCKLAND, J.—I agree.

B. N. & N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 59 OF 1919.

February 16, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

KASHI NATH *alias* KASHI RAM, AND AFTER HIS DEATH BABU LAL AND ANOTHER —DEFENDANTS—APPELLANT

versus

ABDUR RAHMAN KHAN AND OTHERS— PLAINTIFFS—RESPONDENTS.

Registration Act (XX of 1866), s. 17 (d)—Kabuliyat *lease for indefinite period—Registration, whether compulsory.*

A *kabuliyat* the terms of which show that though the lease might continue for an indefinite number of years, there is no certainty that it would last beyond the term of one year, does not come within the classification of section 17 (*d*) of the Registration Act as being a lease for a term exceeding one year and is not compulsorily registrable and, therefore, such a *kabuliyat* is admissible in evidence.

Letters Patent Appeal from a judgment of Mr. Justice Rafique, modifying a decree of the First Additional Judge, Aligarh.

Dr. *Kailas Nath Katju*, for the Appellants.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—Abdul Rahman brought this suit on the 1st of June 1916 to recover the site of a house. He alleged that there was an agreement of the 8th of May 1868 whereby the defendant had contracted to pay eight annas a year as the rent of the site. The case presented no difficulty if the *kabuliyat* of the 8th of May 1868 could be receivable in evidence provided, of course, the Court was of opinion that the document was a genuine one. In this appeal that has been the substantial matter raised and our attention has been drawn to section 17 of Act XX of 1866, which was the Statute governing the reception or rejection of the document of the 8th of May 1868. The terms of the *kabuliyat* have been read to us. Shortly, they are to the effect that the Zamindar let the site to Sheo Prasad on a payment of eight annas a year and incidental obligations but the *kabuliyat* provided that if the eight annas was not paid in any one year, or if the tenant failed to make the incidental payments for marriages etcetra, the lease would thereby come to an end. Furthermore, the lease would also come to an end if the lessee did not conduct himself properly towards the Zamindar. Therefore, when the terms of the lease are looked at, one sees that though in fact it might continue for an undefined number of years, there was no certainty that it would last beyond the term of one year. Therefore, it did not come within the classification of section 17 (*d*) as being a lease for a term exceeding one year. That being so, it was not a document which had compulsorily to be registered. It was receivable in evidence and establishes, in our opinion, the right of the plaintiff to maintain and succeed in this action. Consequently, this appeal must be dismissed with costs.

J. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 105 OF 1920.

April 18, 1921.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

HAMIDA RAHAMAN AND ANOTHER—PETITIONERS—APPELLANTS

versus

JAMILA KHATUN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1, cl. (2)—Suit for partition—Receiver appointed to take possession—Objection by persons who are no parties to suit—Duty of Court to come to definite finding—Court, whether can delegate enquiry to Receiver.

Where in a suit for partition a Receiver is appointed to take possession of the properties in suit, the Court, on an objection being made by persons who are no parties to the suit claiming the properties to be theirs and in their possession, is bound by clause (2) of rule 1 of Order XL of the Civil Procedure Code to come to a definite finding as to the truth of these allegations before it can make an order directing the Receiver to take possession of the properties. [p. 837, col. 2.]

It is not the duty of a Receiver of a property to enquire into the claim of title made by third parties, and the Court has no power under the Code to delegate an enquiry on this point to the Receiver. [p. 838, col. 1.]

Appeal against the orders of the Subordinate Judge, First Court, Chittagong, dated the 17th and 23rd March 1920.

Dr. *Sarat Chunder Basak* and Babu *Chandra Sekhar Sen*, for the Appellants.

Babus *Joges Chunder Roy* and *Narendra Kumar Das*, for the Respondents.

JUDGMENT.—This is an appeal against two orders by which the Receiver who had been appointed in a suit was directed to take possession of certain properties, moveable and immoveable. In the suit in question Jamila Khatun and others were the plaintiffs and Mokbul Ahmed and others were the defendants. The appellants before us are no parties to the suit; but all the parties to the suit and the two appellants are descendants of one Haji Sadaddin Sadagar. The suit in question is a suit for partition of the properties left by Khalil Ahmed Sadagar, the eldest son of Haji Sadaddin Sadagar. When the Receiver was appointed in the suit and directed to take possession of the properties described in the plaint the present appellants filed a petition in which they alleged that certain properties described in schedule 1 of their petition belonged to them both, that certain immoveable properties described in schedule 2 belonged to the petitioner No. 2, and that certain moveable property described in the list which had been previously filed was in the possession of and was the property of both the petitioners. The learned Subordinate Judge who was trying the suit was of opinion that the allegation in this petition was not *bona fide* as regards the properties of schedule 2 of the application and the moveable property. As regards the properties of schedule 1 he directed the Receiver to make an enquiry as to the truth of the allegation and at the same time directed the Receiver to take possession of all the properties except the properties of schedule 1. That is the first order appealed against, being order No. 18 of the order-sheet dated 17th March 1920. The second order appealed against is the order No. 25 passed on 23rd March 1920. There the Receiver was again ordered to take possession of the properties in suit other than that as to which he had been ordered to enquire and report, and he was further directed to take the help of the Police and, if necessary, to break open any locks on doors of houses in which the properties of which he was to take possession were reasonably believed to be.

In our opinion, this appeal must be allowed. The lower Court, on an objection being made by persons who were no parties to the suit claiming the properties to be theirs and in their possession, was bound by clause (2) of rule 1 of Order XL to come to a definite finding as to the truth of these allegations before it could make an order directing the Receiver to take possession of the properties. We do not think that the allegations in the petitions can be disposed of on the ground of a discrepancy between them and the contents of earlier petitions filed by one of the petitioners and others when they applied to be added as parties to the suit. As regards the moveable property there was a distinct allegation of sale by auction by the National Bank and purchase by the

petitioner. The petitioner should have been given an opportunity of proving the truth of this allegation. Similarly, with regard to the properties of schedule 2 an enquiry should have been held into the allegation as to the purchase by the petitioner No. 2. As regards the properties of schedule 1 an enquiry has been ordered, but such an enquiry should have been held by the Court. It is not the duty of the Receiver of a property to enquire into the claim of title made by third parties, and the Court has no power under the Code to delegate an enquiry on this point to the Receiver. As an enquiry must be held into the allegation as regards the properties of schedule 2 by the Court, so also must an enquiry as to the allegation with regard to the properties of schedule 1 be held by the Court. It is pointed out on behalf of the respondents that, although in the petition it is stated that the moveable properties claimed were set out in a list previously filed yet when the Pleader moved the petition in the lower Court he was unable to find that list. It appears, however, that, subsequently, when the Receiver tried to take possession there was no real doubt as to what properties were claimed by the petitioner-appellants. If there be any difficulty on this point the appellants can be called on to furnish a list to take the place of the one which could not be found when the applications were made.

The result is, that the appeal is allowed. We set aside the orders of the lower Court dated the 17th of March 1920 and the 23rd of March 1920 directing the Receiver to take possession of the properties claimed by the petitioners and we further direct that no such order be made in respect of any of the properties claimed until the claim of the petitioners has been duly investigated by the lower Court. The respondents must pay the appellants their costs in this appeal. We assess the hearing-fee at three gold *mohurs*.

RULE No. 611 OF 1920.

The connected appeal having been decreed, no order is necessary on this Rule.

B. N.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 605 OF 1920.

February 21, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

MUHAMMAD ISMAIL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MANOHAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 1, 11—Abatement of appeal—Order, whether appealable.

No appeal lies from an order declaring that an appeal has abated.

Hamida Bibi v. *Ali Husen Khan*, 17 A. 172; A.W.N. (1895) 42; 8 Ind. Dec. (N. S.) 436 and *Walayat Husain* v. *Ram Lal*, 25 Ind. Cas. 643; 12 A. L. J. 1113, followed.

Second appeal from a decree of the Additional Judge, Allahabad.

Messrs. *Iqbal Ahmad* and *Haidar Mehdi*, for the Appellants.

Messrs. *B. E. O'Conor*, *Lalit Mohan Banerji*, *Pearl Lal Banerji*, *Benoy Kumar Mukerji*, Dr. *Kailas Nath Katju* and Mr. *Yatish Chandra Roy*, for the Respondents.

JUDGMENT.—This is a second appeal from an order of the District Judge of Allahabad declaring that an appeal pending before him had abated. It has been held in this Court for more than twenty-five years that such an appeal does not lie, see *Hamida Bibi* v. *Ali Husen Khan* (1). That case was followed recently in *Walayat Husain* v. *Ram Lal* (2). This being the view of our Court, we feel bound to follow it and hold that no appeal lies. We have been asked, in that view, to treat this memorandum of appeal as an application in civil revision, but we do not think it necessary to accede to this request. The result is that this appeal fails and is dismissed with costs.

J. P. *Appeal dismissed.*

(1) 17 A. 172; A. W. N. (1895) 42; 8 Ind. Dec. (N.S.) 436.

(2) 25 Ind Cas. 643; 12 A. L. J. 1113.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 373 OF 1919.
May 6, 1921.
Present:—Justice Sir N. R. Chatterjea, Kt, and Mr. Justice Panton.
MESBAHUDDIN AHMED CHOWDHURY—DEFENDANT—APPELLANT
versus
ABDUL BORKAT AHAMADULLA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Bengal Tenancy Act (VIII of 1885), ss. 15, 16—Landlord—Succession—Registration—Suit for rent on basis of kabuliyat*—Land Registration Act (VIII B. C. of 1876), ss. 78, 81.*

A suit for recovery of rent in respect of a *patni* by a transferee from an heir of a deceased *patni*-holder who has not got his name registered in the Collectorate under section 78 of the Land Registration Act, is maintainable by reason of section 81 of the Act if there is a *kabuliyat* entered into by the defendant-tenant in favour of the heir transferor. [p. 839, col. 2.]

Iswar Chandra Bera v. *Kali Charan Santra*, 43 Ind. Cas 726; 27 C. L. J. 474, not followed.

Section 16 of the Bengal Tenancy Act being a penal provision should be strictly construed. It applies only to a person who claims the rent *as a holder of the tenure* and not to a person who claims it by virtue of purchase from the person to whom the rent accrued due. [p 839, col. 2; p 840, col. 1]

William Sheriff v. *Jogemaya Dasi*, 27 C 535; 14 Ind Dec (N. S.) 352, followed.

Obiter.—A person who has been deprived of possession of part of the demised premises should not be held liable for the whole rent for ever. This principle applies with greater force where the tenant is deprived of any portion of the leasehold property by any act on the part of the landlord himself. [p. 840, cols. 1 & 2.]

Appeal against a decree of the First Additional District Judge, Dacca, dated the 27th November 1918, affirming that of the Additional Subordinate Judge, Dacca, dated the 30th November 1917.

Dr. *Sarat Chunder Basak* and Babu *Bhupendra Chandra Guha*, for the Appellant.

Moulvi *A. K. Fazlul Huq* and Babu *Jahnabi Chandra Das Gupta*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of rent in respect of a *putni*.

The property originally belonged to one Salimannessa, and on her death was inherited by her mother Raisannessa Begum. The latter sold it to the plaintiff who brought the suit for rent on the basis of a *kabuliyat* dated the 10th Assin 1312.

The Courts below have concurred in giving a decree to the plaintiff and the defendant has appealed to this Court.

Three contentions have been raised on behalf of the appellant. The first is, that the plaintiff cannot recover rent, because Raisannessa did not get her name registered in the Collectorate in respect of the revenue paying property as required by section 78 of the Land Registration Act. But there was a written contract (*kabuliyat*) between Raisannessa and the defendant, and section 81 of the Land Registration Act lays down that nothing contained in section 78 shall be held to interfere with the conditions of any written contract.

It is true that in one case, *Iswar Chandra Bera* v. *Kali Charan Santra* (1), a restricted view was taken of the section, limiting it to the persons actually parties to the contract; but it has been held in some other cases that the provisions of the section are applicable to cases similar to the present (see Second Appeal No. 3276 of 1912 decided by Woodroffe and D. Chatterjee, JJ., on the 20th May 1914, reported as *Surya Kanta Ghattak* v. *Ananda Mohan Chatterjee* (2); see also Second Appeal No. 1624 of 1919 decided on the 4th March 1921 (*Proloth Chandra Mitter* v. *Harish Chandra Naskar* (3))]. We think, therefore, that this contention must fail.

The next contention is that Raisannessa not having applied under section 15 of the Bengal Tenancy Act, she was precluded by the terms of section 16 from suing to recover rent, and that the plaintiff, therefore, was also so precluded.

Now, section 16 refers to rent payable to a person as the *holder* of a tenure and in the case of *William Sheriff* v. *Jogemaya Dasi* (4) it was held by Banerjee and Stevens, JJ., that section 16 of the Bengal Tenancy Act being a penal provision it should be strictly construed, and that it applies only to a person who claims the rent *as a holder of the*

(1) 43 Ind. Cas. 726; 27 C. L. J. 474.
(2) 24 Ind. Cas. 886.
(3) 64 Ind Cas. 58.
(4) 27 C. 535; 14 Ind. Dec. (N. S.) 352.

tenure, and not to a person who claims it by virtue of purchase from the person to whom the rent accrued due, as in the present case. It is no doubt anomalous that although Raisannessa could not sue the defendant for rent, a transferee from her would be so entitled. As pointed, however, by Banerji, J., "Perhaps that may appear somewhat anomalous, but the opposite view would result in a greater anomaly and indeed in hardship and injustice. For it may so happen that a son succeeding his father may not comply with the requirements of section 15 of the Bengal Tenancy Act immediately, but may expect to do so at any time within three years, that is, before his claim for rent is barred, and then he may die suddenly; and then if, section 16 is to apply to the claim of his heir or successor for rent which accrued due during his lifetime, that claim would be irrecoverably lost, as his heir or successor could not possibly satisfy the requirements of section 15 so far as he was concerned." We think we may follow the said decision, and we accordingly hold that this contention must also fail.

The last contention is that there should be an apportionment of rent in respect of items Nos. 11 and 12 of the *patta*.

Now, the *kabuliyat* stated: "You shall never be competent to enhance the said *jama* on any ground ; nor shall we get abatement of the *jama* on the ground of diluvion or on any other ground." The learned Judge was of opinion that the words "on any other ground" contained a clear stipulation that the lessees shall not be entitled to have deduction of the rent on any account. It has been held, however, in some cases that these words would be taken as referring to cases of like nature as diluvion. [See the cases of *Uma Sunkur Sirkar* v. *Tarini Ohunder Singh* (5), *Watson & Co.* v. *Nistarini Gupta* (6)].

The principle no doubt is one in consonance with natural justice and equity that a person who has been deprived of possession of part of the demised premises should not be held liable for the whole rent for ever and this principle applies with greater force where the tenant is deprived of any portion of the leasehold property by any act on the part of the landlord himself.

But there are certain circumstances in the present case which ought to be taken into consideration. The first is, that the *patta* was executed as a settlement of family disputes, and, secondly, the 11th and 12th items in the schedule are described as Mahal Diara which indicates that they are temporary settled estates. The learned Subordinate Judge says: "Probably they got some advantages from other properties comprised in the *patni*, and so they did not think it worth their while to keep any provision for abatement of rent in case of Salima's not taking fresh settlement of the Diara Mahal; had not that been the intention of the parties, *patni* lease of temporary settled estates would not have been taken, and the defendants would not have bound themselves to pay the entire *jama* for ever." But it does not appear what the relative income or advantages of the other properties, and items Nos. 11 and 12 are. The Court of Appeal below has not gone into this matter fully nor has it considered the circumstances which led to the inclusion of these properties in the lease without there being any provison that the lessor would take any re-settlement from Government.

In these circumstances, we think that the case should go back to the lower Appellate Court in order that it may enquire into the matter, and consider all the surrounding circumstances and come to a decision whether it was intended that the rent should be paid even though the lessor did not apply to Government for renewal of the temporary settlement.

The first two questions we have already disposed of. The case is remanded only on the last point.

Costs to abide the result.

N. H.

Case remanded.

(5) 9 C. 571; 11 C. L. R. 366; 4 Ind. Dec. (N. S. 1028.

(6) 10 C. 544; 5 Ind. Dec, (N. S.) 364.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1239 OF 1920.

February 27, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

BUDHI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

THE ADMINISTRATOR-GENERAL OF MADRAS HIGH COURT—PLAINTIFF AND INAMULLAH—DEFENDANT—RESPONDENTS.

Mortgage—Prior and subsequent mortgagees—Sale in decree of first mortgage—Subsequent suit by puisne mortgagee—Decree, form of—Redemption—Auction-purchaser and private purchaser, distinction between—Improvements—Auction-purchaser, whether can claim.

Where a puisne mortgagee wishes to sell property which has already been sold in execution of a decree passed under a prior mortgage, the decree must direct redemption by the second mortgagee of the first mortgage and then an order for sale if the purchaser of the property does not wish to redeem the second mortgage and there is no distinction in such a matter between an auction-purchaser and a private purchaser. [p. 841, col. 2; 842, col. 1.]

An auction-purchaser under a prior mortgage decree cannot claim the amount spent by him on improvements as payable before the puisne mortgagee could bring the property to sale. [p. 841, col. 2.]

Second appeal from a decree of the District Judge, Farrukhabad, modifying that of the Munsif, Kanauj.

Mr. *Gulzari Lal*, for the Appellants.

Dr. *Kailas Nath Katju*, for the Respondents.

JUDGMENT.—The circumstances giving rise to this appeal are as follows:—Inamullah, defendant No. 1, made a mortgage of a grove in favour of Manni Lal, defendant-appellant, on the 1st of June 1906. On the 6th of July 1910 he made a second mortgage of the same grove in favour of Shamshad Ali who is now represented by the plaintiff respondent. In 1915 the first mortgagee brought a suit and obtained a decree for sale. To this suit the second mortgagee Shamshad Ali was not made a party and, therefore, his rights, whatever they were, were not affected by this decree. On the 20th of January 1916 the mortgaged property was sold in execution of the decree aforesaid and was purchased by Budhi Lal, defendant No. 3, and one of the appellants before us, and on the 1st of June, 1917 he obtained possession of the property. The plaintiff has now brought this suit for sale on the second mortgage and he has impleaded as defendants the original mortgagor, the holder of the decree on the first mortgage, and the auction-purchaser in execution of that decree. The defence raised by the auction-purchaser and the prior mortgagee decree-holder was that the plaintiff could not bring the property to sale without redeeming the prior mortgage. They also claimed Rs. 247 for improvements made on the property by the auction-purchaser.

The Trial Court decreed the plaintiff's claim subject to his paying Rs. 798-8-0 and interest thereon at six per cent. per annum from the 23rd of January 1916 to the date of payment, and Rs. 247, for improvements to the auction-purchaser before the plaintiff could sell the property, or, in other words, it gave a decree to the plaintiff conditional upon paying off the prior mortgage which had been, so to say, discharged by the auction purchaser. The plaintiff went up in appeal and the learned Judge has, for reasons which commended themselves to him, decreed the plaintiff's claim unconditionally. The defendants, prior mortgagee and the auction-purchaser in execution of the decree under the prior mortgage, come here in second appeal, and their first contention is that the decree of the lower Appellate Court giving the plaintiff an unconditional decree for sale is bad and that the plaintiff should have been directed to redeem the first mortgage before he could bring the property to sale. They also claim the amount spent by the auction-purchaser on improvements as payable before the plaintiff could bring the property to sale.

As to the last contention, we have not been referred to any rule of law under which the auction-purchaser could make such a claim. It has been decided in the negative by the Madras High Court in the case of *Gangayam Venkataramana Iyer* v. *Gomperts* (1).

As to the first contention, the general rule is that where a puisne mortgagee wishes to sell property which has already been sold in execution of a decree passed under a prior

(1) 31 M. 425; 3 M. L. T. 397; 18 M. L. J. 298.

mortgage, the decree must direct redemption by the second mortgagee of the first mortgage and then an order for sale if the purchaser of the property does not wish to redeem the second mortgage : see *Gangayam Venkatu-ramana Iyer* v. *Gomxerte* (1). We see no reason why in this case we should depart from the general rule stated above. All the parties interested in the mortgaged property are before us and we can do justice between them and adjust the equities of the case. It has been contended before us by the learned Advocate for the respondents that this rule does not apply to the case of auction-purchasers. We do not see any reason why an auction-purchaser should stand on a different footing from a private purchaser in this particular matter. No distinction seems to have been made between purchasers at auction and those by private treaty in the case of *Mutiullah Khan* v. *Banwari Lal* (2), and in the case of *Manohar Lal* v. *Ram Babu* (3). We think this appeal must be allowed and the decree of the Court below set aside.

We accordingly allow the appeal with costs including in this Court fees on the higher scale. As the decree passed by the Munsif is not quite clear, we discharge the decrees of both the Courts below and in lieu thereof pass a decree for sale in favour of the plaintiff, giving the defendants six months' time from to-day to redeem the plaintiff's mortgage, and in case of their failure to do so, give the plaintiff three months' time from the expiry of the six months aforesaid to pay off the amount mentioned in the decree passed by the Munsif as due on the prior mortgage to defendant No. 3 (but not the sum of Rs. 247), and in case of such payment being made within the period aforementioned, the plaintiff will be entitled to realise the amount due on his mortgage as also the amount payed to satisfy the prior mortgage *plus* the costs of this litigation by sale of the mortgaged property. In case of failure by the plaintiff to make such payment, the suit shall stand dismissed with costs in all Courts.

J. P.

Appeal allowed.

(2) 5 Ind. Cas. 132; 32 A. 138; 7 A. L. J. 61.
(3) 14 Ind. Cas. 674; 34 A. 323; 9 A. L. J. 323.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 266 OF 1919.

November 2, 1921.

Present :—Mr Justice Broadway and Mr. Justice Abdul Qadir.

FATEH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BUR SINGH—PLAINTIFF—RESPONDENT.

Mahant—*Succession—Removal*—Gurdwara *of Guru Hargobind Singh at Hafizabad.*

A *mahant* is the head of any Hindu *dera* or religious institution and a person succeeding to such a headship by hereditary right can quite correctly be styled a *mahant* [p. 843, col. 2.]

The only law as to *mahants*, their offices, functions and duties is found in custom and practice, which is to be proved by testimony. [p 844, col. 1.]

A self-constituted *sangat* unable to prove any customary right to interfere in the control of *Gurdwara* or to remove the *mahant* have nothing to do with the succession to the office which is quite independent of any action on their part. [p. 841, col. 1.]

Bhagwan Das v. *Hardit Singh*, 52 P. L. R. 1905, relied upon.

Asa Ram v. *Hari Singh*, 53 P. R. 1904, distinguished.

The people of Hafizabad have no customary right to interfere in the control of the *Gurdwara* of Guru Hargobind Singh or to remove its *mahant* for misconduct [p 844, col. 2]

Second appeal from a decree of the Additional District Judge, Gujranwala, at Lahore, dated the 15th November 1918, reversing that of the Senior Subordinate Judge, Gujranwala, dated the 8th June 1918.

Pandit *Sheo Narain*, R. B., and Dewan *Mehr Chand*, for the Appellants.

Dr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.—Bur Singh, the plaintiff-respondent in this case, is a *mahant* of the *Gurdwara* of Guru Hargobind Singh at Hafizabad. This office was held before him by his father Dayal Singh, who had succeeded his own father Gurdit Singh. Gurmukh Singh, father of Gurdit Singh, was the first of the present line of *mahants* to occupy the position. In 1916 a meeting of certain persons describing themselves as worshippers at this *Gurdwara* and professing to be interested in it was held which passed a resolution to the effect that Bur Singh be removed from the position of a *mahant* and his cousin Fateh Singh be appointed in

his place, as the former had through his misconduct become unworthy of the post. The *mahant*, however, challenged the authority of any such body of worshippers to remove him from an office, which he had got by inheritance from his forefathers, and brought this suit for a declaration that he was the hereditary *mahant* and for an injunction restraining defendants Nos. 1 to 5 from interfering with his management. The defendants were Fateh Singh, the *mahant* nominated at the meeting, and four others, who were members of that meeting which was styled a *sangat*. The Senior Subordinate Judge held that it was proved that Bur Singh had an illegal intimacy with a Brahmin widow and was thus guilty of misconduct and, finding that the *sangat* were entitled to oust him under such circumstances, dismissed the plaintiff's suit. Bur Singh appealed against the decision of the Trial Court, with the result that his appeal was accepted by the Additional District Judge of Gujranwala, who has held that there was nothing on the record to show that the *sangat* had any power to remove the *mahant*, that for three generations the office had descended from father to son, and that the *mahant* did not owe his position to any action in his favour by the persons who now claimed the power to remove him. The declaratory decree as well as the injunction prayed for were, therefore, granted to the plaintiff by the learned District Judge. The defendants have preferred a second appeal to this Court against the decree of the District Judge and we have heard Rai Bahadur Pandit Sheo Narain for the appellants and Dr. G. C. Narang for the respondent.

Before discussing the arguments addressed to us on both sides it may be mentioned that Fateh Singh, defendant-appellant No. 1, died during the pendency of the appeal and no representative of his has been brought on the record in his stead. More than six months have elapsed since his death. His appeal, therefore, abates but as this was a case in which any of the members of the *sangat* above mentioned could have been made a party and five of them had been selected by the plaintiff at his own option, the appeal of the other defendants is not affected by this abatment.

Mr. Sheo Narain started his arguments by attacking the finding of the lower Appellate Court that Bur Singh was the *mahant* of the *Gurdwara*. He had to admit that this was a finding of fact which he was not entitled to assail in second appeal but he urged strenuously that Bur Singh and his progenitors had been loosely described as *mahants*, that they were nothing better than mere servitors of the institution, who were Aroras by caste and carried on ordinary business as shopkeepers and eked out their income by taking certain offerings made at the *Gurdwara*. They were not, he went on to say, appointed by any *bhek* or religious fraternity, nor duly elected by any body of men, nor even nominated by their *Gurus*. All this may be true, yet we do not see how the clear finding that Bur Singh and his father, grandfather and great-grandfather were *mahants* of the *Gurdwara* at Hafizabad can be affected thereby. There is no definition of the term *mahant* anywhere which would make all or any of the above conditions necessary to make the designation *mahant* applicable to a person. According to the "Glossary of the Tribes and Castes of the Punjab and North-West Frontier Province" compiled by Mr. H. A. Rose, a *mahant* is "the head of any Hindu Dera or religious institution" and a person succeeding to such headship in the way in which Bur Singh has been found to have done can quite correctly be styled a *mahant*.

The only other question for decision in this case is that of the power of the *sangat* to remove the *mahant*. In this connection, Dr. Narang contends that it is not open to any persons constituting themselves into a committee or *sangat* to remove a *mahant* from his office without having recourse to law. He concedes that if a *mahant* misbehaves he may be removed from office but he adds that this can be done only by taking proper legal measures to oust him and not arbitrarily by meetings of the kind described in this case. Dr. Narang says that this *Gurdwara* has not been at any stage of its known history under the management or control of any committee of secular men worshipping at this *Gurdwara* or even under any *bhek*. It is said that a small committee was formed a few years before suit, with the

plaintiff as one of its members to collect subscriptions for making certain improvements in the buildings of the *Gurdwara* but it had never asserted any right to control the management or the headship of the institution. The *sangat* which passed a resolution against the plaintiff did not profess to be even a meeting of this committee but a public gathering of a somewhat nebulous character. It is argued by Dr. Narang that a body of men who had no hand in the appointment of Bur Singh, who became a *mahant* by hereditary right, could obviously have no *locus standi* to have a hand in his removal. We think this contention has a great deal of force in it. As laid down by their Lordships of the Privy Council in *Greedharee Doss* v. *Nundokissore Doss Mohunt* (1), "the only law as to those *mahants* and their offices, functions and duties, is to be found in custom and practice, which is to be proved by testimony" and we have no hesitation in saying that there is nothing in the evidence produced on behalf of the defendants-appellants in this case to show that the right to interfere in the management of this institution has been asserted at any time by any committee or any body of outsiders, nor is there anything pointing to the existence of any custom entitling the worshippers to control the appointment or the succession of *mahants* or to remove them without invoking the aid of law.

Reliance is placed by the appellants on *Asa Ram* v. *Hari Singh* (2), where it was laid down by a Division Bench of the Punjab Chief Court that the conduct of the *mahant* of a *dera* in the village Ujlam having been proved unworthy of his office, the worshippers of the *dera* were fully justified in removing and competent to remove him. It is clear, however, that there were several circumstances in that case which do not exist here and the decision in each case is based on the peculiar facts of that case. The *dera* in the case above referred to was "entirely supported by the villagers, who had made over certain land for its support." The village had always taken a predominant part in the arrangements of the said *dera*. There was a *bhek* in that village having the right of appointment and rejection and it had acquiesced in the action taken by the villagers. All these facts would certainly show that in that particular instance the village body could justly claim the power of appointment and removal of a *mahant* but we have nothing parallel to that in the case before us. The decision of the Chief Court in Civil Appeal No. 359 of 1901, published as 52 P. L. R. 1905 [*Bhagwan Das* v. *Hardit Singh* (3)], appears to be better applicable to the facts found in this case. It was found in the said case that the management had not been in village hands and no representative of the village had asserted a right to control the succession to the *mahantship* when it passed from the previous holders. It was held, therefore, that the villagers had no right to interfere in the succession to the *mahantship* or to remove a *mahant* for misconduct. For similar reasons we hold in this case that the self-constituted *sangat* in Hafizabad has not been able to prove any customary right to interfere in the control of the *Gurdwara* or to remove the *mahant*, whose succession to the office was quite independent of any action on their part. We uphold the decree of the lower Appellate Court and dismiss this appeal with costs.

N. H.

Appeal dismissed.

(1) 11 M. I. A. 405 at p. 428; 8 W. R. P. C. 25; 2 Suth. P. C. J. 86; 2 Sar. P. C. J. 306; 20 E. R. 154.
(2) 53 P. R. 1904.

(3) 52 P. L. R. 1905.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 224 OF 1919.

January 31, 1922.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

Mussammat JAIRAJI—PLAINTIFF—APPELLANT

versus

BHAGWAT PRASAD PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition—Formal separation need not be proved—Specification in sale-deed of shares of members, whether proof of separation.

JAIRAJI *v.* BHAGWAT PRASAD PANDE.

In order to establish separation by members of a joint family, a plaintiff is not bound to prove formal separation accompanied by an apportionment of the family property It is sufficient if he can produce evidence to satisfy the Court that the position of the various members was such that they could not have been living as members of a joint family. [p. 845, col. 2.]

It is by no means an unusual thing for members of a joint family, when acquiring landed property by purchase, to cause to be specified in their document of title the shares which they would respectively take upon a partition. No clear inference in favour of separation or break up of the joint family can be drawn from a transaction of this sort. [p. 847, col. 1.]

First appeal from a decision of the Subordinate Judge, Basti, dated the 29th June 1918.

Mr. *S. A. Haider*, for the Appellant.

Messrs. *J. M. Banerjea* and *Lakshmi Narain Tewari*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—In this suit the question in issue was the jointness or separation amongst the members of a certain Hindu family, the descendants of one Jeo Lal. This gentleman had three sons, named Sital, Durga and Chhutkan. Chhutkan had one son only, named Sheo Mangal, and this man had a son, named Kateshwar. This Kateshwar was married three times but died without male offspring. He left him surviving two widows, named Dharam Raji and Jai Raji. The present suit was instituted by these two ladies jointly to recover possession of specified shares in immovable property of various descriptions, upon the plea that the property so specified formed the separate estate of Kateshwar from which his widows had wrongfully been ousted by the male agnates. *Musammat* Dharam Raji died after the institution of the suit, but it has been continued by the remaining widow *Musammat* Jai Raji, who is the appellant in this Court. Of the three sons of Jeo Lal, all of whom had died before the institution of this suit, one Sital had a son who is the principal defendant in the case, Bhagwat Prasad. Durga had four sons. One of these is the defendant Ram Bali. The remaining defendants, Sat Narain and Ram Lal *alias* Ghisiwan, are respectively the grandson and the son of other sons of the aforesaid Durga. *Musammat* Jai Raji's case is that, when she had gone in to head-quarters to fight the mutation case in respect of her late husband's estate, Bhagwat Prasad and the other defendants took possession of the house in which she had previously been living, of all the lands which Kateshwar had been cultivating in severalty and all Kateshwar's shares in the various Zemindari properties which had belonged to him. The plaint does not say when the joint family was supposed to have broken up, the plaintiffs contenting themselves (as they were quite entitled to do) with pleading that Kateshwar Pande at the time of his death was living as a separated Hindu. We may note that he died in the month of May 1916. The defendants, no doubt, with a view to tying the plaintiffs down to something definite, have put in evidence the statement made by *Musammat* Dharam Raji, the plaintiff, who has since died, before the Mutation Court. That lady there alleged that the family had separated and come to a partition of the joint family property in the life-time of Sheo Mangal, the father of Kateshwar. The date of Sheo Mangal's death is left uncertain, but he must have been dead at the time of the execution of the deed printed at page 36 R, the date of which is the 7th of August 1906. The defendants in a suit of this sort start with a certain presumption in their favour; but we may readily admit that the presumption is not a very strong one in the present case, because the relationship between Kateshwar and the nearest to him of the defendants, namely, Bhagwat Prasad, is not a very near one. Nor do we consider that the plaintiff was bound to prove that a formal separation, accompanied by an apportionment of such goods or properties as it was desired to divide immediately and an ascertainment of shares in respect of other landed properties, took place in any formal manner or at any specified date. The plaintiff can succeed if she can produce evidence to satisfy the Court that the position of Kateshwar and the defendants up to the time of the death of the first-named was such that they could not have been living as members of a joint undivided family. The defendants have, however, re-inforced such presumption as may exist in their favour by a very considerable body of evidence. The oral evidence includes statements by tenants who were cultivating lands which, according to the defendants, are the property of the joint family; of the *patwaris* of villages in which the family property is situated,

and of various neighbours or connections by marriage of the parties. It is very little use discussing this evidence in detail. In a general way, it does go to prove that, up to the time of Kateshwar's death, he and the defendants were regarded by persons in a position to know the facts as living jointly together. Statements like that of the witness Sochit, that he cultivates a field belonging to Kateshwar, deceased, and to the defendants, that he has always paid the rent to Bhagwat Prasad, that he never at any time paid rent to Kateshwar are not without significance. We have been taken through this evidence in detail and much of it has been subjected to criticism of various kinds. It seems sufficient for us to say that we concur in the opinion of the Trial Court that this very considerable body of oral evidence does make out, on the whole, a case in favour of the jointness of the family which it would require some very definite and satisfactory evidence on the other side to rebut. Of oral evidence on the side of the plaintiff there is practically none, beside her own statement and the deposition of *Musammat* Dharam Raji in the Mutation Court which the other side has brought upon the record. Her brother Nageshar was examined on her behalf and made certain more or less vague and unsatisfactory statements regarding the residence of various members of the family. One Brij Nath, whose son was married to a daughter of Kateshwar, says that he has known the family for about three years and that during that time Kateshwar was living as a separated Hindu. This evidence is of very little weight as against the oral evidence for the defendants. The plaintiff relies mainly on certain documents and the inferences to be drawn from them. It may be as well to discuss these in some little detail. At page A4 we have a lease of the 3rd of January 1908, purporting to be executed by *Musammat* Karamdani, the widow of the father of the defendant Sat Narain, in favour of one Bhawani Baksh. By this document *Musammat* Karamdani, acting for herself and as guardian of her minor son Sat Narain, purports to lease out to Bhawani Baksh a number of shares in various items of property in dispute. We may take it that the shares purporting to be conveyed are those which that lady's husband would have taken on a partition of what the defendants call the joint family property. Now, the mere execution of a document of this sort has little or no evidential value. Any Hindu widow on bad terms for the time being with the male relatives of her late husband may set her name to a document of this sort, merely for the purpose of making herself unpleasant to the members of the family. If the lessee obtained actual and effective possession under the lease, it would become a significant circumstance that the male members of the family should be allowing a fraction of the alleged joint family property to be dealt with in this way. Now, Bhawani Baksh was called as a witness. He turns out to be the brother of *Musammat* Karamdani and he deposes positively that he never obtained possession under the lease. He says he was allowed for a time to manage a few *bighas* of *sir* land which had been separately apportioned for purposes of enjoyment to the husband of his ostensible lessor, but that even this only lasted for a short time and that he certainly never obtained possession over the shares in Zemindari property specified in his lease. The statement of Bhawani Baksh has been criticised before us and we have been asked to disbelieve him, mainly on the ground that the term of the lease having now expired the deponent had no interest in asserting his rights under it. It does not follow that he had any interest in perjuring himself for the sake of the defendants. We cannot say that we see sufficient reason for disbelieving the witness and in any case the result of his evidence, there being no direct contradiction of it on behalf of the plaintiff, leaves the lease of the 3rd of January 1908 absolutely unsupported by any evidence that its terms were ever effectively in operation. There is, therefore, no real importance to be attached to this item of evidence. The next document on which the plaintiff relies is a sale-deed printed at A 6. By this document one Baobeha purports to sell certain Zemindari property to Bhagwat Prasad and to Ram Bali, defendants, and the feature of the document most insisted upon is that he conveys two shares to Bhagwat Prasad and one share to Ram Bali. Bhagwat Prasad was examined about this transac-

tion. He says that Kateshwar had been seriously ill for three years before his death and was in fact dying of phthisis. When spoken to about this proposed purchase of land from Bachcha he said that he had no particular interest in the matter and did not wish his name to appear in the sale-deed. Bhagwat Prasad, although he does not express himself very clearly, obviously means that this is the reason why the specification of shares was made out in this peculiar manner. Assuming, as the witness wishes us to believe, that it was really a joint family transaction, the representatives of the three branches of the family, namely, Bhagwat Prasad, Kateshwar and Ram Bali, would be interested in the matter to the extent of one-third each, if we take into consideration the shares that would fall to them on a partition. As Bhagwat was acting for himself and Kateshwar, and the latter had not wished to be associated in the transaction, he caused the document to be drafted in the manner in which it was. It is by no means an unusual thing for members of a joint family, when acquiring landed property by purchase, to cause to be specified in their document of title the shares which they would respectively take upon a partition. Where this is not done the ordinary inference from the document, on the face of it, would be that the vendees are taking in equal shares, and the members of the family may well think it convenient that such a presumption, where it is not in accordance with the facts, should be rebutted by a specification of shares; no clear inference in favour of separation or the break-up of the joint family can be drawn from a transaction of this sort. Very similar remarks apply to the document printed at A8; the manner in which the parties were really dealing with the property is further illustrated by the fact, proved by documentary evidence printed at page R 56, that when it came to mutation of names Bhagwat Prasad and Ram Bali allowed themselves to be recorded as having acquired the property in equal shares, ignoring Kateshwar altogether. There is only one more document produced by the plaintiff on which her case is strongly based and that is a sale-deed of the year 1305 Fasli. According to this document Bhagwat Prasad joins with Ram Bali and with Sri Nivas, the brother of Ram Bali, who was then alive, in conveying to Sheo Mangal, the father of Kateshwar, a one-third share in certain mortgagee rights, for a price which is stated at one third of the mortgage-money. The document nowhere says that payment of the consideration had passed from Sheo Mangal to the ostensible transferors. The learned Subordinate Judge does Bhagwat Prasad something less than justice when he says that the latter was unable to explain this transaction when he was questioned about it. The truth seems to be, that Bhagwat Prasad had forgotten all about it and was taken by surprise by the production of the document. His statement on the subject does not strike us as being at all the kind of statement which a dishonest litigant would have made, as such a person would have come to Court primed with a plausible explanation on a point of this sort. What Bhagwat Prasad is quite certain about is that no consideration passed from Sheo Mangal; that it was mere paper transaction intended as an acknowledgment of the fact that the mortgage having been acquired out of joint family funds, Sheo Mangal was interested in the same and that the extent of his interest, in the event of a partition would amount to a one-third share. There is really no reason for not believing this explanation. Indeed, the learned Subordinate Judge has himself accepted in substance this very explanation, though he says that Bhagwat Prasad did not give it. A transaction of this sort would be very unlikely to take place if Sheo Mangal had actually separated from the rest of the family. Assuming a separation to have taken place, accompanied by an apportionment of immoveable property, a division by metes and bounds of such immoveable property as it was desired to partition and an ascertainment of shares in respect of Zemindari properties which the family desired to keep under joint management, it would not have been open to one member of the family, after such a transaction had been completed, to approach the others and claim an interest to the extent of his rateable share in a property which had not been dealt with at the time of the separation and division. Any such claim

on his part would probably be met by the assertion that, inasmuch as he had not advanced it at the time of the separation, he had virtually admitted the particular mortgage in question to be the separate self-acquired property of the members ostensibly interested therein. On the other hand it is quite conceivable that such a document might be executed as between members of a joint family, merely in order that there might be clear evidence in existence as to their respective rights in the event of any future difference or separation. It may be conceded to the plaintiff that such a document might also quite conceivably be executed at a moment when a separation of the family was taking place; but if this transaction of 1305 Fasli had taken place as part of a formal separation and distribution of assets and specification of shares botween Sheo Mangal and the other members of the family, one would have expected to find clear evidence both oral and documentary of contemporaneous transactions to the same purpose and effect. In the absence of such evidence, it is impossible to treat the execution of this document as if it proved an actual transfer of property from Bhagwat Prasad, Ram Bali and Sri Nivas to Sheo Mangal, which transfer would no doubt (had it in fact taken place) be very difficult to reconcile with the existence of a state of jointness between the three at the time. It seems to us, however, that there was no real transfer, but merely a formal recognition of an interest which every one concerned admitted Sheo Mangal to possess and, as we have said, such formal recognition is not inconsistent with a state of jointness. This is really the whole of the evidence for the plaintiff. In the very careful and exhaustive argument which has been addressed to us in support of this appeal we were taken through the defendants' evidence and here and there a point was made in favour of the plaintiff from the wording of particular portions of documents produced and relied upon by the other side. We do not think it necessary to discuss these matters in detail. It is sufficient to say that there is a mass of documentary evidence tending to prove that the defendants and Kateshwar Pande were living and carrying on Zamindari business and money-lending business, right up to the time of Kateshwar's death, on such terms as one would expect them to do if they were members of a joint undivided family. The points that have been made to the contrary are, in our opinion, of slight weight and not such as to call for detailed discussion. We are satisfied that the decision of the Court below was correct and that this suit has been rightly dismissed. We dismiss the appeal accordingly with costs, including fees on the higher scale.

WALSH, J.—I agree. The case seems to me to lie within such a small compass that I am not surprised that any one who was able to devote five hours to its discussion should find himself too exhausted to take any further interest in it.

N. H.

Appeal dismissed.

RAMHIT v. EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 866 OF 1921.
January 25, 1922.
Present :— Mr. Justice Ryves.
RAMHIT AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 25, 27, 30—Statement of accused to Police Officer, value of—Confession—Property in possession of accused long after dacoity and openly—Inference—Burden of proof—Accused making false statement—Inference of guilt.

In a case of dacoity a statement made by an accused to a Police Officer, at the time of the search of his house, that property would be found in the possession of his co-accused, is not admissible in evidence against the accused making the statement nor is it admissible against his co-accused as proving their participation in the dacoity. [p 849, col 2]

A statement made by an accused to a Police Officer if it does not amount to a confession may, nevertheless, be used against him and more particularly if the statement turns out to be false in the light of the other evidence in the case If it amounts to a confession, then it must be excluded from evidence altogether under section 25, but in either event it can only be used against the accused making the statement. [p 850, col 1.]

A statement made by one accused person can only be used against another co-accused person if the provisions of section 30 are applicable [p 850, col. 1.]

The fact that a *dupatta* stolen in a dacoity was found some 40 days after the dacoity in the possession of a person, not hidden away but openly worn, does not lead to the necessary inference that that person took part in the dacoity. [p. 850, col 2.]

It is for the prosecution to establish their case and because an accused person loses his head or gets frightened and does not tell the truth, he cannot, on that account, be convicted. [p. 850, col 2.]

Criminal appeal from an order of the Second Additional Sessions Judge, Gorakhpur.

Mr. *Shiva Prasad Sinha*, for the Appellants.

Mr. *Sankar Saran* (Government Pleader), for the Crown.

JUDGMENT.—Thegu, Rambali, Ramhit, Raghunandan and Jamuna were put on their trial before the learned Sessions Judge of Gorakhpur on a charge of dacoity. He acquitted Raghunandan and Jamuna and convicted the remaining three and sentenced them to five years' rigorous imprisonment each. They have appealed; Thegu and Rambali from jail and Ramhit is represented by Counsel. The dacoity is said to have taken place on the night of the 8th of June 1921 at the house of one Chanderbhan. Chanderbhan made a report in which he said he had identified three persons whom he named and that a large number of other dacoits had robbed him. He gave three separate lists, at least, of property which he said had been looted. The persons named in the report were arrested and their houses searched, but they were released by the Police and not sent up for trial as the search of their houses produced nothing suspicious. It is not very clear how the Police got on to the track of the five persons who were ultimately put on their trial. It appears, however, that Sub-Inspector Sat Narain searched the house of Thegu on the 19th of July and took possession of a large quantity of property. A great number of the articles found in the possession of Thegu have been identified by Chanderbhan and other persons of the family. The number is so large that I do not think there can be any doubt as to his guilt. I think it more probable that he was the actual thief, rather than a 'receiver'. There remains the case of Rambali and Ramhit. When the house of Thegu was being searched the Sub-Inspector says that Thegu mentioned Rambali and Ramhit as persons in whose possession property would be found. In consequence of this information the houses of Rambali, and Ramhit were searched. Nothing suspicious was found in the house of Ramhit but Thegu appears to have indicated a *dupatta* which Ramhit was wearing and said that it was part of the proceeds of the dacoity. The learned Judge felt that there was some difficulty about the admissibility of this statement. He says: "I think there can be little doubt, in view of the provisions of section 27 of the Indian Evidence Act, that this statement of Thegu has a certain value both against himself and Rambali and Ramhit, accused". The statement is not admissible in evidence against Thegu himself nor is it admissible against Rambali or Ramhit as proving their participation in the dacoity. I think the learned Sessions Judge is wrong in his interpretation of section 27 and in this

connection I would call his attention to *Emperor* v. *Kangal Mali* (1). The statement made by Thegu to the Sub Inspector amounted to a confession or it did not. A statement made by an accused to a Police Officer, if it does not amount to a confession, may nevertheless be used against him and more particularly if the statemant made turns out to be false in the light of the other evidence in the case. If it amounts to a confession (which in my opinion it does not) then it must be excluded from evidence altogether under section 25, but, in either event, it can only be used against Thegu himself. A statement made by one accused person can only be used against another co-accused person if the provisions of section 30 are applicable. All really that the Sub-Inspector ought to have been allowed to say was that, in consequence of something Thegu said to him, he searched the houses of Rambali and Ramhit and took possession of these articles. Against Ramhit the only admissible evidence is the fact that on the 19th of July he was wearing a *dupatta* which two witnesses, namely, Chanderbhan and one of the women, identified with some certainty. Chanderbhan says it was his and *Musammat* Pirthi corroborates him. Another woman, it is true, identified it as belonging to Chanderbhan, but as she made three mistakes about other articles of clothing, her identification does not carry much weight. The *dupatta* is not before me. I would call the attention of the learned Sessions Judge to General Letter No. 1037-8-4 of 1921. This certainly was such an exhibit as would prove of material aid to the High Court in reaching a correct decision in this case. There was nothing suggested in the record or in the judgment to indicate that there was anything peculiar about this *dupatta* which would make its identification easy or probable. Therefore, I am not so convinced that this identification is correct that I would base the conviction for dacoity upon it, but, apart from that, it seems to me that even if it be granted that this *dupatta* was stolen in the dacoity, the fact that it was found some 40 days afterwards in the possession of Ramhit, not hidden away be it noted but actually openly worn, would not lead to the necessary inference that Ramhit took part in the dacoity. I am not sure even if it would be sufficient evidence to convict him under section 411 much less section 412 of the Indian Penal Code. It is true that Ramhit has not been able to convince the Court of how it came into his possession. but it is for the prosecution to establish their case and, because an accused person loses his head or gets frightened and does not tell the truth, he cannot, on that account, be convicted. The learned Judge says that there is nothing to show that Thegu had any enmity against Ramhit. It seems to me quite possible that Thegu was a great friend of Ramhit and gave him as a present this head-dress which Ramhit was pleased to wear. In my opinion the Assessors took a correct view of the evidence in his case. Coming now to the case of Rambali, I think it is sufficient to quote the reasons given by the learned Sessions Judge who convicted him, as sufficient ground for acquitting him. He says: "The cases of Rambali and, to a greater degree, of Ramhit, are decidedly more doubtful. In Rambali's possession there were found only a woman's *dhoti*, a piece of square cloth or *jharan* and a piece of long cloth and a piese of muslin. These are articles which he might perhaps have owned himself, although I do not think it is particularly likely. They are fairly well identified, but apart from the *dhoti* they are not articles which admit of very certain identification. Nonetheless, in view of the identification and of the way which these articles were traced to Rambali's possession, I find it difficult to reject the prosecution case against him." The learned Sessions Judge has shown that these are not such things as would be easily identifiable and they might well have belonged to Rambali. As to the identification, he says: "they are fairly well identified." They are identified to his satisfaction or they were not. I take it that he would not have been satisfied with the identification if it stood alone, for he goes on to say: "in view of the way in which these articles were traced to Rambali's possession, I find it difficult to reject the prosecution case

(1) 26 Ind. Cas. 1161; 41 C. 601; 15 Cr. L. J. 713.

against him." In other words, he brings in aid the statement which he allowed Sat Narain, Sub-Inspector, to depose to as having been made to him by Thegu accused. In my opinion that statement cannot be used against Rambali. The result is, that I dismiss the appeal of Thegu. I allow the appeals of Rambit and Rambali, acquit them of the offence of which they have been convicted, and direct that they be released.

J. P.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 587 OF 1921.
January 19, 1922.
Present:—Mr. Justice Walmsley and
Mr. Justice Suhrawardy.
SAMAD ALI AND ANOTHER—FIRST PARTY—PETITIONERS
versus
ABDUL MAJID AND OTHERS—SECOND PARTY—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 145—Irregular proceeding—Property attached—Proceeding dropped—Subsequent delivery of property on petition of opposite party, legality of.

A land was attached under section 145 (4) of the Criminal Procedure Code. After several adjournments, the Magistrate holding the proceedings refused to give further time to the first party and recorded the order: "Proceedings stopped: File." On the same day a petition was put in by the second party and the Magistrate passed on it an order: "Heard the parties: examined the documents. The first party have failed to prove their possession and case though repeated opportunity was granted. Second party will remain in possession":

Held, that the procedure was irregular and that as the land had been attached under clause (4) some further order than merely dropping the proceeding was necessary; [p. 852, col. 2.]

Held, also, that possession ought not to have been awarded to the second party merely because the first party had failed to prove its case, [p. 852, col. 1.]

Rule.

FACTS appear from the judgment.

Babu *Suresh Chandra Talukdar* (with him, Babu *Bankim Chandra Banerjee*), for the Petitioners.—This matter arises out of a proceeding under section 145 of the Code of Criminal Procedure. The land was attached under the section in January 1921. On June 22nd the Magistrate, rejecting our petition for time, stopped the proceedings. On the same day, on the application of the second party, ordered that we having failed to substantiate our case the other side were to remain in possession. My submission is that the proceedings are entirely *ultra vires*. The Magistrate had no jurisdiction to award possession to the second party without recording any evidence. The proceedings have been vitiated by gross irregularity. My next submission is that the Magistrate having once dropped the proceedings became *functus officio* and was not competent to re-open them on the application of the second party.

Babu *Santosh Kumar Basu*, for the Opposite Parties.—The proceedings are regular. The Magistrate was competent to give possession to the second party after examining their documents. They had been given sufficient opportunities to make out their case, which they could not do. I submit the Magistrate did not act without jurisdiction.

Babu *Suresh Chandra Talukdar*, replied briefly.

JUDGMENT.

WALMSLEY, J.—This Rule arises out of proceedings taken under section 145, Criminal Procedure Code.

In January a proceeding was drawn up in the usual terms and the land was attached under clause (4). After several adjournments, on June 22nd the learned Magistrate refused to give further time to the first party, and recorded the order, "proceedings stopped: File." That is very ambiguous. However, we are not called on to interpret the meaning of such an order for on the same day, a petition was put in by the second party and the learned Magistrate wrote on it this order:—"Heard the parties: examined the documents. The first party have failed to prove their possession and case, though repeated opportunity was granted, second party will remain in possession." Then he gave the petitioners time to move this Court, and on July 11th this Rule was obtained and on July 13th he ordered that the land should remain under attachment pending disposal of this Rule.

LACHCHI RAM v. EMPEROR.

The procedure is irregular. It was undoubtedly open to the Magistrate to drop the proceeding if he thought that circumstances rendered them unnecessary, but as the land had been attached under clause (4), some further order was necessary. But it is the second order to which objection is taken. The Magistrate appears to have re-opened the proceedings at the instance of the second party, and then, forgetting about the attachment, he awarded possession to the second party as the party in possession merely because the first party had failed to prove its case. In doing so, I think he was clearly wrong. In the first place, having dropped proceedings he ought not to have re opened them, and, secondly, assuming that he had jurisdiction to go on with the case without a fresh proceeding, he ought to have put the parties on the same footing instead of awarding possession to the second party because the first party had failed to prove its case.

I think we should set aside both the orders of June 22nd, and direct the Magistrate to take up the case at the point which it had reached on the morning of June 22nd and to dispose of it according to law.

Let the record be sent down at once.

SUHRAWARDY, J.—I agree.

J. P.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 737 OF 1921.

February 15, 1922.

Present:—Mr. Justice Gokul Prasad and Mr. Justice Stuart.

LACHCHI RAM—APPLICANT

versus

EMPEROR—

Public Gambling Act (III of 1867), ss. 1, 2—"Common gaming house", keeping of—Conviction, when sustainable—"Instruments of gaming," meaning of.

Instruments of gaming include articles used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming. [p. 853, col. 2.]

The words "common gaming house" do not mean simply a house in which instruments of gaming are kept or used for the purpose of carrying on or facilitating gaming [p. 853, col 2.]

Before convicting a person found in possession of instruments of gaming for keeping a "common gaming house" it must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gaming, or, at the outside, that he manipulates the conditions in such a manner that he cannot possibly lose. [p. 853, col. 1.]

Criminal revision from an order of the Additional Sessions Judge, Meerut.

Mr. *Nehal Chand*, for the Applicant.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—The decision of this revision has been referred to this Bench. The facts are as follows. Lachchi Ram, applicant, occupies a shop in Muzaffarnagar city. The Superintendent of Police, on information received, raided the shop on the 15th of October 1921. He found therein a book of tickets in a red cover and a cash box. On the facts, we are satisfied that the tickets contained in the book were being used as forms of memoranda on which to record wagers. It is clear that wagering was actually in progress. The event on which the wagering took place was the determination of the last digit or the last two digits in the average price at which a chest of opium might be sold in the Government sales during a certain period. This is a form of wagering which is common in certain towns in this Province. The question which we have to consider is whether, upon these facts, the applicant has been rightly convicted under section 3 of the Gambling Act for keeping a common gaming house. The tickets in question and the cash-box are instruments of gaming as they were used for the purpose of carrying on gaming. So the shop of the applicant was certainly a house in which instruments of gaming were kept and used, but we have to see whether they were kept or used for "the profit or gain" of the applicant "whether by way of charge for the use of such house..... or otherwise howsoever," and, unless this is established, the conviction must fail. The Magistrate has stated that the applicant charged commission from those persons who made successful wagers, but there is no evidence to support that assertion. It

ppears clear to us that the applicant was what is known as a book-maker and that he laid wagers with persons using the establish ment. If he won he took their money, if he lost he paid them at the odds agreed on. But can it be said that the tickets and the cash-box were kept or used for his profit or gain? They were used in furtherance of his business—otherwise they would not be instruments of gaming—but in themselves they could not be said to be used for his profit or gain. In order to sustain the conviction, the words "for the profit or gain of" would have to be read as meaning, for the purpose of carrying on the gaming. But they cannot be read in that way as such an interpretation would make the words a meaningless redundancy. Instruments of gaming include articles used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming. We cannot interpret the words "common gaming house" to mean a house in which articles used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming, are kept or used for the the purpose of carrying on or facilitating gaming. This is simple repetition. And, further, the meaning of the words "for the profit or gain of the person .....owning such house" is indicated by the succeeding words "by way of charge for the use of such house.....or otherwise howsoever." The definition of a common gaming house, in our opinion, is not materially different under the new Act from what it was under the old Act, with the exception that it is no longer necessary as an ingredient of the offence to establish playing by cards, dice, gaming tables or other articles of that nature. But the essential element remains. It must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gaming, or, at the outside, that he manipulates the conditions in such a manner that he cannot possibly lose. Here there is no evidence of commission having been taken and there is no evidence as to how the wagers were made. There was no charge for the use of the house. If it had been established, as was suggested by the learned Magistrate, that the applicant had deducted commission from the winners to an extent which would invariably give him a profit, or if it had been established that he charged for the use of his premises, he could have been legally convicted under the new Act for keeping a common gaming house, even although the instruments of gaming were only the cash-box in which the money was kept and the forms upon which the wagers were recorded. But, as the case stands, no offence has been committed. We, therefore, allow the application and set aside the conviction. The applicant is already on bail. His bail-bond will be cancelled.

J. P.

Application allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 258 OF 1921.

November 4, 1921.

Present :—Mr. Justice Kumaraswami Sastri.

ADAIKKAN AND OTHERS—PETITIONERS

versus

MALLAKARUPPAN AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Documentary evidence of title, whether can be relied on, to corroborate oral evidence as to possession.

In proceedings under section 145, Criminal Procedure Code, a Magistrate is entitled to rely on the documentary evidence as to title, to corroborate the oral evidence as to possession [p. 854, col. 1.]

Kali Kristo Thakur v. *Golam Ali Chowdhry*, 7 C. 46; 4 Shome L. R. 119; 8 C. L. R. 245; 3 Ind. Dec. (N. S.) 579, followed.

Petition, under section 107 of the Government of India Act, praying the High Court to revise the order of the Sub-Divisional Magistrate, Devakottai, in Miscellaneous Case No. 16 of 1920.

Mr. *V. Ramaswamy Iyer*, for the Petitioners

Mr. *K. S. Jayarama Iyer*, for the Respondents.

ORDER.—I cannot help remarking that the order of the Magistrate might have been much clearer. The Magistrate in paragraph 5 thinks that counter-petitioners were allowed to be in possession from the date of the decree in 1907 till delivery of possession was given in 1916 by Exhibit

B. This would imply that the opposite side got possession afterwards, but the Magistrate says lower down that he was not satisfied that the decree-holder was in possession subsequent to the delivery in 1916. He thinks the oral evidence on both sides is not very trustworthy, but having considered the evidence on both sides and the documentary evidence afforded by the decree order for possession and *kist* receipts, he thinks the version of No. 1 party as to possession was more probable.

A great deal has been made of the halting opinion of the Magistrate, and it is argued that the case is one under section 146 of the Code of Criminal Procedure, the Magistrate not being able to find who is in possession.

The Magistrate is entitled to rely on the documentary evidence as to title, to corroborate the oral evidence as to possession. *Kali Kristo Thakur* v. *Golam Ali Chowdhry* (1), and, reading the judgment as a whole, I think what the Magistrate means is that, though the oral evidence is unsatisfactory, and had it stood alone, would not afford a basis of decision as to who was in possession, the documentary evidence supports the evidence of No. 1 party and makes it more probable that it was in possession.

I do not think that I can in revision say that the Magistrate had no materials for arriving at the conclusion.

The petition fails and is dismissed.

M. C. P.

J. P.

Petition dismissed.

(1) 7 C. 46; 4 Shome L. R. 119; 8 C. L. R. 245; 3 Ind. Dec. (N. S.) 579.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 41 OF 1922.

February 17, 1922.

Present:—Mr. Justice Ryves.

HANUMAN AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 238, 423—Penal Code (Act XLV of 1860), ss. 147, 323—Conviction under s. 147, whether can be altered to one under s. 323—Appellate Court, power of.

Where more than five persons are charged under section 147, Indian Penal Code, and on appeal only four are found guilty and the rest are acquitted the Appellate Court has power to alter the conviction from one under section 147, Indian Penal Code, to one under section 323, Indian Penal Code.

Criminal revision from an order of the Sessions Judge, Banda.

Mr. *K. N. Laghate*, for the Applicants.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—Fourteen men were put on their trial before a Magistrate of the First Class on the following charge:—"That you on the 15th day of August 1921 at 4 P. M. all committed a riot upon Daco at.....the common intention of your unlawful assembly being to assault Daco, and it was in pursuance of this common object that you all moved in a body and did cause bodily injury to Daco and thereby committed an offence punishable under section 147 of the Indian Penal Code." The Magistrate convicted all the accused and sentenced them to various terms of imprisonment and fine. They appealed. Now, there was no question that Daco had been assaulted by some one. The medical evidence proved that. According to his evidence all fourteen men took part in beating him. He was corroborated also by his son who came up while the beating was going on and deposed to the same effect. The learned Sessions Judge, however, on appeal, thought that, having regard to the small amount of injury actually received by Daco, he had exaggerated the number of persons who had beaten him. Now, one of the witnesses called was Purna, a Chaukidar, to whom Daco had made a statement shortly after the occurrence. In cross-examination Purna

GOGAN HOWLADAR v. KARIMADDI.

admitted that Daco had told him that the persons who had beaten him were Jagannath, Hanuman, Masua and Bodhan. Acting on this evidense, the learned Sessions Judge acquitted the other ten accused but confirmed the conviction of these four, holding that it was proved to his satisfaction that these four combined together in beating Daco. But, as there were only four, he altered the conviction to one under section 323, and he reduced the sentence of imprisonment. In revision before me it is argued that, having regard to section 238, Criminal Procedure Code, and certian rulings of the Calcutta High Court, it was not open to the learned Judge, on appeal to alter the conviction from one under section 147 to one under section 323. I am not prepared to accept this contention. The Judge has found as a fact that these four men and not fourteen combined in a joint assault on Daco. Whether section 147 is applicable or not depends on the number of persons concerned. Section 149 is not in question. I think there is no force in the other grounds raised and, therefore, reject the application.

J. P.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISON NO. 302 OF 1921.

May 26, 1921.

Present:—Mr. Justice Teunon and Mr. Justice Suhrawardy.

GOGAN HOWLADAR—PETITIONER

versus

KARIMADDI CHAWKIDAR AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Final order—No evidence on record.

A final order in a proceeding under section 145, Criminal Procedure Code, made by the Trial Magistrate on basis of a local enquiry of which there is no note or memorandum, is an order based upon no evidence and as such cannot be sustained.

Criminal revision against an order of the Sub Divisional Magistrate, Bagerhat, dated the 16th March 1921.

Babu *Hemendra Chandra Sen* for Babu *Bhujanga Bhusan Mukherjee*, for the Petitioner.

RAM RATAN v. EMPEROR.

Babu *Santosh Kumar Bose*, for the Opposite Party.

JUDGMENT.—In this case proceedings under section 145 of the Code of Criminal Procedure were initiated in respect of a tract of land measuring some 48 *bighas*. The final order has been made by the Trial Magistrate on the basis of a local enquiry of which we have no note or memorandum, and on the basis, further, of a judgment in a case made under section 448, Indian Penal Code, instituted on the complaint of one Sajoo Bibi, the wife of Hasnuddi, against Karimaddi Chaukidar and Dholai Howladar who appear to be members of the second party. The final order is thus it appears based upon no evidence and must, therefore, be set aside. The proceedings will now be re-opened at the stage reached on the 10th February 1921 and the matter heard and disposed of in accordance with law.

The Sub Divisional Magistrate who made the final order, we learn from the explanation submitted by the District Magistrate, has been transferred from the Sub-division in question. There is nothing, therefore, to prevent the further trial now directed from taking place in the Court of the officer now holding the position of the Sub-Divisional Magistrate.

J. P & N. H.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 647 OF 1921

January 6, 1922.

Present:—Mr. Justice Stuart.

RAM RATAN—APPLICANT

versus

EMPEROR—RESPONDENT.

Works of Defence Act (VII of 1903)—Platform in existence in Cantonment area for 30 years—Demolition—Acquiescence.

A Cantonment authority which has acquiesced in the existence of a platform for over 30 years in the Cantonment area, cannot be permitted to demolish it.

NANDKISHORE SAO v. BIKAN SINGH.

The Works of Defence Act, 1903, does not authorise the demolition of a platform only three feet high.

Criminal revision from an order of the Sessions Judge, Agra.

Mr. *Narain Prasad Asthana*, for the Applicant.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—The first point to decide is the age of the platform. The documentary evidence shows that it was in existence in 1902 and I see no reason to disbelieve the oral evidence that it has been in existence for thirty years before the date of the case. The Cantonment authorities having acquiesced in its existence for that period cannot be permitted to demolish it now. The Magistrate has made a reference to the Defence Zone. Act VII of 1903 does not afford any authority for demolition of the platform and, in any circumstances, as it is only about three feet high, its existence cannot be considered a danger to the defence of Agra. I set aside the conviction and sentence accordingly. The fine, if paid, will be refunded.

J. P. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 35 OF 1922.

February 16, 1922.

Present:—Mr. Justice Jwala Prasad.

NANDKISHORE SAO AND OTHERS—1ST PARTY—PETITIONERS

versus

BIKAN SINGH AND ANOTHER—2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 145—Dispute as to possession—Proper proceedings—Rent-decree, evidential value of.

A rent-decree passed against a person is to some extent evidence of possession in favour of that person, but it is not conclusive against one who was not a party to it. [p 857, col. 1]

A Magistrate does not act without jurisdiction if, in a proceeding under section 144, Criminal Procedure Code, he passes an order on the strength of such a rent-decree when a breach of the peace is imminent. But before making the order final, however, he should convert the proceedings into one under section 45, for in all cases, unless where the possession has already been determined by a Civil Court, or is undisputed, the proper procedure for a Magistrate to adopt is to convert a proceeding under section 144 into section 145 and determine the issue of possession once for all so as not to leave occasion for further dispute. [p. 857, cols & 2]

Sukan Singh v. *Prayag Singh*, 57 Ind. Cas 95; 1 P. L. T 81; 2 U. P. L R (Pat.) 25; (1920) at. 124; 21 Cr. L. J 575 and *Gouri Dutt* v. *Gobind Singh*, 53 Ind. Cas. 829; 1 P. L. T. 44; 20 Cr. L. J. 829, relied on.

Criminal revision against an order of the Sub-Divisional Magistrate of Madhupura, dated the 18th January 1922.

Mr. *G. C. Pal*, for the Petitioners.

Messrs. *Jayaswal* and *J. N. Sen Gupta*, for the Opposite Party.

JUDGMENT.—The 2nd party has come to this Court as aggrieved by an order of the Magistrate passed under section 144 of the Code of Criminal Procedure on the 2nd of January 1922, which was made absolute on the 18th of January.

The Magistrate's order was passed upon a Police report, dated the 18th December 1921, which showed that there was an imminent danger to a breach of the peace on account of the 2nd party claiming possession of the land in dispute which, according to the investigation of the Police, was found to be in possession of the 1st party. Both parties gave evidence with respect to their respective claims of possession over the land in dispute before the Police. The Sub-Inspector accepted the evidence of the 1st party and rejected that of the 2nd party on two principal grounds: (1) that against the 1st party the landlord obtained a rent decree on the 14th of January 1920 for the years 1324 to 1327, with respect to the land in question, and (2) that out of the witnesses examined on behalf of the 2nd party one of them, Babu Lall, gave out that the disputed land was cultivated by Bhikham Singh, (?) the 1st party, and that he had planted Kurbi this year. Accepting the report of the Police, the Magistrate issued an *ex parte* order under clause (2) of section 144 of the Code of Criminal Procedure. The 2nd party objected to this order by means of a petition. It was alleged that the rent-decree relied upon by the 1st party was a collusive one, and they not being party to it were not bound by it. At the hearing of the case on the 18th January both parties accused the landlord (The Darbhanga Raj) of having colluded with the other party. It was

difficult for the Court to determine this point. The Magistrate observed: "It is quite possible that the collusion of the Raj advanced by both parties is now in favour of the 2nd party." The Magistrate relies upon the rent decree as being a *prima facie* evidence of possession in favour of the 1st party. The rent-decree is to some extent evidence under section 13 of the Indian Evidence Act as to the landlord having recognized the holding as being in possession of the 1st party: but that evidence is not conclusive as against the 2nd party. It does not stand on the same footing as the delivery of possession given by a Civil Court or a decree awarding possession by a Civil Court. These have been held to be sufficient to entitle a Magistrate to pass an order under section 144 of the Code of Criminal Procedure, inasmuch as the Civil Court delivery of possession puts to an end any dispute as to possession of immoveable property which alone can be the subject-matter of an enquiry under section 145 of the Code. In such a case it has been held that action under section 144 is appropriate and the Magistrate is not required to initiate proceedings under section 145 of the Code: *Vide Sultan Singh* v. *Prayag Singh* (1). The possession delivered by a Civil Court may, under certain circumstances, also operate against the persons not parties to the Civil Court decree as has been held in the case of *Gouri Dutt* v. *Gobind Singh* (2). It is, however, doubtful whether a mere rent-decree obtained by a landlord will bind one who is not a party to it so as to hold that possession was either determined by a Civil Court or was undisputed. Therefore, the rent decree in the present case itself is not a conclusive proof of possession in the favour of the 1st party. The possession was disputed before the Police and, as observed above, both parties adduced evidence in support of their respective claim to possession. The Sub-Inspector relied upon the evidence of a witness on behalf of the 1st party, named Babu Lall, (?) who proved that the land in question was cultivated by the 1st party and some crop was also grown. This was, therefore, an additional evidence and putting this alongside the rent decree, the Sub-Inspector was of opinion that the evidence of possession was conclusive. Based upon that report the Magistrate thought that there was a *prima facie* case of actual possession in favour of the 1st party and consequently he issued an order under section 144 of the Code of Criminal Procedure. In the circumstances of the case, it may be that the order of the Magistrate of the 2nd of January was good inasmuch as it was passed with a view to prevent a breach of the peace which was then imminent. The more appropriate action, however, would have been for the Magistrate, after hearing the parties on the 18th of January, to convert his order under section 144 into a proceeding under section 145 of the Code so as to once for all determine the right of the contending parties to the possession of the land in question. The order of the 2nd of January confirmed on the 18th January will expire in about two weeks, and one cannot be sure that the order of the Magistrate has been so effective as to safeguard the public peace and that the dispute between the parties will not recur. The Magistrate may then be driven to the necessity of adopting successive proceedings under section 144, which has been condemned by this Court. A proceeding at the initial stage on the 18th of January under section 145 would have, as observed above, once for all settled the dispute between the parties and put to an end any danger to a breach of the peace. I, therefore, do not go so far as to hold, in the circumstances of the present case, that the order of the Magistrate of the 2nd of January 1922 was without jurisdiction. Certainly, I think that the Magistrate will, in case of any future danger to a breach of the peace, adopt the more effective measure by instituting a proceeding under section 145 of the Code, treating the effect of his order of the 2nd of January upon the possession of the parties as not affecting the claim of the 2nd party. In other words, the enquiry as to possession, in case of the Magistrate's adopting a proceeding under section

(1) 57 Ind. Cas 95; 1 P. L T. 81; 2 U. P. L. R. (Pat). 5; 1920 Pat. 24: 21 Cr. L. J. 57.

(2) 58 Ind. Cas. 822; 1 P. L. T. 44; 20 Cr. L. J. 829.

154 in future, will be of a date anterior to the 2nd of January 1922.

N. H. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 688 OF 1921.

January 18, 1922.

Present:—Mr. Justice Gokul Prasad and Mr. Justice Stuart.

EMPEROR—PROSECUTOR

versus

SHEO DARSHAN SINGH—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439, cl. (4)—High Court, power of, in revision—Acquittal how can be converted into conviction—Murder, offence of, what is.

When death is caused by an act which has been done with the intention of causing bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, the offence is murder. [p. 858, col. 2; p. 859, col. 1.]

A High Court cannot in revision convert a finding of acquittal into one of conviction; the only way in which this can be done is by an appeal by the Government against the acquittal but it can enhance a sentence passed under any section of the Penal Code. [p. 859, col. 1.]

Criminal revision from an order of the Additional Sessions Judge, Cawnpore at Banda.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

Mr. *Hamid Hasan*, for the Opposite Party.

JUDGMENT.—Sheodarshan Singh was committed to the Court of the Sessions Judge of Banda on a charge under section 302 of the Indian Peral Code. The Sessions Judge found that on the facts an offence under section 302 of the Indian Penal Code was not made out but that an offence under section 304 of the Indian Penal Code was made out. He, accordingly, found Sheodarshan Singh guilty under that section and sentenced him to seven years' rigorous imprisonment. The judgment of the Sessions Judge being brought to the notice of Piggott, J., on perusal of the Sessions statement, he directed that notice should go to Sheodarshan Singh to show cause why he should not be convicted of the offence of murder or why the sentence passed upon him should not be enhanced. It is to be noted that Sheodarshan Singh did not appeal against his conviction. He has, however, been represented before us in the matter of enhancement by a competent Counsel who has taken us through the whole of the evidence in the case. On the evidence, it is perfectly clear that on the day in question a man called Sukhnandan was sitting under a tree in Aineshwara, in the Banda district, and that Sheodarshan Singh was sitting close by him. There is nothing to show how a quarrel arose between the two, but at about 2 P. M. in the afternoon, Sheodarshan Singh with two other men set on Sukhnandan with *lathis*. Sukhnandan got up and ran away endeavouring to escape. They followed him, brought him down, and continued to rain *lathi* blows on him. Sukhnandan succumbed to his injuries. The injuries inflicted upon him were about as severe injuries as could be inflicted upon a human being with *lathis*. His skull was fractured. There were no less than 13 injuries upon the head and there were also other injuries upon the body. The man was battered to death in a most deliberate and merciless way. Apart from other evidence, three persons, Parshadi, *Musammat* Chunki and Khushali, who assert that they were eye-witnesses of the affair and whom we see no reason to disbelieve, have deposed that Sheodarshan took part in the brutal assault upon the deceased. These witnesses were believed by the Sessions Judge and the Assessors. Now, upon these facts, Sheodarshan Singh was undoubtedly guilty of murder. The reasons given by the Sessions Judge for finding that the offence committed was less than a murder show, we regret to say, a complete want of acquaintance with the law on the subject. He appears to think that if there is no premeditation and if an attack is made with *lathis* such as are usually carried by villagers, it is impossible for the offence to be murder. We suggest to the learned Judge that he should carefully study the provisions of sections 299 and 300 of the Indian Penal Code. He will then find that when death is caused by an act which has been done with the intention of causing bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, the offence is murder. We cannot, however, change the conviction into a conviction of murder. Sheodarshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot, in revision, convert a finding of acquittal into one of conviction. The only method by

which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal. But even if the Sessions Judge had been right in his views, and the case had been a case of culpable homicide, the sentence is inadequate. Taking it as a case of culpable homicide, it is about as bad a case of culpable homicide as can be conceived and was a case in which the maximum sentence allowed by the law should have been inflicted. We inflict that sentence now by enhancing the sentence of seven years' rigorous imprisonment into one of transportation for life.

J. P. *Sentence enhanced.*

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 670 OF 1921.

November 16, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

UMAYYATHANTAGATU PUTHEN VEETIL KUNHI KADIR—

PRISONER—APPELLANT,

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 196, 252—Sanction to prosecute under alternative sections—Legality—"Hearing the complainant", meaning of—Martial Law (Supplementary) Ordinance III of 1921, cl. (6)—Trial by Special Tribunal—Prosecution under s. 121 or 121A, Penal Code—Omission to examine complainant on oath—Illegality—Penal Code (Amendment) Act (XVI of 1921), s. 2—Forfeiture of property under ss. 121, 122, Penal Code, abolished.

A sanction under section 196, Criminal Procedure Code, to prosecute an accused should be specifically directed to the particular sections of Chapter VI of the Code in respect of which proceedings are to be taken and the order should be preceded by and be the result of a deliberate determination that proceedings shall be taken in respect of a particular section or sections and no other. It is opposed to the true intention of section 196, Criminal Procedure Code, to give a roving power to determine under what sections proceedings should be taken. [p. 859, col. 2.]

But a sanction under section 196, Criminal Procedure Code, to prosecute an accused in the alternative under section 121 or 121A of the Indian Penal Code is entirely specific and proper. [p. 859, col. 2.]

The expression "hearing the complainant" in section 252, Criminal Procedure Code, does not involve his examination on oath and a trial under Ordinance III of 1921 without such examination of complainant is not irregular. [p. 860, col. 1.]

The punishment of forfeiture of property for offences under sections 121, 122, Indian Penal Code, has been abolished by section 2 of the Indian Penal Code (Amendment) Act. [p. 861, col. 2.]

In some cases it may be hard to draw the line between rioting of a serious nature in which numerous persons take part and the offence of waging war against the King. But the offence is clear when the object of the mob is the total subversion of the British power. [p. 860, col. 1; p. 861, col. 1.]

Reg. v. *Gordon (Lord George)*, (1781) 21 St. Tr. 486, *Reg.* v. *Frost*, (1839) 9 Car. & P. 129; 4 St. Tr. (N. S.) 85; 2 Mood. C. C. 140 and *Barindra Kumar Ghose* v. *Emperor*, 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453, cited.

Appeal against the judgment of the Court of the Special Tribunal, Malabar, Calicut, in Case No. 4 of the Calendar for 1921.

Dr. *S. Swaminathan* and Mr. *B. Pocker*, for the Accused.

Mr. *J. C. Adam*, (Public Prosecutor), for the Crown.

JUDGMENT.—The accused appeals against his conviction by the Special Tribunal sitting at present in the Malabar district, of an offence punishable under section 121, Indian Penal Code, and his sentence to be hanged and to forfeit his property.

The first point taken is, that the sanction of the Local Government which is required by section 196 of the Code of Criminal Procedure is defective in that it does not specify with sufficient clearness the section of the offence in respect of which it is given. The sanction is Exhibit B and it, no doubt, is a sanction for the prosecution of the accused in the alternative for offences under section 121 or under section 121A, Indian Penal Code. It is urged that a sanction in the alternative is not such as the law contemplates and the judgment of Sir Lawrence Jenkins, C. J., in *Barindra Kumar Ghose* v. *Emperor* (1) is relied on. We respectfully and fully accept the observations of the learned Chief Justice to the effect that, "the sanction should be specifically directed to the particular sections of Chapter VI in respect of which proceedings are to be taken, and that the order or authority should be preceded by and be the result of a deliberate determination that proceedings shall be taken in respect of a particular section or particular sections of the chapter and no other." We agree further that "it would be opposed to the true intendment of section 196, Criminal Procedure Code, for the Local Government by its order to give its legal or other advisers a roving power to determine under what sections proceedings should be taken." But we see no reason to doubt that the requirements are fulfilled in

(1) 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453.

the present case. The present case in fact differs from that with which Sir Lawrence Jenkins, C. J., was dealing *in toto*, since the sanction there, after specifying a number of sections, gave a general authority to proceed under any other section which might be found applicable to the case. Here the sanction is entirely specific and the only question left open, no doubt, for the benefit as such of the Court which was to try the case as of the Prosecutor who was to institute the complaint, was which of the two sections specified applies to the facts which might be proved. We hold the sanction proper. This objection, therefore, fails.

The next objection taken to the proceedings is that they did not begin with an examination of the complainant by the Court. The procedure under clause 6 of Ordinance III of 1921, dated 5th September 1921, is to be that prescribed for warrant-cases and no doubt the first incident in the trial of such a case under section 252 is to be that "the Magistrate shall proceed to hear the complainant (if any)" the section providing next that "he shall take all such evidence as may be adduced." This, however, in no way assists the accused's contention that a trial without the examination of the complainant on oath is irregular. The expression used in section 252 is "hear the complainant." The taking of evidence is separately referred to. We have been shown no authority for holding that "hearing" a complainant involves his examination on oath. We may, in dismissing this objection, observe that nothing resembling it appears to have been put forward at the trial and that it is not shown how the accused was in any way prejudiced by the procedure followed.

Turning to the merits, we have the evidence, first, of the Deputy Superintendent of Police that the accused was seen in a crowd described as composed of two or three thousand persons, which attacked the force of the Police and Military after it had had been engaged under the District Magistrate's supervision in searching for war knives under ther Malabar War Knives Act, India Act XXIV of 1854. The witness says that the mob came on against the force of about two hundred Police and Military, that it attacked them with swords, knives and bludgeons, that the Police had to fire in self defence and that it was only after nine persons had been killed and three wounded by that fire that the mob retreated to Tirurangadi and some of these composing it entered the mosque there. The Police and Military followed the mob to the mosque and the first witness then saw the accused in the mosque. He knew him previously—how he know him previously we shall explain—and asked him to come out. Accused was then arrested and, at the request of the first witness and others, he told the mob to disperse and it obeyed his directions.

The second witness, Deputy Inspector-General of Police, corroborates this evidence generally, except that he saw the accused only at the mosque. These are the two witnesses regarding the actual occurrence. There is, it may be said, no evidence on this part of the case for the accused. He, moreover, attempted no cross-examination. He merely denied that he was present as alleged but made practically no further attempt to defend himself or to counter the prosecution evidence. In these circumstances, we have no hesitation in believing that evidence and holding that the accused was in the mob, as the first witness alleges, and was, as the first and second witnesses allege, at the mosque and that after his surrender the other members of the mob dispersed under his directions. There is the further important fact, which also we accept on the authority of the first witness, that the accused was in the front rank of the mob on the right just by the standard bearer. It is objected to this part of the evidence that it was only given on the fourth occasion on which this witness was examined. It was given, however, in reply to a question put by the Court and we see no reason for doubting that it was a pure accident that it was not mentioned earlier for thinking that it does not represent what the witness really saw.

The next question is, whether these acts of the accused amounted or not to the offence of waging war against the King. Dr. Swaminathan on his behalf has contended that they did not. We are quite ready to recognise that in some cases it may be hard to draw the line between mere rioting of a serious nature, in which numerous persons take part, and the offence with which we are dealing. But we do not think it necessary to quote at length the law bearing on the case, for we have no doubt that the statement of

it in the leading cases of *Reg.* v. *Gordon* (*Lord George*) (2), and *Reg.* v. *Frost* (3) fully supports the view we take of the nature of the offense of the accused in this case. The object of the mob was not merely resistence to the District Magistrate or to any isolated action, or for any particular purpose, but, as appears from the evidence we shall next refer to, the total subversion of the British Power. That evidence is given by the fourth and fifth witnesses, the former a constable and the latter an independent land-owner. Nothing to their discredit has been alleged and here again the accused has given no counter evidence. They say and it is apparently not denied—that the accused has for some time been the Secretary of the Khilafat movement, which has an office at Tanur, within six miles of the scene of the occurrence. At meetings of the Khilafat movement, as the 4th witness deposes uncontradicted, it was urged that no revenue should be paid to Government and that those present should non-co-operate with it. The accused, there is evidence, preached these doctrines. It is said—and it is not contradicted by the accused, in fact the defence witness speaks to the fact—that he had already, for some time before this occurrence, been usurping one prerogative of a sovereign power by holding a mock Court of justice of his own. On the morning of this occurrence the fourth and fifth witnesses heard him at a largely attended meeting at Tanur saying that those present must subvert the British Raj and establish the Khilafat Government and that all Government offices, Railways and Telegraphs must be destroyed. He said that all must start at once for Tirurangadi and destroy the British soldiers and the District Magistrate there. He had with him at that time a flag which was being carried in the forefront of the crowd when it attacked the District Magistrate and his forces. M. O. 1, there is no doubt, is the flag that was then being carried, since it was picked up on the spot by the Deputy Inspector General, 2nd prosecution witness. We have adopted the Court witnesses' version of the inscription on it and taking that version in the form most favourable to accused without the word 'combat'—the inscription runs:—'God the greatest. The Khilafat, go to work light mindedly and slowly and you will certainly succeed and God will be with you." It does not seem to us that the substitution of 'work' for 'combat' in the connection, in which the word stands on a banner used in the circumstances in which it was used, greatly assists the accused's case; for with neither word can it be possible to regard the banner as a peaceful symbol. We have, then, that the accused was taking part in an organised armed attack on the constituted authorities, that attack having for its object, in the words of his own speech, the subversion of British Raj and the establishment of another Government. That being so, we concur without hesitation in the lower Courts' conclusion that the accused was guilty of the offence of waging war against the King.

The remaining question is as to sentence. The lower Court apparently was not aware that the punishment of forfeiture of property had been abolished by Act XVI of 1921, which received the assent of the Governor-General on the 29th September 1921. In these circumstances, we must set aside that part of the sentence.

In view of the character of the occurrence we can find no reason for interference with the sentence of death, which we, therefore, confirm.

M. C. P.

J. P. & N. H.

Sentence confirmed.

(2) (1781) 21 St. Tr. 486.

(3) (1849) 9 Car. & P. 129; 4 St. Tr. (N. S.) 85; 2 Mood. C. C. 149.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 39 OF 1922.

February 23, 1922.

Present:—Mr. Justice Ryves.

MAHENDRA SINGH—APPLICANT

versus

Musammat RAJPATTI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 192 - Proceedings under s. 145, whether can be transferred—"Any case" in s. 192, interpretation of.

MUTHUKANAKKU PILLAI v. EMPEROR.

The words "any case" in section 192 of the Criminal Procedure Code are wide enough to cover an enquiry under section 145 of the Criminal Procedure Code.

Therefore, a Sub-Divisional Magistrate who institutes proceedings under section 145, Criminal Procedure Code, has power to transfer the same to any Magistrate subordinate to him for enquiry or trial.

Criminal revision from an order of the Sessions Judge, Ghazipur.

Messrs. *Haribans Sahai* and *Kumuda Prasad*, for the Applicant.

Mr. *Uma Shankar Bajpai*, for the Opposite Party.

JUDGMENT.—This revision arises out of proceedings under section 145 of the Code of Criminal Procedure. The Court has come to the conclusion that there is a dispute relating to immoveable property which is likely to cause a breach of the peace, and after an exhaustive judgment, has found itself unable to decide which of the two parties is in possession, or rather it has found that both parties have tried to take possession. Under these circumstances, it passed an order under section 145, Criminal Procedure Code. Under section 435, paragraph 3, this Court cannot interfere in revision. One point, however, is taken that the Court that passed the order had no jurisdiction. It arises in this way. The Sub-Divisional Officer instituted proceedings under section 145 and transferred them to the Court which ultimately held the enquiry and passed its order. It is said that the Sub-Divisional Officer had no jurisdiction to transfer the case. Having regard to section 192, which provides that a Sub-Divisional Magistrate may transfer any case, of which he has taken cognizance, for enquiry or trial to any Magistrate subordinate to him, it gave him authority to transfer this matter. I think the words "any case" in the section are wide enough to cover an enquiry under section 145 of the Code. I reject this application.

J. P. *Application rejected.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 399 OF 1921.
(CRIMINAL REVISION PETITION No. 312 OF 1921).
December 15, 1921.

Present :—Mr. Justice Odgers.

MUTHUKANAKKU PILLAI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 141, 147, 352—Criminal Procedure Code (Act V of 1898), ss. 239, 535—Prosecution under s. 147, Penal Code—Conviction for minor offence of assault under s. 352, Penal Code, maintainability of—Minor offence—Abetment of assault.

A person charged under section 147, Indian Penal Code, for rioting may be convicted of an offence of assault under section 352, Indian Penal Code, but on a charge under section 147 there can be no conviction of abetment of assault. [p. 863, col. 2.]

A different *mens rea* is not necessary in section 146, Indian Penal Code, as contrasted with section 352. Criminal force being an element of the offence of section 146 it must be taken to be capable of carrying a conviction under section 352. [p. 864, col. 2; p. 863, col. 2.]

Where an accused was charged of an offence under section 147, Indian Penal Code, but was convicted of an offence under section 352, Indian Penal Code, and where the whole of the defence evidence was let in in the Court of first instance and was disbelieved and it was also disbelieved in the lower Appellate Court any irregularity in conviction was cured by section 535, Criminal Procedure Code. [p. 864, col. 1.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Devakota, in Criminal Appeal No. 9 of 1921, preferred against the judgment of the Court of the Second Class Magistrate, Tiruvadanai, in Calendar Case No. 203 of 1920.

Mr. *R. Kesava Iyengar*, for the Petitioners.

Mr. *J. C. Adam*, (Public Prosecutor), for the Crown.

ORDER.—In this case accused Nos. 2, 3, 4, 5 and 7 were convicted by the Second Class Magistrate of an offence under section 147 of the Penal Code, *i.e.*, of rioting. It is unnecessary to go into the evidence for the prosecution which was believed by the Second Class Magistrate who originally tried them. The common object alleged was of getting P. W. No. 1, Udayar Pusari, to execute a

certain re-conveyance of lands. On appeal to the First Class Sub-Divisional Magistrate, he agreed with the lower Court as to the credibility of the prosecution evidence but altered the convictions into convictions under section 352, *i.e.*, assault, as against accused Nos. 4, 5 and 7. Accused Nos. 2 and 3 were convicted of abetment of assault under sections 352 and 114, Indian Penal Code.

With regard to accused Nos. 2 and 3 their case can be dealt with at once. The conviction of the abetment of assault on a charge under section 147, Indian Penal Code, clearly cannot stand, and if authority is wanted, it is to be found in the case reported in *Padmanabha Panjikannaya* v. *Emperor* (1). With regard to the second conviction against accused No. 7, *i.e.*, wrongful restraint, Mr. Kesava Iyengar, who has delivered a very learned argument for the accused, had little to say and I think that the conviction can stand.

The real point of this revision petition is as concerns the convictions of accused Nos. 4, 5 and 7 under section 352, they having been charged under section 147. The learned Vakil admits that the point is a technical one and is purely one of law and I have to decide whether such a conviction is illegal, and, if so, I must interfere. Now, several cases have been cited but they are, many of them, cases on section 323, *i.e.*, hurt. It is contended that section 238 of the Criminal Procedure Code does not apply to a case of this kind. In other words, that assault is not a minor offence to rioting. Reliance is placed on a judgment of the Calcutta High Court in *Kanta Neya* v. *Emperor* (2) which was, as a matter of fact, a case of sections 147 and 323. The passage which has caused me some perplexity in the judgment is as follows: "It cannot be said that any minor offence is included in section 147. The use of criminal force is a necessary ingredient in that offence but any particular kind of voluntary use of such criminal force may and should be separately charged, etc." I think the word 'any' must be taken as equivalent to 'every kind' of minor offence. I do not think that the learned Judges meant to lay down that there could be no minor offence under section 147 at all and this view finds support in a case reported in *Sabir Husain* v. *Emperor* (3). But that does not dispose of the difficulty. The question is, is the second part of the sentence quoted above applicable to any particular kind of voluntary use, etc.?

Now, rioting—section 146 is an intensification of an unlawful assembly section 141 and the common objects enumerated in 141, (No. 5) is by means of criminal force or show of criminal force to compel any person to do what he is not legally bound to do and section 350 is the definition of criminal force. Section 351 is the definition of assault, of which criminal force is undoubtedly an ingredient, Mr. Kesava Iyengar has ingeniously attempted to persuade me that criminal force in sections 141 and 146 must be essentially different from the criminal force in sections 350 to 352. He says that in section 146 the force or violence used by an unlawful assembly is of indeterminable character, *i.e.*, not directed against any particular person as long as it is enough to cause—or to cause a threat of—a disturbance of public tranquillity; that will bring it within section 146. But he says that in order to establish an offence against section 352, the general or indeterminate force in 146 is not sufficient and a specific charge of using that criminal force as against a determinate person is imperative. There are cases, as I have pointed out above, which were cited to me with regard to sections 147 and 323 though we have a doubt expressed by Napier, J. in *Mongalu Aorodhono Hathi, In re* (4) as to whether section 323 is not a minor offence under section 147. I think there is no doubt that criminal force being an element of the offence of 146, it must be taken to be capable of

(1) 5 Ind. Cas. 145; 33 M. 264; 7 M. L. T. 79: 20 M. L. J. 84; 11 Cr. L. J. 49.
(2) 9 Ind. Cas. 455; 12 Cr. L. J. 82.
(3) 63 Ind. Cas. 157; 19 A. L. J. 487; 3 U. P. L. R. (A.) 101; 22 Cr. L. J. 621.
(4) 41 Ind. Cas. 828; 18 Cr. L. J. 860.

carrying a conviction under section 352. I am not satisfied that a different *mens rea* is necessary in 146 as contrasted with section 352. In any case, I am inclined to think that this is an instance in which section 535 of the Criminal Procedure Code may fairly be brought into play. The whole of the defense evidence was let in in the Court of the first instance and was disbelieved. It was also disbelieved in the lower Appellate Court. Under these circumstances, I am unable to say that the convictions of accused Nos. 4, 5 and 7 are illegal and, in my view, these convictions must be confirmed and the criminal revision petition dismissed with regard to accused Nos. 2 and 3, their convictions must be quashed and the fines, if levied, refunded.

M. C P.

Petition dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 50 OF 1922.

February 10, 1922.

Present:—Mr. Justice Ryves.

BOHRA BIRBAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 174—Summons—Illness—Non-attendance, when offence—Sufficient cause.

If a person is sufficiently incapacitated by illness to have given up his ordinary avocations, this is sufficient excuse for him not to attend a Court in obedience to a summons. If he is so ill that his absence cannot be regarded as a wilful disobedience to the Court's order, the fact that he does not send a man to inform the Court of his illness does not render him liable to punishment.

Criminal reference made by the Sessions Judge, Agra.

FACTS appear from the following referring order:

"Bohra Birbal applies for revision of an order of a Magistrate imposing a fine for an offence under section 174 of the Penal Code.

"There appears to be no doubt that the applicant was summoned and that he did not appear. He pleaded that his failure to attend was not wilful disobedience, but that he was prevented by illness. The Magistrate has not given any finding as to whether he accepted the evidence that the applicant was ill, but he has said that he might have sent an excuse to the Court, as he was living in the same town, or that probably he was not so ill that he could not have attended the Court in a conveyance.

"I refer this case as it appears to me that the Magistrate has taken an incorrect view as to the degree of necessity to obey a summons. He seems to have thought that if a person summoned to a Court was unwell, but at the same time was not so dangerously ill that he could not be moved, failure to attend would be punishable under section 174. I think that this is wrong. It appears to me that if a person is sufficiently incapacitated by illness to have given up his ordinary avocations, this would be sufficient excuse for him not to attend a Court in obedience to a summons. If the applicant was so ill that his absence could not be regarded as a wilful disobedience to the Court's order, the fact that he did not send a man to inform the Court of his illness, would not render him liable to punishment, though it might show that he was not endowed with the virtue of politeness. I, therefore, submit the record to the High Court with a recommendation that the conviction be set aside."

JUDGMENT.—For the reasons given by the learned Sessions Judge, I accept the reference, acquit the accused and direct that the fine, if paid, be refunded.

J. P.

Reference accepted.

SOHAN SINGH v. RIDDICK.

LAHORE HIGH COURT.
CIVIL REVISION PETITION
No. 160 OF 1921.
November 12, 1921.
Present:—Mr. Justice Campbell.
SOHAN SINGH AND ANOTHER—
DEFENDANTS—PETITIONERS
versus
LIEUTENANT-COLONEL G. B. RIDDICK—
PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 20, 21—Place of suing—Breach of contract—"Carries on business," meaning of—Failure of justice.

Plaintiff, residing at Sialkot, leased a house situate at Murree, from defendants, who resided at Rawalpindi The negotiations were carried on by correspondence between the parties and at some stage the plaintiff posted a cheque to the defendants from Sialkot It was found that defendants leased out certain property which they owned at Sialkot, through an agent Plaintiff sued defendants at Sialkot for damages for breach of contract:

Held, (1) that the contract was formed at Rawalpindi; [p. 865, col. 2.]

Muhammad Shafi v. *Karamat Ali*, 76 P. R 1896 and *Firm of Asa Ram-Kalu Ram* v. *Firm of Bakhshi Ram-Kanahyia Ram*, 53 Ind. Cas. 331; 1 L. 203, followed.

(2) that the breach, if any, had taken place at Murree; [p. 866, col 1.]

(3) that the mere posting of the cheque by the plaintiff from Sialkot did not have the effect of completing the contract at Sialkot; [p 865, col. 2]

(4) that it was doubtful whether the mere leasing of house property at Sialkot by the defendants through an agent amounted to carrying on business at Sialkot within the meaning of section 20 of the Civil Procedure Code; [p 866, col. 1]

(5) that, therefore, the Sialkot Courts had no jurisdiction to entertain the suit, but that as there was no failure of justice in consequence of the suit having been tried at Sialkot, objection as to place of suing could not be sustained by High Court by reason of section 21 of the Civil Procedure Code [p 866, col. 1.]

Petition, under section 44 of Act IX of 1921, for revision of a decree of the Judge, Small Cause Court, Sialkot Cantonment, dated the 3rd January, 1921.

Mr. *M. S. Bhagat*, for the Petitioners.

JUDGMENT.—This petition for revision arises out of a suit tried by the Judge, Small Cause Court, Sialkot Cantonment, in which the plaintiff was Lieutenant Colonel G. B. Riddick, R. A. M. C, and the defendants Sohan Singh and Mohan Singh, house proprietors, residing at Rawalpindi.

The subject-matter of the suit was the plaintiff's tenancy for the summer of 1920 of a house at Murree owned by the defendants.

In brief, the plaintiff's claim was that the defendants had misrepresented the condition, capacity and furnishing of the house, that in consequence he had been put to the extra expense of bringing up supplementary furniture from Sialkot, and that he had suffered a loss of half the rent of Rs. 1,300 on an arrangement between himself and another officer that they were to share the house. The plaintiff stated that he had paid Rs. 650 to the defendants on 4th February 1920, and he claimed to set off his loss of half the rent against this sum and asked for a decree for Rs. 300. The Judge, Small Cause Court, granted him a decree in accordance with his prayer.

The first point taken for the defendant-petitioners is, that the Sialkot Court had no jurisdiction to hear the suit.

The contract between the parties appears to have been effected by correspondence between the plaintiff writing from Sialkot and the defendants writing from Rawalpindi. Admittedly, the respective residences of the parties are at these two places. The correspondence, with the exception of a letter from the defendants to the plaintiff dated 24th February 1920, is not on the record. The lower Court accepts it as proved (and it is not disputed) that Lieutenant-Colonel Riddick sent the defendants a cheque for Rs. 650 from Sialkot on the 4th February 1920 and found that the suit could have been brought at Sialkot because "the defendants carried on the business of house owners, themselves or their agents," there as well as at Rawalpindi and Murree, because the plaintiff resided there, because he paid the money there, and because he might just as easily have paid the money to the defendants' Sialkot agent.

It does not appear to me that the posting of the cheque by the plaintiff from Sialkot at some stage in the negotiations not made clear would have the effect of completing a contract at Sialkot. On the information before me it must be held, following *Muhammad Shafi* v. *Karamat Ali* (1) and *Firm of Asa Ram-Kalu Ram* v. *Firm of Bakhshi Ram-Kanahyia Ram* (2), that the contract was made at Rawalpindi. The plaintiff's cause of action was the contract

(1) 76 P. R. 1896.
(2) 53 Ind. Cas. 331; 1 L. 203.

and its alleged non fulfilment. The latter certainly took place at Murree, if it did take place, and no part of the plaintiff's cause of action can be said to have taken place at Sialkot. The plaintiff's place of residence is immaterial.

It remains to be seen whether the defendants carried on business within the meaning of section 20, Code of Civil Procedure, at Sialkot. Their Counsel before me admits that they own houses at Sialkot which their agent leases on rent. There is no evidence on the record giving further information. Although the rulings quoted by Counsel for the petitioners *Nobin Chunder* v. *Buroda Kant* (3), *Anonymous case* (4) and *Gosvami Shri* v. *Shri Govardhanlalji* (5) are not exactly in point and no direct authority against the lower Court's finding is quoted, I think it doubtful whether the mere leasing of house property through an agent can be said to be "carrying on business." In default of further light upon the actual dealings of their Sialkot agent on behalf of the defendants, I am not prepared to say that they carry on business at that place. The suit, therefore, was not properly instituted at Sialkot.

The further question arises, whether there was a consequent failure of justice. Since, under section 21 of the Code of Civil Procedure, the objection as to the place of suing cannot be sustained by this Court unless such is made out.

The suit was first decided *ex parte* but the *ex parte* decree was subsequently set aside and the defendants were represented by Counsel. The witnesses summoned by them did not appear but they were expressly given up. Counsel cross examined the plaintiff's witnesses and was heard in argument and there is no complaint before me that the defendants were prejudiced in not being able to present their case properly.

It is urged, however, that the learned Judge, Small Cause Court, imported into his judgment his own ideas or knowledge regarding the management of the defendants' house property at Sialkot, and allowed himself to be influenced by irrelevant evidence regarding that management in coming to a decision about what happened at Murree, a totally different place. There are certainly some remarks in the judgment which might have been omitted but on going through the record of evidence I find that there is material to justify the lower Court's findings, apart from anything which has been said about the Sialkot property. There appears to me to have been no failure of justice in consequence of the suit having been tried at Sialkot.

The other points argued for the petitioners are that there is no material on the record showing that the defendants represented the house as fit for the occupation of two families, or that the plaintiff spent Rs. 30 in bringing up furniture to supplement what was found deficient on the defendants' list. On the latter point the lower Court has chosen to believe the plaintiff who went into the witness box. On the first point it has believed the evidence of Captains Fletcher and Harris, both Medical Officers, regarding the unfitness of the house for habitation and the defects in the furniture, and the lower Court's construction of the defendants' letter of 24th February 1920 as representing that the house was in habitable condition and actually furnished with the articles detailed, cannot be called unreasonable.

I am not prepared to interfere on revision and I dismiss the application with costs.

Z. K.

Application dismissed

(3) 19 W. R. 341.
(4) 23 W. R. 223 at p. 224.
(5) 14 B. 541; 7 Ind. Dec. (N. s.) 825.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 328 AND 197 OF 1918 AND 197 OF 1919.

July 22, 1921.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Buckland.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

Moulvi WAZED ALI KHAN PANI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Alluvial land—Suit for possession—Re-formation in situ of permanently settled estate—Thak *and Survey*

maps, state of things described in, evidentiary value of—Burden of proof—Quinquennial papers, Hakikat Chauhaddi *papers and hand-sketches drawn on their basis, evidentiary value of—Miscalculation or mis-statement in returns, if can defeat title to estate—Adverse possession of waste lands, nature of—Dispossession of trespasser by* vis major *of floods—Constructive possession of true owner—Revenue sale—Adverse possession against purchaser, when commences to run—Suit to recover possession by plaintiff who became entitled to possession on determination of limited estate—Limitation Act (IX of 1908), Sch. I, Arts.* 140, 142, 144.

It cannot be presumed as a matter of law that the state of things described in the *thak* and Survey maps existed at the time of the Permanent Settlement The question, what lands were included in the Permanent Settlement, is a question of fact and not of law which may or may not be satisfactorily proved by subsequent Survey maps. The onus of proving that any particular lands were included in the Permanent Settlement of 1793 is on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the *thak* and Survey maps showing that specific lands are included in a particular estate The *thak* and Survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement [p 8 9, col 2.]

Jagadindra Nath v. *Secretary of State for India*, 30 C. 291; 7 C W. N. 193; 5 Bom L. R. 1; 0 I. A. 44 P. C.) and *Ananda Hari Basak* v. *Secretary of State for India*, 3 C. L. J. 316, followed.

The quinquennial papers prepared by the Revenue Authorities under the provisions of Regulation XLVIII of 1793 are admissible in evidence. [p. 870, col 2.]

Shoshi Bhooshun Bose v. *Girish Chunder Mitter*, 20 C. 940; 20 Ind Dec N. s 6 0, followed.

The *Hakikat Chauhaddi Bandi* papers are boundary papers prepared by the owners of the estates and submitted to Government [p 870, col 2.]

Reliance can be placed upon hand-sketches drawn by the parties on the basis of the information derivable from the quinquennial papers and the *Hakikat Chauhaddi* papers. [p 87', cols. 1 & 2.]

Haradas Acharjya Chowdhuri v *Secretary of State for India*, 43 Ind. Cas. 361; 22 M. L. T. 438; 26 C. L. J. 590; (1918) M. W. N. 28; 20 Bom. L. R. 49 (P. C.) and *Secretary of State for India* v. *Kalika Prosad*, 14 Ind. Cas. 609; 15 C. L. J. 281, relied on.

Importance cannot be attached to the areas of the Mouzas as mentioned in the quinquennial papers If, in fact, the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate. [p. 872, col. 1.]

Haradas Acharjya Chowdhuri v. *Secretary of State for India*, 43 Ind Cas. 361; 26 C. L. J. 590; 22 M L. T. 438; (1918) M. W. N. 28; 20 Bom L. R 49 (P. C.), relied on.

The nature of the possession required in an adverse possessor of waste lands sufficient to take the title out of the true owner, is that it must be adequate in continuity, in publicity, and in extent of area [p 874, col. 2.]

Radhamoni Debi v. *Collector of Khulna*, 27 C. 943; 4 C. W. N. 597; 2 Bom. L. R. 592; 7 Sar. P. C. J. 514; 27 I A. 136; 14 Ind Dec. (N. s) 6 7 (P. C.), *Jogendra Nath Rai* v. *Baldeo Das*, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735, *Basanta Kumar Roy* v. *Secretary of State*, 40 Ind. Cas. 337; 41 C. 855; 1 P. L. W. 593; 32 M L. J. 505; 21 C W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P. C.), relied on.

No rational distinction can be drawn between cases where re-formed land is after a few years again submerged by the flood for a time, and cases where the re-flooding is seasonal and occurs for several months in each year. [p. 874, col. 2.]

On the dispossession of a trespasser by the *vis major* of floods, the constructive possession of the land is in the true owner, in other words, the land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. [p. 874, col. 1.]

Secretary of State for India v *Krishnamoni Gupta*, 29 C. 518 (P C. ; 6 C. W. N. 617; 4 Bom. L R 547; 8 Sar P. C J. 269; 29 I. A. 104 (P. C.) and *Trustees and Agency Co* v. *Short*, (1888) 13 A. C. 793; 58 L. J P. C 1; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132, followed

In a sale held under Act XI of 1859 what is sold is not the interest of the defaulting owner which is determined on the failure to pay the Government assessment but the interest of the Crown subject to the payment of the Government assessment, and, therefore, the period of limitation for adverse possession against the purchaser at such a sale only commences to run from the date of the sale. [p 875, col 1.]

Surja Kanta Acharjya v *Sarat Chandra Roy* 25 Ind. Cas. 3 9; 20 C. L J 563; 18 C. W. N. 1281; 16 M. L. T. 290; 27 M. L. J 365; 1 L. W. 807; (1914) M. W. N. 757; 16 Bom. L. R 925 (P C. , relied on.

A suit to recover possession of a land from a trespasser by the plaintiff who became entitled to possession only after the determination of a limited or particular estate held by another, whatever its precise nature might have been, and when that estate did not fall into possession until the death of the holder of the limited estate, is governed by Article 140 of Schedule I to the Limitation Act. In such a case Article 142 cannot apply where the plaintiff was never in fact dispossessed; nor can Article 144 apply, as possession of a trespasser cannot be deemed adverse against a person not entitled to be in possession at that time. [p 875, col. 2.]

Appeal against a decree of the Subordinate Judge, Pabna, dated the 8th July 1918.

Babus *Ram Charan Mitra* and *Surendra Nath Guha*, for the Appellant.

Dr. *Dwarka Nath Mitter* and Babu *Manindra Lal Banerjee*, for the Respondents.

SECRETARY OF STATE FOR INDIA *v.* WAZED ALI KHAN PANI.

JUDGMENT.

MOOKERJEE, J.—The subject matter of the litigations which have led up to the present appeals is an extensive tract of alluvial land and covers an area of about six thousand *bighas* The plaintiffs in the two suits so messed below claim title to different shares in this tract of land. It is not necessary for our present purpose to set out in detail the shares claimed by these persons respectively; it is sufficient to state that the plaintiffs taken together as a body claim to be entitled to the disputed lands as reformation *in situ* of the permanently settled estates Nos. 26, 31 and 774 461 of the Mymensing Collectorate. The two last named estates have been transferred to the district of Pabna and bear Nos. 343 and 907 on the Revenue Rolls of the Collectorate of that district. These three estates comprised lands in the two districts, and the subject-matters of the two suits are situated in the Pabna district. The case for the plaintiffs in both the suits is, that these three estates which are permanently settled include the disputed lands as comprised within the Mouzas and Paras (villages and their hamlets) mentioned in the plaint, namely, Mouza Argyola including its Para Mehernagar, Mouzas Purbapara, Raneepur, Habbaspur, Dighalia, Idil Jangalia, Javariapara, Mouza Gajansahar, known as Laskarpur, including its Para Sonekalsi, Kismat Kathenga, Kismat Matiahati, Mouza Kowapara or Kowabari, Mouza Kole, Mouza Noada or Gopalbari including its Para Majitbari. The plaintiffs assert that their predecessors-in-interest were in possession of these Mouzas from the time of the Permanent Settlement, that while they were in possession, some of the Mouzas were wholly and others were partly washed away by the strong current of the river Jamuna (a section of the river Brahmaputra) before the Thak and Revenue Surveys, that accordingly they could not be surveyed by the Revenue Authorities at the time except in so far as there were dry lands not submerged in the river, that the lands subsequently re-formed from time to time, and that when the lands emerged from the river and became fit for occupation possession was wrongfully taken on behalf of the Secretary of State. On these allegations the plaintiffs seek to recover possession with mesne profits. The claim was contested by the Secretary of State on the allegation that the suits were barred by limitation and that the disputed lands did not form part of the Mouzas mentioned in the plaints as comprised in the three permanently settled estates Nos. 26, 333 and 907. It was further asserted that in 1891, an island *chur* (subsequently named Chur Bell) was discovered in the bed of the Jamuna or Brahmaputra which is a public navigable river so that its bed was not the property of any individual, but belonged to Government; the disputed lands in reality formed part of this *chur* and of the accretions thereto. On these pleadings, eight issues were framed in the following terms and were set down for trial:—

(1) Is the suit barred by special limitation?

(2) Is the suit barred by general limitation?

(3) Have the plaintiffs acquired a right by adverse possession of the disputed lands for over sixty years?

(4) Do the disputed lands appertain to the several Mouzas claimed by the plaintiffs and are those lands permanently settled with them and have the plaintiffs any right to the Mouzas and their Paras, as mentioned in the plaints?

(5) Is the allegation of diluvion and alluvion as given in the plaint correct?

(6) Is the description of the disputed lands and Mouzas as given in the plaints correct?

(7) Is Mehernagar a Para of Argyola? Does Mouza Sonekalsi belong to the plaintiffs? Does Majidbari belong to the plaintiffs and is it a Para of Gobalbari? Is Para Matiahatte the same as Mouza Matiahatte and does Matiahatte belong to the plaintiffs? Is Gajansahar another name of Laskarpur with Para Sonekalsi? Is the disputed land part of Gajansahar or Sonekalsi?

(8) Is the plaintiff entitled to get any *wasilat*? If so, how much?

The Subordinate Judge appointed a Commissioner for local investigation, who submitted with his report a case map after relaying the Revenue Survey maps of the several Mouzas the Dearah Survey map, the Settlement map of Chur Bell and of Chur Sahapur. The Commissioner came to the conclusion that Chur Bell of 1901 falls within the disputed lands and occupies the site of

what was the entire bed of the river Jamuna at the time of the Revenue Survey with small encroachments on the Revenue Survey Mouzas Dighulia, Idil Jangalia and Tookra Gohalbari No. 2 on the east bank, on Mouza Matiahatte on the south, and on Saray Mouzas Khidder, Kathenga, Kole, Habbaspur, Raneepur, Laskarpur and Parbapara on the west. No exception was taken to the accuracy of the map and report submitted by the Commissioner, and the Subordinate Judge consequently accepted them as correct. On their basis, taken along with the voluminous evidence on the record, the Subordinate Judge held that the lands in suit were comprised within Mouzas Parbapara, Argyola, Mehernagar, Gajansahar, or Laskarpur with Para Sonekalsi, Raneepur, Habbaspur, Kole, Jangalia, Kathenga with Matiahati, Gohalbari and Majitbari, Asabpur or Asarpara and Chuk Jangalia and Chuk Gohalbari and Dighalia. The Subordinate Judge also found that Mouza Argyola, including its Para Mehernagar, Mouza Parbapara, Mouza Gajansahar or Laskarpur with its Para Sonekalsi, Mouzas Raneepur, Habbaspur, Dighulia, and Idil Jangalia appertain entirely to estate No. 26, that eight annas of Mouza Kathenga, including its Para Matiahati, the twelve annas of Mouza Kowabari and the eight annas of Javariapara are also comprised in estate No. 26, and that the remaining eight annas of Kismat Kathenga, including its Para now Mouza Mattiahatte, the entire Mouza Kole and Noada known as Gohalbari are comprised in estate No. 344 and the remaining four annas of Kowabari to estate No, 907. The Subordinate Judge also held that the plaintiffs had failed to establish their alleged right to Majitbari and to prove that it is a Para of Gohalbari Upon the question of limition, the Subordinate Judge found in favour of the plaintiffs except as to a small portion. On these findings, the Subordinate Judge decreed the suits in part. On the present appeals, the decrees of the Subordinate Judge have been challenged substantially on two grounds, namely, first, that the plaintiffs have failed to establish their title to the disputed lands as appertaining to Argyola. Meherdanga Laskarpur, Kathenga and Gohalbari and, secondly, that the claim is barred by limitation.

As regards the question of title, the case for the Secretary of State was that the plaintiffs must be restricted to the lands shown as included within their permanently settled estates in the Thak and Revenue Survey maps. This position is clearly untenable As was pointed out by their Lordships of the Judicial Committee in *Jogadindra Nath* v. *Secretary of State for India* (1) and by this Court in *Ananda Hari Bisak* v. *Secretary of State for India* (2), it cannot be presumed as a matter of law that the state of things described in the Thak and Survey maps existed at the time of the Permanent Settlement. The question, what lands were included in the Permanent Settlement, is a question of fact and not of law which may or may not be satisfactorily proved by subsequent Survey maps. The onus of proving that any particular lands were included in the Permanent Settlement of 1793 is clearly on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the Thak and Survey maps showing that specific lands are included in a particular estate. The Thak and Survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement. In the case before us, it appears that at the time of the Revenue Survey maps, Beal Kamlai and Argyola, Goyla Dabu in the north lay wholly or mostly under water, but that the limits of these Mouzas were shown in the Revenue Survey map; it further appears that Argyola, Goyla Dabu lay to the east of Beal Kamlai and that to the east of Argyola Goyla Dabu lay on the east bank the Mouza Meererpara, and to its east, Mouza Argyola of Isafsahi, and on the west of Beal Kamlai, lay the village of Hatboyra on the west bank, and that between Hatboyra on the west and Meererpara on the east, flowed the main channel of the river Jamuna, and that as the river ran from there southwards, it had on its east bank, Mouza Dighulia, to the south of Meererpara, Mouza Edil Jangalia and Tookra Gohalbari No. 2, both lying to the south, one after the other, of Dighulia;

(1) 30 C. 291; 7 C. W. N. 193; 5 Bom. L. R. 1; 30 I. A. 44 (P. C.).
(2) 3 C. L. J. 316.

on the west bank of the river opposite the Mouza Meererpara from the north to Mouza Tookra Gohalbari No. 2 to the south lay then the Mouzas Purbapara, Laskarpur Raneepur, Habbaspur, Kathenga and Khidder, from north to south, while between Kathenga and Khidder on the one side and Tookra Gohalbari No. 2 on the other bank, lay a portion of Mouza Matiahattee, while the other portion of the last named Mouza was situate south of Tookra Gohalbari No. 2 up to Koriapukur to the east; Matiahattee though shown in the Mahalwar map of 1857, as within certain limits, seems to have been partly under water at the time of the Revenue Survey. The case map further shows that the river Jamuna flowed between the Mouzas on the east and those on its west bank there and that Matiahatte was the southernmost Mouza; that to the east of Edil Jangalia lay the surveyed Mouza Javariapara or Jarariapara, to its east lay Mouzas Tookra Gohalbari No. 1 and Chuck Jangalia, one after the other, and that to the east of Chuck Jangalia as well as of Mouza Dighulia lay Mouza Soloso Jangalia; Mouza Kowapara or Kowabari was also surveyed at the Revenue Survey and lay east of Javariapara and Tookra Gohalbari No. 2 and to the south of Tookra Gohalbari No. 1 Chuck Jangalia and Soloso Jangalia; Mouza Rajnagar lay, according to the Revenue Survey, east of Dighulia and to the north or north-east of Soloso Jangalia. The plaintiffs assert that portions of Argyola with its Para Mehernagar, portions of Gajansahar Laskarpur with its Para Sonekalsi and portions of Mouza Kathenga with its Para Matiahattee and of Mouza Gohalbari with its Para Maidbari and the entire Mouza Jangalia were in the bed of the river Jamuna, at the time of the Revenue Survey, but were not measured or shown there and the plaintiffs would place the above named Mouzas in the bed of the river between the two banks, and they pointed out to the Commissioner, the bed of the river as at that time as the sites of these Mouzas. Such then was the position of the river Jamuna—a deep and navigable public river—at the time of the Thak and Revenue Surveys. The question arises, whether the lands in dispute which at the time of the Thak and Revenue Surveys were in the bed of this public navigable river formed part of the river bed at the time of the Permanent Settlement. If they were, it is improbable in the highest degree that they should have been settled with a private individual as included in his permanently settled estate. To elucidate the antecedent history of this tract of land, five sets of documents have been produced. The first of these documents is a plan referred to throughout as Rennel's map. This was made by Major Rennel as part of a Survey which was conducted by him between the years 1764 and 1773. The map now under consideration is stated to have been prepared about the year 1781. The map itself does not purport to give the boundaries of different Mouzas nor indeed to define their position with any exactness. It appears that the map was prepared rather for the purpose of showing the roads and the waterways than of locating villages, and consequently the description and definition of the different places is only necessary in relation to the rivers and the roads. The second class of documents consists of quinquennial papers prepared by the Revenue Authorities from 1795 to 1799 under the provisions of Regulation XLVIII of 1793. These contain information as to the lands comprised in revenue paying estates in the District of Mymensingh and were clearly admissible in evidence on the authority of the decision in *Shoshi Bhooshun Bose* v. *Girish Chunder Mitter* (3). The third set of papers is described as *Hokikat Ohauhaddi Rundi* papers which, as pointed out by the Judicial Committee in *Haradas Acharjya Chowdhuri* v. *Secretary of State for India* (4), are boundary papers prepared by the owners of the estates and submitted to Government. The precise purpose for which they were prepared in 1821 cannot be ascertained beyond doubt at this distance of time, but this is clear that they were not voluntary. They were made, under Regulation I of 1819 read with Regulation V of 1816, section 7, clauses 5 and 8, on a Government form in pursuance of a Government request and to afford the Government satisfactory information upon the various questions to which they furnish answers inclusive of the names of proprietors the names and boundaries of Mouzas, the local boundaries of Perganas, the number and names of villages and estates, the articles of produce,

(3) 20 C. 940; 10 Ind. Dec (N. s) 630.
(4) 43 Ind Cas. 320; 22 M. L. T 438; 26 C. L. J. 590; (1918, M. W. N. 28; 20 Bom. L. R. 49 (P. C.).

the rates of rent, the rules and customs established in each Pergana and all like local infromation: the duty to report to the Collector the death of every *sadar malguzar* and the names of their heirs clearly implies an authority, if not obligation, to keep a record of the names of proprietors in possession. The fourth document is a map prepared in 1831 by Lt. Wilcox. The fifth document is a map prepared for Settlement purposes by one Sambhu Charan Singh in 1845, six years before the Revenue Survey Map of 1851. If now we re-call the fact that the Decennial Settlement made in 1788 was transformed into the Permanent Settlement in 1793, it is manifest that we have materials for a fairly continuous history of the disputed locality for a period of seventy years from 1781 to 1851. The general features of the locality may be visualised with fair approach to accuracy by the help of the two imaginary sketches or hand-sketches which have been drawn up by the parties on the basis of the information derivable from the quinquennial papers and the *Hakikat Chauhaddi* papers.

In view of the decision of the Judicial Committee in *Haradas Acharjya Chowdhuri* v. *Secretary of State for India* (4), which reversed the decision of this Court in *Secretary of State for India* v. *Kalika Prosad* (5), there can now be no question as to the propriety of placing reliance upon such hand sketches. The boundaries indicated in the two classes of revenue papers do help the Court to form an idea of the relative situation of the Mouzas and to fix the location of their external boundary, taking them in the aggregate. The circumstance that the Mouzas do not form an absolutely compact block does not necessarily vitiate the method of investigation which met with the approval of the Judicial Committee in *Haradas Acharjya Chowdhuri* v. *Secretary of State for India* (4). In the case before us, the Mouzas are sufficiently proximate to justify the application of that method, and we are of opinion that the hand-sketch prepared on behalf of the plaintiffs approximates more closely to the actual relative situation of the Mouzas than the hand-sketch prepared on behalf of the defendant. After examination of Rennel's map, Wilcox's map and Sambhu Charan Singh's map with the help of the hand-sketches prepared on the basis of the information derivable from the quinquennial papers and *Hakikat Chauhaddi* papers, we have arrived at the conclusion that the inference drawn by the Subordinate Judge is correct. According to Rennel's map, the river Brahmaputra used to flow in its main channel, through what is now known as the District of Mymensingh, and one of its branches—a much smaller stream than the main channel—flowed through the tract, which became subsequently known as the districts of Bogra and Pabna: this branch bore in its upper course the name of Jenai and in the lower or southern portion, the name of Jamuna; another river used at that time to pass through the two districts of Bogra and Pabna, and it had three names in its three different parts; at the extreme north, it was known as the Bangala river, in the middle, as the Ichamati, and in its lower part, the Konai; the Jamuna or the Jenai and the Konai were connected with each other by a small streamlet joining them near a place called Nalthi, but the Jamuna and the Konai were separate rivers and used to flow parallel to each other but at a distance one from the other; the two rivers were about 8 to 10 miles apart. This Konai was not, therefore, a branch of the rivers Brahmaputra at that time. Even if it was a branch of the Brahmaputra, Konai was a separate stream from Jenai or Jamuna, and there is nothing in the record to show that the Jenai or Jamuna was at any time known as Konai; from Wilcox's map, no doubt, it appears that a river which was at the time apparently the main channel of the Brahmaputra, bore the name of Jenai and that it had spread out into two branches, at a spot much above Sarajgunje, and the western of the two branches was known as the Konai; this bifurcation began at a spot much higher up stream, from where the Konai of Rennel's map was connected with the Jamuna and at a considerable distance to the north of the spot where the *Hakikat Naksa* Konai can be located; besides, Wilcox's river Jenai bore the name of Jamuna at its southern extremity; so Wilcox's Jenai or Konai was not the Konai of Rennel or of the *Hakikat Naksas* A comparison of the Survey map with the other maps goes to show that the river Jamuna did not flow over the disputed lands at the time of the Permanent Settle-

(5) 14 Ind. Cas. 609; 15 C. L. J. 281.

ment. The map prepared by Sambhu Charan Singh on behalf of the Government shows that the river Jamuna used to flow east of Asli Kowapara and east of the newly formed *chur* and east of Dighulia; both Dighulia and Kowabari or Kowapara were surveyed at the Revenue Survey when the river Jamuna was flowing west of Dighulia and Kowapara; so the bed of the river Jamuna, at the time of the Revenue Survey in 1852 53 was not its bed in 1845, but the river had moved after 1845 westwards to its position in 1852-53; then we have got Lieutenant Wilcox's map and it shows the river running east of Kowapara and Shahapur and at a distance to the east of Kariapukur; at the time of Sambhu Singh's map, the river had thrown up *churs* east of Kowapara, and so, it had at that place shifted or shrunk a little towards the east from its position at the time of Wilcox's map of 1830 31. Then, Wilcox's map shows that Argyola lay at a distance to the west of the river, and near a small stream flowing into it; now, according to the *Hakikat Naksas* of 1820-21, the river Konai ran between Argyola Mehernagar to the east and Purbapara to the west; so it flowed west of Argyola; but the river Jamuna or Jenai of Wilcox flowed to the east of Argyola and at a distance from it, so it did not flow between Argyola to the east and Purbapara to the west, and so the Konai of the *Hakikat Naksas* did not at the time (1830-31) form part of bed of the river Jamuna or Brahmaputra: the Konai of *Hakikat Naksas* passed between Argyola and Purbapara but did not pass through or near Kowabari, and so, it could not be the river Jamuna or Jenai of Wilcox's map. Thus, we get it that in 1830 31, the river Jamuna or Brahmaputra or Jenai did not flow over the lands over which it flowed in 1852-53, but passed over lands lying at a distance to their east. Then, from Rennel's map we get it that the river Konai passed near a place called Belkuchi and that the river Jamuna flowed at a distance of 8 or 10 miles to the east; the Mouzas in dispute are much nearer to Belkuchi than to the river Jamuna of Rennel's map, but there is no mention in Rennel's map of any river or waterway over the tract that was covered by the lands now in dispute and lay between these two rivers. At the time of the Revenue Survey, the river Konai of Rennel's map was existing, though as a small stream, and it still passed by Belkuchi, and the Survey Sheet map shows that a small stream or channel connected that Konai with the Jamuna at the time, and that it passed through or near Purbapara Mouza where it joined the Jamuna; the Sheet map also shows that a similar streamlet issuing from the river Jamuna north of Laskarpur, and after passing westwards, took a southerly course, and passed on southwards, past Mouza Kole, leaving it to the east. In the *Hakikat* hand-sketches filed by the parties, an arm of the river Konai is shown passing west of Kole, and, according to the *Hakikat Naksa* papers, the river Konai also passed through Laskarpur or between it and Purbapara to the north. The plaintiffs urged that the river Konai of the *Hakikat Naksas* was a small off-shoot of the Konai of Rennel's map and that the portion of it that had formerly passed between Purbapara and Argyola, had got engulfed in the big current of the river Jamuna after it had moved from east to west from its position in 1830 31 to its bed at the time of the Revenue Survey in 1852-53; they further urged that it was a very small stream and not a deep or navigable river and was part of the property of the owners of the Mouzas on its banks. We are of opinion that this is the correct view to take of the case. There is no mention of any river between the Konai and the Jenai in Rennel's map, and Wilcox's map does not show that the river Jamuna or Brahmaputra used to flow over the lands now in suit, but it ran at a distance to the east; on the other hand, it is clear that the bed of the river at the time of the Revenue Survey, was not its bed in 1845, and that in 1830-31, the river flowed very near its bed of 1845. If there had been any deep or navigable river between the Mouzas claimed by the plaintiffs, mention would certainly have been made in any of the available maps of Rennel, of Wilcox and of Sambhu, but there is not the least reference to any such thing in any of them. Considering these and other matters, we are of opinion that the evidence in the case shows that the lands in dispute were comprised in the Mouzas mentioned in the plaint and the two or three other Mouzas stated above. We may add that the river Konai of *Hakikat Naksas*, did not pass near or through the southern Mouzas of the said *Naksas*, and the Mouzas Kathenga, with Para Matiahatte, Gobalbari

with Para Majidbari, Mouza Jangalia, Asabpur or Asurpara, Chuck Jangalia, Chuck Gohalbari and Dighulia formed in 1820 21, a compact tract between Bhangabari, Ghote Dhul, Khidder and Chapra to the west and Ranjagar and Soloso Jangalia to the east; in that year no river passed through this tract; even if the river Konai of the *Hakikat Naksa* were held to be the river Jamuna or any other public river, the portion of the disputed land, lying between these two western and eastern boundaries and forming a compact whole, must have formed part of the Mouzas lying between them, as mentioned in the *Hakikat Naksa* papers. In fact, it is clear that in 1781 Konai was a small river distinct from the Brahmaputra and several miles distant from it: in 1831 Brahmaputra or Jamuna had moved westwards, and in 1845 had overflowed the lands now in dispute. There is no foundation for the suggestion that the Konai itself was a public navigable river at the time of the Permanent Settlement. In this connection, the observation of the Judicial Committee in *Haradas Achar ya Chowdhuri* v. *Secretary of State for India* (4), may be repeated, that there is no copy of the *sanad* grant at the date of the Permanent Settlement, nor of the *kabuliyat* nor indeed of any intermediate documents affecting the title, but this is rather the misfortune than the fault of the plaintiffs. Importance also cannot be attached to the areas of the Mouzas as mentioned in the quinquennial papers; there is nothing to show that at the time of the preparation of the papers, there was a public survey according to which the areas of the Mouzas permanently settled had been ascertained. Besides, as was pointed out by the Judicial Committee in *Haradas Acharjya Chowdhuri* v. *Secretary of State for India* (4), if, in fact, the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate. As the Subordinate Judge has pointed out, the evidence in this case leads to a conclusion which is in conformity with a statement in a well known work of authority (Hunter's Statistical Accounts of Bengal, Volume VIII, page 141): *Secretary of State for India* v. *Shanmugaraya Mudaliar* (6), *Steamship Dra chenfels, In the matter of the* (7). It is stated there that in 1811 that is, about thirty years after the publication of Rennel's map in 1781, the change of course of the river Brahmaputra had begun to be effected. Rennel's map shows that there was no public river just near the lands in suit which lay at a short distance from Belkuchi on or near the river Konai of Rennel's map; Wilcox's map shows that in 1830 31 the river Brahmaputra did not flow over them. The change in the course of the Brahmaputra consequently took place several years after the Permanent Settlement of 1793. This tends to support the plaintiff's case that this tract was dry land at the time of the Permanent Settlement and the lands must consequently have at that time formed part of the Mouzas pointed out by the plaintiffs to the Commissioner even though they may have been in part in the bed of the small rivulet Konai. We accordingly affirm the finding of the Subordinate Judge that the lands in suit were comprised within Mouzas Purbapara, Argyola, Mehernagar, Gajansahar *alias* Laskarpur with Para Sonekalso, Raneepur, Habbaspur, Kole, Jangalia, Kathenga with Matiahatte, Gohalbari and Majidbari, Asabpur or Asurpara and Chuck Jangalia and Chuck Gohalbari and Digulia, and that the bed of the stream Konai of *Hakikat Naksa* was part of the Mouzas through which it passed. We also affirm the finding of the Subordinate Judge that Mouzahs Argyola, including its Para Mehernagar, Mouza Purbapara, Mouza Gajansahar known as Laskarpur with its Para Sonekalsi Mouzas Raneepur, Habbaspur, Dighulia and Idil Jangalia appertain in entirety to estate No. 25, and 8 annas of Mouza Kathenga (Kismat) including its Para Matiahatte, surveyed as a Mouza, and a 12 annas of Mouza Kowabari and an 8 annas of Javaria-para are comprised in that estate, and that the remaining 8 annas of Kismat Kathenga including its Para, now, Mouza Matiahatte, the entire Mouzas Kola and Noada, known as Gohalbari, are comprised in estate No. 543 and the remaining four annas of Kowabari to the estate No. 907. The plaintiffs in each suit have got rights to the extent stated in the plaint, in the lands in dispute included in those

(6) 16 M. 369; 20 I. A. 80; 17 Ind. Jur. 274; 6 Sar. P. C. J. 296; 5 Ind. Dec. (N. S.) 964.

(7) 27 C. 360; 14 Ind. Dec. (N. S.) 562.

Mouza. The plaintiffs have got no right to Majidbari and have failed to prove that it is a Para of Gohalbari; they also have been unsuccessful in proving acquisition by adverse possession of any title to any of the lands in suit. It is not necessary to re state the evidence on this part of the case which has been analysed in minute detail with great accuracy by the Subordinate Judge. The summary of the evidence as given by him has been subjected to scrutiny in every particular and has not disclosed any flaw or error. We hold accordingly that the finding of the Subordinate Judge upon the question of title cannot be successfully challenged.

The question of limitation has been argued from a two-fold point of view, namely, first, that the plaintiffs have failed to prove possession or dispossession within twelve years of suit, and, secondly, that the plaintiff in suit No. 10 is not entitled to the benefit of either Article 140 or 144 of the Schedule of the Indian Limitation Act. In our opinion, neither of these contentions is well-founded. As regards the first branch of the argument, it is plain that the view taken by the Subordinate Judge must be upheld upon the authority of the decision of the Judicial Committee in *Secretary of State for India* v. *Krishnamoni Gupta* (8), which overruled the case of *Kally Churn Sahoo* v. *Secretary of State for India* (9) decided by a Full Bench of this Court in 1881. Lord Davey relied upon the earlier decision of the Judicial Committee in *Trustees and Agency Co.* v. *Short* (10) in support of the proposition that on the dispossession of a trespasser by the *vis major* of the floods, the constructive possession of the land is in the true owner; in other words, the land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. The Subordinate Judge has correctly held on the evidence that, except as regards a small portion, Chur Bell specified in his judgment, before the defendant could acquire title by adverse possession for the statutory period, the lands both of Chur Sahapur and Chur Bell became submerged in 1877, 1891, and 1901, so as to interrupt the adverse possession and the present suit has been instituted within twelve years from the date of the last emergence. The Subordinate Judge has also correctly applied the test as to the nature of the possession required in an adverse possessor of waste lands sufficient to take the title out of the true owner. Such possession must be, as stated by Lord Robertson in *Radhamoni Debi* v. *Collector of Khulna* (11), adequate in continuity, in publicity, and in extent of area to extinguish the title of the rightful owner. See also *Jogendra Nath Rai* v. *Baldeo Das* (12). To the same effect is the judgment of Lord Sumner in *Basanta Kumar Roy* v. *Secretary of State* (13) where it was pointed out that no rational distinction can be drawn between cases where re-formed land is after a few years again submerged by the flood for a time, and cases where the re flooding is seasonal and occurs for several months in each year. Both these contingencies have, as the Subordinate Judge correctly finds upon the evidence, happened in the present case. Consequently, when the land was re-submerged, whether for a period of years or only for a season, the possession of the Government determined, and while it remained submerged, no adverse possession could be deemed to continue so as to be available towards the ultimate acquisition of title by the Government against the true owner. As regards the second branch of the argument on the question of limitation, it is equally plain that the Subordinate Judge has correctly decided in favour of the plaintiff. The plaintiff in suit No. 10 relies on two circumstances, namely, first, that she is a purchaser from a purchaser at a sale for arrears of revenue, held on the 28th March 1898, and time does not run against her from before the date of the revenue sale; and, secondly, that as her predecessor-in-interest, her mother in-law had an interest for life only, time

(8) 29 C. 518; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269: 29 I. A. 104 (P C.).

(9) 6 C. 725; 8 C. L. R. 90; 4 Shome L. R. 95; 3 Ind. Dec. (N. S.) 470.

(10) (1888) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 182.

(11) 27 C. 943; 4 C. W. N. 597; 2 Bom. L. R. 592; 7 Sar. P. C. J. 514; 27 I. A. 136; 14 Ind. Dec. (N. S.) 617 (P. C.).

(12) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

(13) 40 Ind. Cas. 337; 44 C. 855; 1 P. L. W. 593; 32 M. L. J. 505; 21 C W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P. C.).

runs against her only from the date of the termination of such life interest, which took place within twelve years of the institution of the suit. Both these contentions are well-founded. As regards the first contention, reference need be made only to the case of *Surja Kanta Achar ya* v *Sarat Chandra Roy* (14) where the Judicial Committee ruled that, in a sale held under Act XI of 1859, what is sold is not the interest of the defaulting owner which is determined on the failure to pay the Government assessment but the interest of the Crown subject to the payment of the Government assessment, and, therefore, the period of limitation for adverse possession against the purchaser at such a sale only commences to run from the date of the sale. See also *Bilas Chandra* v. *Akshay Kumar Das* (15). As regards the second contention, it is clear that the plaintiff is entitled to the benefit of Article 140 of the Schedule to the Indian Limitation Act which provides that a suit by a remainder-man or reversioner for possession of immoveable property may be instituted within twelve years from the date when his estate falls into possession. The plaintiff has proved the deed of agreement dated 6th September 1865 between her husband and his adoptive mother, which was construed by this Court in the cases of *Dinamoni Chaudhurani* v. *Elahudad Khan* (16) and *Dinamoni Chaudhurani* v. *Elahadut Khan* (17). According to its provisions, the mother-in-law of the plaintiff (the adoptive mother of her husband) was to enjoy the properties of her adopted son for life; she was also to enjoy for life such immoveable properties as she might acquire out of the profits of the properties of her adopted son in her possession, and there is no donbt that the mother-in-law of the plaintiff purchased the shares in estates Nos. 26 and 348 out of such profits. Now, the husband of the plaintiff died on the 27th April 1897 and her mother-in law died on the 26th February 1900; the present suit was instituted on the 29th March 1910. It is thus plain that the plaintiff became entitled to possession only after the determination of the limited or particular estate held by her mother-in-law, whatever its precise nature might have been, and that estate did not fall into possession until her death, which, as we have seen, took place within twelve years before the suit. Article 142 cannot apply as the plaintiff was never in fact dispossessed; nor can Article 144 apply, as possession of a trespasser cannot be deemed adverse against a person not entitled to be in possession at that time. There is thus no bar to the application of Article 140, and if that Article applies, as we hold it does, the suit is not time barred. The view we take is in accordance with that adopted by this Court in *Promotha Nath Ray Chauahuri* v. *Dinamani Chaudhurani* (18).

The result is, that in each case the decree made by the Subordinate Judge is confirmed and the appeal is dismissed with costs. The cross-appeal is not pressed and is dismissed without costs.

BUCKLAND, J.—I agree.

B. N.

Appeals and Cross-Appeal dismissed.

(14) 25 Ind. Cas. 309; 20 C. L. J. 563; 18 C. W. N. 1281; 16 M. L. T. 260; 27 M. L. J 365; 1 L. W. 807; (1914 M. W. N. 757; 16 Bom. L. R. 925 (P. C.).

(15) 14 Ind Cas. 219; 15 C. L. J. 436; 16 C. W. N. 587.

(16) 7 C. W. N. 678.

(17) 8 C. W. N. 643.

(18) 65 Ind. Cas. 826; 24 C. L. J. 129.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 223 OF 1921.

March 4, 1922.

Present :—Mr. Batten, J. C.

SHIVPRASAD—APPLICANT

versus

SANTOOJI AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution—Auction sale—Encumbrance not mentioned in proclamation—Auction-purchaser, whether can apply to set aside sale.

SHIVPRASAD v. SANTOOJI.

An auction-purchaser is a person whose interests are affected by a sale within the meaning of Order XXI, rule 90 of the Civil Procedure Code and can, therefore, maintain an application under the rule for setting aside an auction-sale when an encumbrance existing on the property sold has not been mentioned in the sale-proclamation. [p 877, col. 1.]

Bhavirisetti Gopala Krishnayya v. *Pakanati Pedda Sanjeeva Reddy*, 55 Ind. Cas. 333; 38 M. L. J. 228; 11 L. W. 184; (1920) M. W. N. 152, followed.

Appeal against an order of the District Judge, Nimar, in Execution Civil Appeal No. 6 of 1921, dated the 26th July 1921.

Mr. *K. K. Gandhe*, for the Applicant.

Mr. *S. B. Gokhale*, for the Non-Applicants.

JUDGMENT.—In this case the auction-purchaser at a sale of a house in execution of a decree for sale in a mortgage suit has applied under Order XXI, rule 90, First Schedule of the Civil Procedure Code, to set aside the sale on the ground that, although the property was encumbered and the Executing Court had ordered the encumbrance to be mentioned in the schedule of the sale-proclamation, the encumbrance was not mentioned in the sale-proclamation.

The first Court held that, as the judgment-debtor had a saleable interest, the auction-purchaser's application did not lie. It made some observations on the merits, but did not really hold any enquiry. The District Judge in disposing of the appeal seems to have considered that the first Court decided the case on the merits and agreed with its decision, overlooking the fact that no proper enquiry had been made into the facts, but he also seems to have agreed with the first Court that an auction-purchaser cannot avail himself of the provisions of Order XXI, rule 90.

The only point that I have to decide is, whether or not an auction-purchaser is a person whose interests are affected by the sale within the meaning of Order XXI, rule 90. The Privy Council ruling in *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry* (1) on old section 311 of 1882 is not applicable since the provisions of the law have now been altered. In *Khetro Mohan Datt* v. *Dilwar* (2) the view taken by the lower Courts has been adopted, but no reasons have really been given in the judgment for the view taken. It has been assumed to be axiomatic that every man buys at an auction-sale with his eyes open and the general principle that an auction purchaser cannot attack his own purchase except on the ground provided for in rule 91 that the judgment-debtor had no saleable interest, must apply. I prefer the view taken in *Bhavirisetti Gopala Krishnayya* v. *Pakanati Pedda Sanjeeva Reddy* (3), in which reasons, which appear to me to be convincing, are given for the opposite view. I will quote the judgment as a whole, as it is short and to my mind very much to the point:—

"The only question to be decided is, whether an auction-purchaser is a person 'whose interests are affected by the sale' within the meaning of Order XXI, rule 90 of the present Code of Civil Procedure. These words did not occur in the Code of 1882 and the question is, therefore, one of first impression so far as auction-purchasers are concerned. Under Order XXI, rule 91 an auction-purchaser may apply to the Court to set aside a sale on the ground that the judgment-debtor had no saleable interest, but these words do not go far enough to meet the case of auction-purchasers who have been misled by a statement inserted through error or fraud in the proclamation of sale to the effect that the property to be sold is unencumbered.

"There can be no doubt that, if an application is made under Order XXI, rule 92 to set aside a sale, an auction-purchaser is entitled to notice of the application as being a person 'affected' thereby. In this respect, the practice of giving notice to auction purchasers has received the approval of the Privy Council [See *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4)].

"If an auction purchaser's interests are affected by an order setting aside the sale,

(1) 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. s.) 6 (P. C.).

(2) 46 Ind. Cas. 614; 3 P. L. J. 516; 5 P. L. W. 151.

(3) 55 Ind. Cas. 383; 38 M. L. J. 228; 11 L. W. 184; (1920) M. W. N. 152.

(4) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. s.) 898 (P. C.).

it is difficult to see why his interests are not also affected by the sale, although it is true that they are affected in a different sense and in a different degree. In one case, he stands to lose an interest acquired by the sale, in the other, he acquires an interest which he did not possess previously. We have not been shown any reason for confining the word 'interests' in rule 90 to the narrow meaning of interests in existence prior to the sale so as to exclude interests created by the sale.

"In *Mahomed Kala Mea* v. *A. V. Harperink* (5) the Privy Council have laid stress upon the duty of Courts to see that in sales held under their direction, nothing is done to mislead purchasers into the belief that properties for which they bid are free from encumbrances, when, if the truth were known, it would appear that they were properties of little or no value on account of their being heavily encumbered. The present is a case in which the respondent was equi ably entitled to have the sale aside as being an unfair bargain into which he was induced to enter by misrepresentation and we think that the Courts below were right in their opinion that the words of the Code are wide enough to provide a remedy for such a case in execution.

"We, therefore, confirm the order appealed against and dismiss the appeal with costs."

I hold that the auction purchaser is a person 'whose interests are affected by the sale' within the meaning of Order XXI, rule 90. I set aside the order of the District Judge and order that the Subordinate Judge should restore the application to his file and dispose of it on its merits according to law. Costs will be costs in the suit.

G. R. D.

Application allowed.

(5) 1 Ind. Cas. 122; 36 C. 323; 13 C. W. N 249; 6 A. L. J. 34; 5 M. L. T 126; 9 C. L. J. 165; 11 Bom. L. R. 267; 19 M. L. J. 115; 35 I. A. 32; 5 L. B. R. 25 (P. C.).

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 171 OF 1921.

January 6, 1922.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

LALTA PRASAD—DECREE-HOLDER—APPELLANT

versus

SURAJ KUMAR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48, cl. 2 (a)—"Fraud", interpretation of—Execution of decree delayed through judgment-debtor's fraud—Limitation.

Where execution of a decree has been obstructed by fraud on the part of the judgment debtor for more than 12 years from the date on which it was passed the decree-holder is entitled to further opportunity under section 48, clause 2 (*a*, of the Civil Procedure Code. [p. 878, col. 2]

Beni Prasad v *Kashi Nath*, 2 Ind. Cas. 222; 6 A. L. J. 401 and *Mewa Lal* v *Ahmad Ali*, 13 Ind. Cas. 929; 9 A. L. J. 17, followed

Per *Walsh, J*—The word "fraud" dealt with by section 48 (2) (*a*) of the Civil Procedure Code is such as prevents the execution of a decree within twelve years, and Judges ought to take a broad view of conduct deliberately adopted by judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections, which are dishonest upon the face of them The word "fraud" in this section should no be narrowly interpreted. [p. 878, col. 2.]

Execution first appeal from a decree of the First Subordinate Judge, Cawnpore.

Mr *Gulzarilal* (with him, Mr. *Indu Bhushan Banerjee*), for the Appellant.

Mr. *Madan Mohan Nath Raina*, for Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is a decree-holder's appeal in an execution matter. On the face of it, it seems not a little startling that a decree originally passed on the 16th of January 1900 and affirmed by this Court in appeal on the 19th of February 1903 should still be under execution, The Court below has held that the decree-holder is now barred, both by the three years' rule of limitation under the Indian Limitation Act, and also by the special provisions of section 48 of the Code of Civil Procedure. Taking these points in order, we do not think the Court below was right regarding the three years period. The application now before us was made on

the 12th of May 1920, and it was well within three years of a previous application which had been disposed of in the year 1918. The Court below has got round this difficulty by a process of reasoning based upon the fate of a previous application of the year 1915. For reasons which we need not enter into, the record is seriously defective; but in a general way we may accept the fact that in the year 1915 there was a decision by the Execution Court to the effect that the execution of the decree was then time-barred. What we do not know is, whether this decision proceeded with reference to the three years' rule, or the twelve years' rule laid down in section 48 of the Code of Civil Procedure. The same question of limitation was raised again in the year 1918 and was then decided in favour of the decree-holder. That decision may have been a bad one. It is possible that if the judgment-debtors had contested it in appeal, there might have been a decision in their favour on the ground that the decision of the year 1915 could not be reconsidered or set aside. As the case now stands, the later of the two decisions in respect of which either party can plead the principle of *res judicota*, is in favour of the decree-holder. The grounds, therefore, upon which the Court below has applied the three years' rule of limitation, cannot be sustained.

The question regarding the application of section 48 of the Code of Civil Procedure is a more difficult one. The fact is, that until the month of July 1907 the decree-holders were being held up by a subsequent litigation, in which it was finally decided that their decree could not be executed against one set of defendants who were minors at the time it was passed. This does not affect the validity of the present execution, but merely serves as a partial explanation of the long delay which has affected those proceedings. When the decree-holder took out execution in the year 1908, an objection was raised on behalf of the brothers of one of the present respondents, that is, the party against whom the decree was admittedly capable of execution, which led to further litigation, and after a decision in this Court in favour of the decree-holder on the question of limitation, to a compromise under which a substantial portion of the decree was realised. Since then the judgment-debtors have obstructed the execution of the decree in various ways; even in connection with this present application they seem to have avoided service of the notice and to have succeeded with difficulty in obtaining a re-hearing in the Court below after an *ex parte* order had been passed against them. Taking a broad view of the evidence, we think that the principles affirmed by this Court in cases like those reported in *Beni Prasad* v. *Kashi Nath* (1) and *Meena Lal* v. *Ahmad Ali* (2) are applicable. We hold that execution of this decree has been obstructed by fraud on the part of the judgment-debtors to a sufficient extent to entitle the decree holders to the further opportunity sought by them under this present application. We, therefore, allow this appeal, set aside the order of the Court below and send the case back to that Court with directions to proceed with the execution according to law. The decree-holder-appellant will be entitled to the costs in this matter in both Courts including, in this Court, fees on the higher scale.

WALSH, J.—I agree. I propose to add a few words upon the question of fraud dealt with by the learned Judge. It is clear to my mind that he has taken much too narrow a view of his function. He says that the mere filing of frivolous objections was not a fraud as it did not prevent execution, and that the fraud must be such as to prevent execution. This is a clear misdirection and a total misunderstanding of the section. The "fraud" dealt with by the section is such as prevents the execution of the decree within twelve years, and, to my mind, Judges ought to take a broad view of conduct deliberately adopted by judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest upon the face of them. It is the duty of a Court, and if a Court of law does not perform the duty nobody will ever perform it, to preserve a strict standard of moral conduct. Fraud is merely moral turpitude, and if Judges set a low standard of moral conduct by their decisions in Court, it naturally follows that a low

(1) 2 Ind. Cas. 212; 6 A. L. J. 401.
(2) 13 Ind Cas. 949; 9 A. L. J. 17.

view is taken by the profession, and by the public, and the only way to preserve a standard of conduct for the public in matters of litigation is for the Courts to set a strict and proper standard themselves. The word "fraud" in this section should not be narrowly interpreted. Nobody can doubt that the object of its insertion in this section was to prevent the tricks which are constantly played by judgment-debtors, and I propose to cite two or three simple illustrations of the meaning of "fraud" because nobody can say in anticipation exactly what conduct would in a particular case amount to fraud or the kind of conduct which has always been held to be fraudulent.

Mr. Justice Maule in *Evans* v. *Edmonds* (3) said as follows:—"I conceive if a man having no knowledge whatever of a subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is...guilty of fraud."

Mr. Justice Watkin Williams in *Joliffe* v. *Baker* (4) said:—"Ever since 1845 it has been clear and established law that...the term 'fraud' must be used and understood in the common meaning of the word as it is ordinarily used in the English language and as implying some base conduct and moral turpitude."

Lord Justice Cotton in *Derry* v. *Peek* (5), quoted at page 360 in 14 Appeal Cases, said:—"What, in my opinion, is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false and which is known by him to be false or is made by him recklessly or without care whether it is true or false, that is" fraud.

This principle ought to be strictly applied in execution cases just as in any ordinary suit for decision.

J. P. *Appeal allowed.*

(3) (1853) 13 C. B. 777; 1 Com. L. R. 858; 22 L. J. C. P. 211; 17 Jur. 893; 1 W. R. 412; 138 E. R. 1401; 93 R. R. 732.

(4) (1883) 11 Q. B. D. 255; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

(5) (1889) 14 A. C. 337 at p. 360; 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 33; 1 Meg. 292; 54 J. P. 148.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 155 OF 1921.

March 7, 1922.

Present :—Mr. Kotval, A. J. C.

KASHIRAM—APPLICANT

versus

Musammat GUDDOO—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), Sch. II—Arbitrators appointed by parties—Pleader, power of, to cancel and appoint another.

Where in a case a litigant has himself appointed the arbitrators his Pleader has no power to substitute another or others in their place or to revoke the appointment of one or more of them without the knowledge of or instructions from his client. Power to make an appointment in the first instance in the absence of any instructions to the contrary is one thing and power to undo the appointment made by his client is another thing. [p. 880, col. 2.]

Application for revision of the judgment of the Subordinate Judge, Mandla, dated the 26th April 1921, in Civil Suit No. 29 of 1920.

Mr. *C. B. Parakh*, for the Applicant.

Mr. *B. R. Kendharkar*, for the Non-Applicant.

ORDER.—The minor plaintiff's guardian and the four defendants agreed to refer the entire matter in dispute to the arbitration of five *panchas*. The agreement was reduced to writing and signed by them all and filed in Court on the 10th January 1921. On the same day the Court passed an order referring the matter to the five *panchas* and fixed the 10th February 1921 for the filing of the award in Court. The order-sheet of the 10th February 1921 runs as follows :—

"Plaintiff by Mr. Kekre, Pleader. Defendant by Mr. Umesh Dutt. They now say that Mr. Gopal Rao should be the sole arbitrator. They must file an application to the effect. The case will then be referred to Mr. Gopal Rao and he will be requested to submit his award within a fortnight. For 28th February 1921.

"Application filed and order of reference is made over to Mr. Gopal Rao, Pleader."

The application is to the following effect :—

"It is submitted that in the above suit four *panchas* have been appointed for the decision of the suit. We do not desire a decision by those *panchas*. Now we both parties agree to accept whatever decision

KASHIRAM v. GUDDOO.

Pandit Gopal Rao Sahib, Vakil, alone will give in this case."

It is signed only by the two Pleaders for the parties, namely, Messrs. Kekre and Umesh Dutt Patka.

On the 29th March 1921 Mr. Gopal Rao's award was filed in Court and the 8th April 1921 was fixed for filing objections. On the 7th April 1921 defendants Nos. 3 and 4 filed an application in which they urged that only one *panch* out of the five appointed had decided the case against them in their absence and set forth certain objections to the award. They said that the award was not acceptable to them and they desired that the Court should proceed with the case. The application is signed by a new Pleader, Mr. Dharnidhar. On the 8th April 1921 defendants Nos. 1 and 2 were examined in Court and they also stated that they never agreed that the case should be referred to one arbitrator and that the award was not binding on them. They alleged that they never instructed Mr. Patak to refer the case to one arbitrator. The plaintiff's Pleader made the following statement :—

"The reference to Mr. Gopal Rao was made on the joint application of the parties. Mr. Umesh Dutt had appeared for all the defendants and had signed the petition. The order is thus binding on all the defendants.* * * * * * Mr. Gopal Rao had asked the defendants to produce evidence. But they did not do anything. The plaintiff learns that the defendants had gone to Mr Gopal Rao. Thus, there are no good grounds to set aside the award."

The order-sheet of the same date shows that Mr. Umesh Dutt Patak was present at the hearing but was neither examined by the Court nor made any statement himself as to whether he was instructed to make the application on their behalf. The following issues were fixed by the Court :—

Whether the defendants had through Mr. Umesh Dutt agreed to refer the matter to the sole arbitration of Gopal Rao ;

Whether Mr. Umesh Dutt had no power to refer the matter to arbitration on behalf of the defendants ;

Whether Mr. Gopal Rao had decided in the absence of the defendants after giving them notice ;

Whether the award can be set aside on any of these grounds.

The lower Court writes :—

"I find that, though there was no express authority to Mr. Umesh Dutt, he was fully within his power to refer the matter to the sole arbitrator. The parties had not suggested to Mr. Umesh Dutt to refer the matter to the single arbitrator. No express authority was required for such a purpose. I find that Mr. Umesh Dutt had power to refer the matter as he was placed in charge of the case. * * * Mr. Gopal Rao, Pleader, who gave the award has been examined. I find from his statement that he had given verbal notice to the parties and they failed to appear before him. They did not adduce any evidence. He had thus to depend upon the evidence found on the record of this case. No case is made out for setting aside the award."

It is unnecessary to decide, for the purposes of this case, whether a Pleader has power, in the absence of express authority to that effect, to refer his client's case to arbitration. In my opinion where, as here, a litigant has himself appointed the arbitrators his Pleader has no power to substitute another or others in their place or to revoke the appointment of one or more of them without the knowledge of or instructions from his client. Power to make an appointment in the first instance in the absence of any instructions to the contrary is one thing and power to undo the appointment made by his client is another thing. In this view the cancellation of the appointment of the five *punchas* by the Court based as it is upon the Pleader's request is unwarranted and invalid and the subsequent appointment of Mr. Gopal Rao must also be held to be such. It is not suggested in this Court that the defendants in any way acquiesced in the appointment of Mr. Gopal Rao. So far as the record goes, it shows that they did not recognise his appointment or take part in the proceedings before him. I set aside the reference to Mr. Gopal Rao and all proceedings subsequent to it. The Court will proceed to deal with the case as it stood before the 6th February 1921. Parties will bear their own costs in this Court.

J. P.

Application allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 271 OF 1921.

March 9, 1922.

Present :—Mr. Hallifax, A. J. C.

PANDURANG AN ANOTHER—PLAINTIFFS—APPLICANTS

versus

KALLUDAS—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 85—"Mutual, open and current" account—Test—Civil Procedure Code (Act V of 1908), s. 115 (c)—Revision—Decision based on non-existent facts—Material irregularity.

The test of an account being mutual, open and current within the meaning of Article 85 of Schedule I to the Limitation Act is the intention of the parties; the fact that the balance has always been in favour of the same party would not prevent the account from being mutual, open and current.

If the decision of a case is based not merely on a forced and impossible construction of the facts that were before the Court, but on the importation of facts which were admitted by both the parties not to exist, there is clearly a material irregularity in the exercise of jurisdiction of the sort contemplated by clause (*c*) of section 115 of the Civil Procedure Code.

Messrs. *G. P. Dick* and *A. V. Zinjarde*, for the Applicants

Mr. *M. R. Bobde*, for the Non-Applicant.

ORDER.—The decision of this case is based, not merely on a forced and impossible construction of the facts that were before the Court, but on the importation of facts which were admitted by both parties not to exist. This is clearly a material irregularity in the exercise of jurisdiction of the sort contemplated by clause (*c*) of section 115 of the Civil Procedure Code. The defendant was employed as the *Munim* of the plaintiffs on a monthly salary. This was not paid to him every month but he was allowed to draw what he required from time to time, the amounts so drawn being debited against the amounts due to him as salary. His salary was entered on the credit side of the accounts at the end of each year and not of every month and the balance due by him was carried forward to his debit in the following year. He was shown as having overdrawn at the end of every year, though in some years the sums he drew amounted to less than his salary for that year. The learned Additional District Judge has treated this account as closed at the end of each year, the balance of the credits and debits during that year only, if it was against the defendant, becoming some sort of 'debt' differing from the sort it was till that moment and apart entirely from the accounts of previous or the following year. It was held that "at the end of each year the 'amount of balance' became debt due to plaintiffs from the defendant."

It is impossible to find any justification for taking a year as the period at the end of which this somewhat occult process took place. If it took place at all, it would surely be at the end of each month. And why should it take place in regard to the balance now found to be due as the result of the debits and credits of each year separately? The parties never closed the account at the end of each year and put it aside, so to speak, and opened an entirely new account for the next year, as the learned Judge has done. They carried the debit of each year forward into the next. The balances shown in the books, for the writing of which the defendant himself was responsible, are the result of the debits and credits for the whole period from the beginning of his service, which shows that the parties at least never regarded the balance of the debits and credits of each separate year as undergoing any change of character at the end of that year. It may be remarked also that no interest was ever charged against the defendant on the amounts overdrawn.

In all these circumstances, I find it difficult to imagine an account more completely filling the description in Article 85 of the Limitation Act, "mutual, open and current." The fact that the balance was always in fact in favour of the same party does not prevent the account from being mutual. The test is the intention of the parties, and indeed it is quite probable that there were times at which the balance stood in favour of the defendant, though the accounts were never made up at any such time. The plaintiffs were, therefore, entitled to sue within three years of the last day of *Sambat* 1976, which was 20th March 1920, for the balance due to them on the whole account from the beginning. The plaint puts the accrual of the cause of action on 25th September 1919 when

the defendant left the plaintiffs' service, which is apparently correct, but the three years' period of limitation does not run from that date. This, however, does not matter, as the suit was filed on 17th July 1920.

It was found in the first Court and not denied in appeal, not is it denied here, that the amount due by the defendant to the plaintiffs, provided no part of the claim was barred by the law of limitation, was Rs. 353-11-6 on 25th September 1919 *plus* interest at 1 per cent. per mensem from that date. The amount due as interest from that date to this is, therefore, Rs. 103-9-6, giving a total of Rs. 457-5-0. Interest clearly ought to run on this sum at the same rate until the defendant pays it. The decrees of the lower Courts are, therefore, set aside. In lieu of them, decree will issue ordering the defendant to pay to the plaintiffs the sum of Rs. 457-5-0 together with interest thereon at 1 per cent. per mensem from this date to the date of payment and all the costs incurred by the plaintiffs in both the lower Courts and in these proceedings. The Pleader's fee in this Court will be Rs. 15.

G. R. D.

Application allowed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 126 OF 1920.

February 15, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Das and Mr. Justice Adami.

BHONU LAL CHAUDHURI—PLAINTIFF—APPELLANT

versus

MR. W. A. VINCENT AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy holding—Transfer—Recognition by landlord—Knowledge—Burden of proof—Patwari, authority of—Acquiescence—Construction of document—Operative part—Recitals—Zerait, meaning of, in Bihar—Forgery—Test—Conveyancing—Corporeal and incorporeal hereditaments.

Per *Dawson Miller, C. J.*—The receipt of rent by a landlord from the transferee of a holding, not transferable by custom, validates the transfer. But the *Gomastha* or Patwari of the landlord, although authorised to collect rents on his behalf, has no authority by taking rent from a transferee to create the relationship of landlord and tenant between his master and the transferee. In such cases the landlord would not generally be bound unless he accepted the rent knowing the source from which it came. [p. 909, col]

In such cases it must be shown that the landlord had knowledge of the transaction and ratified it either expressly or by implication. [p 910, col .]

If a Court is satisfied upon the natural construction of the operative part of a deed that a certain property passes notwithstanding that the construction may be difficult, the recitals have no binding force. [p. 908, col. 2: p. 909, col. 1.]

In Bihar the term *zerait* is used to denote all lands in direct cultivation of indigo planters for cultivation of indigo as distinguished from cultivation of indigo by *raiyats*. The factory may hold the land as proprietor, tenure-holder *raiyat*, or under-*raiyat* and whatever the interest may be the land is still called *zerait*. The word used in this sense has no connection with the term *zerait* as used in the Bengal Tenancy Act and meaning proprietor's private lands. [p. 911, cols. 1 & .]

Per *Das, J.*—An assertion by a tenant does not establish a case of recognition. It must be established that such an assertion was made to the knowledge of the landlord and that the landlord acquiesced in the assertion deliberately and with knowledge as to its effect [p 932, col 1.]

Parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them, and where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. Recognition, like waiver, must be an intentional act with knowledge. [p 925, col. 2.]

The fact that the transferee of an occupancy holding pays the rent as such transferee does not decide the question that the transferee has been recognised by the landlord as his tenant. he must establish that the landlord accepted rent from him as a

tenant. In other words, it is the act of the landlord that decides the question, and not the act of the person who claims the status of tenant [p 926, col. 2.]

Where the circumstances are equally consistent both with the case of the tenant who sets up recognition and with the case of the landlord who denies it, the tenant, on whom the onus of proof as to recognition lies, must fail. [p. 934, col. 2.]

It is not within the scope of the authority of a Patwari or a rent collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager. [p 930, cols. 1 & 2.]

A person who has conveyed his proprietary interest to another person but whose name is still borne on the Collector's register, cannot, by giving a rent receipt, recognise a person as having a right of occupancy in the land, who otherwise had no such right. [p. 931, col. 2; p 932, col. 1.]

It is quite true that the recitals in a conveyance are subordinate to the operative part and that, consequently, where the operative part is clear, it is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals: but it is well-established that where the operative part is doubtful and it is impossible to say, on a mere reading of it, to which properties it refers, then the recitals can and ought to be used to explain its meaning; and that while, for the purpose of construing the operative part, the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its true construction than the subsidiary clauses of the deed. For instance, parcels of a deed described with certainty are not cut down by recitals showing that something less was intended to pass; but the recitals assist the construction of the operative part where there is an ambiguity in the operative part as to the property affected. [p. 922, cols. 1 & 2.]

When a Court is considering, not whether the tenant can by lapse of time acquire a right of occupancy in the land but whether his status as an occupancy tenant has been recognised by the landlord by a series of transactions culminating in the lease itself, it is important to consider how the land has been described in the lease itself and whether there is a demise in respect of that land within the *jama* mentioned in the lease. [p 933, col 1.]

An occupancy holding forms a property by itself and is capable of being held and is in fact held distinct and apart from the estate, within the ambit of which it may happen to lie. [p. 925, col. 1.]

The old modes of conveyancing under which an estate accompanied by possession passed by livery, while future estates and other rights in land passed by grant, gave a practical rule for distinguishing between corporeal and incorporeal hereditaments. The old conveyancing test is now obsolete: but the distinction is still maintained, and such rights as are not accompanied by exclusive possession are classed amongst incorporeal hereditaments whereas those rights which entitle the owner to the present possession of the land or to receipt of rent and profit are classed as corporeal hereditaments It is quite true that a right of occupancy, looked at from the point of view of right of property and not subject of property, is incorporeal in its nature; but the actual possession of the land, to which a person having a right of occupancy is entitled, attracts it to the class of corporeal hereditaments. [p. 922, col. 2; p. 923, col. 1.]

It is dangerous to come to a conclusion on the question of forgery on a mere comparison of the writing in a disputed document with the writings in admitted documents. [p. 921, col. 1.]

One of the most useful tests in considering a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formation of an idea or in the mode of spelling particular words. [p. 921, col. 2; p. 922, col. 1.]

Per *Adami, J.*—A recognition by a landlord to be effective in favour of a tenant must be clear and certain. [p. 939, col. 2.]

Letters Patent Appeal against the decision of Mr. Justice Mullick, differing in opinion with Mr. Justice Jwala Prasad, in Appeal from Original Decree No. 97 of 191 , dated the 8th August 192 .

FACTS appear from the following dissenting judgments of Mr. Justice Mullick and Mr. Justice Jwala Prasad, dated the 18th August 1920.

JUDGMENT.

MULLICK, J.—The plaintiff is the owner of estate No. 9507 in the District of Muzaffarpur and sues for the recovery of an area of 36 *bighas* 7 *cottas* and 11 *dhurs* and for mesne profits from the cold weather of 1321 F S. (1913) till the date of the suit, namely, the 5th December 1914 and thereafter till delivery of possession. The principal defendant, Mr. Vincent, resists the suit on the ground that, by virtue of a *ticca* lease executed by the plaintiff's predecessor in favour of his predecessor, Mr. Hasson, he was in possession of that

part of Mauza Etwarpur Jainti which falls within the plaintiff's estate No. 9507 and that on the expiry of the lease, which occurred on the 1st Kartik 1321, corresponding to the 5th October 1914, he surrendered possession of all the lands except the area in suit in which the predecessor of his lessor had acquired the interest of an occupancy *raiyat* by purchase from the former tenants and by recognition by the landlord.

The chain of transactions by which the plaintiff derives his proprietary title is as follows:—

Mauza Etwarpur Jainti was a village situated in a permanently settled estate held in common tenancy by a number of proprietors up to the year 1868. It is alleged that, for the sake of convenience, the lands or some of them were privately partitioned among the proprietors of whom Sunder Sahay was one. In 1868 there was a Collectorate partition by which Sunder Sahay was allotted a separate estate No. 9507 in proportion to his 8 annas share. After Sunder Sahay's death his estate devolved upon one Matuk Lal who, on the 13th July 1895, executed a conveyance of sale in favour of the plaintiff and his co-sharers, Juggu Lal and others. It is admitted that by a partition in 1909 the lands in suit were allotted to the plaintiff.

The chain of transactions by which the defendant claims title is as follaws:—

It is alleged that one Nathu Lal Chaudhury had an indigo concern and that in the year 1271 F. S, corresponding to 1863 64, he purchased from five tenants named Bulaki, Doma, Bhikari, Bhikan and Adam Danuk, portions of their occupancy holdings measuring an aggregate area of 36 *bighas* 7 *cottas* and 11 *dhurs* and that the purchase was recognised by Sunder Sahay by a letter dated the 19th December 1865. On the 30th June 1876, Nathu Lal obtained from Sheo Prasad, the successor of Sunder Sahay, a lease of a 2 annas share of Mauza Etwarpur Jainti, for a period of seven years from 1284 to 1290 F. S. That lease was renewed on the 25th July 1883 for a further period of 9 years, *viz.*, from 1291 to 1299 F. S. The remaining 6 annas share of Sunder Sahay in Etwarpur Jainti No. 9507 was leased on the 20th November 1881, by Matuk Lal, the successor of Sheo Prasad, to Nathu for a term of seven years from the year 1289-1295. For the years 1300 to 1302 the 2 annas share was held under an *amaldastak* or oral settlement by Nathu Lal and the 6 annas share, the lease for which expired in 1295 was held from 1295 till 1302 by an oral settlement of the same kind. On the 23rd July 1890 Nathu Lal sold the entire indigo concern, which was then styled the Pirakpur Indigo Factory, to Mr. Henry William Hudson, who remained in possession till the leases above-mentioned expired in 1302, *i. e.*, till October 1895. During the years 1303-1304 F. S., corresponding to 1895-96 and 1896-97, the Factory was not in possession under any lease. According to the defendant, Matuk Lal collected the rent for this period but on the 19th April 1897 Mr. Hamilton Hudson, on behalf of the proprietors Mr. Henry Wilson Hudson and Mr. Henry Hudson, executed a *kabuliyat* in favour of the plaintiff and his co sharers for the 8 annas share of Etwarpur Jainti for a term of seven years from the years 1305 1311 F. S. That *kabuliyat* was renewed in 1904 for a term of 9 years from 1313-1321 F. S. by Mr. W. Hudson on behalf of Mr. H W. Hudson in favour of the plaintiff and his co-sharers.

Mr. H. W. Hudson was upon his death succeeded by his sons, Mr. H. W. Hudson and Mr. Percy Hudson and after the death of the former Mr. P. Hudson was the sole proprietor of the Factory in 1909. In that year the defendant, Mr. Vincent, who had joined the factory in 1903 as Manager, purchased a 4 annas share from Mr. Hudson and in 1912 after the death of Mr. P. Hudson he purchased the remaining share from his widow Mrs. Hudson.

The defendant's case is that he did not purchase the occupancy holding in suit by his conveyance from Mr. Hudson, and that on the 13th January 1914 Mrs. Hudson executed a sub lease in his favour in respect of this land by which he became an under-*raiyat* for a period of 9 years with an option of successive renewals at an annual rental of Rs. 5.

The case of the defendant, therefore, is that up to 1881 Nathu Lal Chaudhury was an occupancy *raiyat* of this land at a rental of Rs. 197 14 0 inclusive of road cess, and that after he acquired the *ticca* lease of

Etwarpur Jainti he continued to hold as an occupancy *raiyat* during the period of his *ticca*; that from 1890 to 1895 Mr. Hudson continued in possession under the same right and title; that if there was any defect in the title of Mr. Hudson by reason of there not being any custom allowing the transfer of occupancy rights that defect was cured in the year 1303, *i. e.*, 1896, by the receipt of rent in respect of the holding by Matuk Lal the then proprietor; that in the year 1896-97 and in subsequent years Mr. Hudson and his successors continued to retain their occupancy right during the period of their *ticca* lease, and that on the 1st Kartik 1321, corresponding to the 5th October 1913, the plaintiff was entitled to recover possession only of the *ticca* lands and not of the land in suit.

The Subordinate Judge framed five issues in the suit. The second issue related to the title of the defendant, the third to his recognition by the proprietor in 1896, and the fifth to the question whether occupancy rights were transferable by custom in the locality. He did not consider it necessary to determine this last issue but he found issues Nos. 2 and 3 in the defendant's favour and he, therefore, dismissed the action. The plaintiff accordingly appeals.

In my opinion the crucial question in the case is, whether the defendant's predecessor was recognised as an occupancy *raiyat* by the proprietor on the 16th April 1895, and I will first of all deal with the relations between the parties during the years 1895-96 and 1897-98, corresponding to 1302 and 1304 F. S.

The two documents which bear upon this part of the case are Exhibits I and K. Exhibit I is a receipt for a sum of Rs. 138 alleged to have been paid by the Factory to Matuk Lal, the proprietor, on account of the rent of an occupancy holding of 36 *bighas* 7 *cottas* and 11 *dhurs*. The receipt is dated the 18th Baisakh 1303, corresponding to 16th April 1896, and purports to have been given by Khub Lal, Patwari, nephew of Dwarka Lal, Patwari. The rent of the holding is entered as Rs. 191-14-6, the road-cess at Rs. 5-15-6 and the total demand at Rs. 197-14-0. The plaintiff characterises this document as a forgery, but the learned Subordinate Judge, after carefully considering the evidence, has found that it is genuine and I fully agree with him. The plaintiff asserts in his evidence that Khub Lal was never a Patwari in 1303, but there is evidence to the contrary which the learned Subordinate Judge appears to have believed. Attention has been drawn to the fact that Khub Lal has signed as the nephew of Dwarka Lal, Patwari. This matter does not seem to have been made a subject of attack in the lower Court but one possible explanation may be that Dwarka Lal and Khub Lal were both Patwaris, of whom Dwarka Lal was the senior. That Khub Lal had authority to receive the money is not only established by the evidence for the defendant but may also be inferred from the admission made by the learned Vakil for the plaintiff that a sum of Rs. 138 was received by Matuk Lal from the tenants as rent. It is suggested that Khub Lal had no authority to bind the landlord so as to recognise the transfer of the holding but that is a question of fact and I find no trace in the judgment of the learned Subordinate Judge that any such objection was taken before him. If a receipt is given to a tenant by a man who ordinarily collects rent and who is the landlord's Patwari the onus is thrown upon the landlord to show that the Patwari had no authority to accept the rent, for the relations between him and his Patwari must be a matter within his special knowledge.

Then, it is said that there was no recognition in law. To this, again, the answer is that the objection does not seem to have been taken before the Subordinate Judge. The case made before him was that Matuk Lal did receive the sum of Rs. 138, but that it was money collected by his Patwari, Ram Golam, from tenants occupying certain *milkiat* lands, and not from the lands in suit which are *seriat* lands. The sole question before the learned Subordinate Judge seems to have been whether the money was paid by the Factory or not. It seems to have been assumed that, if the defendants' contention was accepted, then recognition would be inferred as a matter of course. The execution of the receipt is proved by Bootan Misser, who has been 25 years in the service of the Factory and who de-

poses that it was written and signed in his presence, and I cannot see why the learned Subordinate Judge's finding as to the due execution and genuineness of the document should be impugned

The document is supported by another document which was prepared the following year, *viz.*, Exhibit K. This is a *wasilbaki* prepared between the 1st and 5th April 1897 of which the heading runs as follows:—

"*Wasilbaki* account settled in the presence of the tenants of Mauza Etwarpur Patti of Babu Matuk Lal Sahu, present purchasers (torn) Lall Chaudhury, Sudhan Lal Chaudhry, Dhonu Lal Chaudhury and Bhonu Lal Chaudhury for the year 13 4 F. when it was held in direct possession." The case of the defendants is that Biseswar Lal, the *mohurir* of the Factory, prepared this document in the presence of the tenants and of the agent of Matuk Lal in order that an account might be made showing the total amount to be collected from the *raiyats* of Etwarpur Jainti for the years 1303 and 1304 as well as the amount already collected and the balance due. It will be remembered that the last lease of the Hudsons' had expired in 1302 and for the years 1303 and 1304 the proprietors were entitled to collect the rent. It will also be remembered that Matuk Lal executed a deed of sale in favour of the plaintiffs' family on the 13th July 1895. Therefore, in the ordinary course, the plaintiffs' family would have been entitled to collect the rents for the years 1303 and 1304; but the evidence shows that the purchasers did not complete the purchase till the 29th August 1896, and the learned Subordinate Judge is, in my opinion, right in holding that for the year 1303 by reason of some arrangement between the vendor and the vendee, Matuk Lal must be regarded as the *de facto* proprietor. But then it is said that title passed as soon as the conveyance was executed and so Matuk Lal had no authority to receive the money. No such argument was advanced before the learned Subordinate Judge and, in any event, the defendant is entitled to reply that as regards the tenants, Matuk Lal who was the registered proprietor was the only person competent under section 60 of the Bengal Tenancy Act to give a valid discharge for the payment of rent. He was, therefore, the person who had authority to recognise the Factory as the tenants of the disputed land. It seems that all that he realised was the sum of Rs. 138 and that a sum of Rs. 1,012 remained outstanding for the two years, 1303 and 1304. Meanwhile, negotiations were going on between the Factory and Matuk Lal for a renewal of the lease, and on the 19th April 1897, Mr. Hamilton Hudson executed a *kabuliyat* in favour of Juggu Lal for a period of seven years from 1305 to 1311 F. S. The document, Exhibit K, shows that seven of the tenants signed the *wasilbaki* under their own hands while the remaining tenants, with the exception of thirteen, signed by the pen of others. The balance outstanding against the tenants, *viz.*, a sum of Rs. 1,012 inclusive of an arrear of Rs. 257-12 0 due from the defendant, was by arrangement paid by the defendant to the new purchasers at the time of the execution of the *kabuliyat* and upon the back of the document, Exhibit K, there is an endorsement in pencil by Mr. Hamilton Hudson in his own handwriting dated 8th April 1897 which runs a follows:—"Bal. 1,150 to pay, demand Rs. 1,012." It appears that the arrangement with the Factory and the incoming and outgoing proprietors was that Matuk Lal was to keep the money which he had collected and that the Factory was to pay the balance due from the tenants to the new purchasers and that the Factory should in its turn reimburse itself by collecting the amount from the tenants. The plaintiff characterises Exhibit K as an absolute forgery. He denies that any such document was drawn up. In particular, he takes exception to the entry against serial No. 142 which states that the proprietor of the Pirakpur Indigo Concern is "*kashtkar*" in respect of a holding of 36 *bighas* 7 *cottas* 11 *dhurs* at a rental of Rs. 197-14 0 and that a sum of Rs. 138 has been received from it leaving a balance of Rs. 257-12 0 due from it. In my opinion, there cannot be the slightest doubt as to the genuineness of this document. The endorsement in blue pencil on the back of it, dated the 8th April 1897, is clearly genuine and there is no reason whatsoever for disbelieving Mr. Hudson when he states that he made this note showing the amount which it was agreed the Factory should pay,

before the new lease was executed. If this document is accepted as representing the true state of facts there cannot be the slightest doubt that in 1897, only 11 days before the lease was renewed by the plaintiff's family, the Factory was claiming the land in suit as its occupancy holding. Both Exhibits I and K came from the custody of the defendants and Mr. Vincent has sworn that in April 1913 when the plaintiff had signified his refusal to renew the lease he caused a search to be made in the Almirahs where the old papers were kept and found these two documents.

The plaintiff seeks to explain the collection of the sum of Rs. 138 by Matuk Lal by a document marked Exhibit 7 which is a receipt dated 29th July 1896 granted by Matuk Lal to Jaggu Lal Chaudhury an adjustment of accounts in respect of the rents of Mauza Eswarpur Jainti for the year 1303. It is said that the purchasers agreed to pay to Matuk Lal for that year the sum of Rs. 520 as the rent which he was entitled to collect from the tenants and that as he had realised from the tenants a sum of Rs 138 the balance of Rs. 382 was paid by the purchasers to him. In support of Exhibit 7 the plaintiff has tendered Exhibit 8 which is a Siha account for 1303 showing from what tenants the sum of Rs. 138 was collected and Exhibits 9 and 10 which are two Revenue Chalans. It is contended that Ram Gulam, Patwari, the man who collected the rent, remitted the balance to Matuk Lal after paying into the Government Treasury the amounts due upon these two Chalans. The learned Subordinate Judge was, in my opinion, right in declining to accept the plaintiff's version of the arrangement with Matuk Lal. The collections entered in the Siha are not proved by the Patwari though he appears to be alive. Then, again, it is not clear why Rs. 520 should be the annual rental when, according to the lease which had just expired, Matuk Lal was entitled to collect from the Factory only the sum of Rs 500 per annum. The learned Vakil for the appellant explains that the additional sum of Rs. 20 represents the rent chargeable upon the holding of Haji Ghous Mia which had been excluded from the rent roll of the Factory by arrangement with the lessors. There is, however, no evidence to this effect. Then, again, it is said that for the years 1303 and 1304 there was a verbal lease given by the plaintiff's family to the Factory at an annual rental of Rs. 575 and that while the plaintiff was paying for the year 1303 to Matuk Lal the sum of Rs. 520 he realised from the defendant the sum of Rs. 575 for that year. In my opinion the learned Subordinate Judge was justified in rejecting these allegations. In my opinion the weight of evidence is clearly in favour of the defendants and establishes that the payment of Rs. 138 was made as part payment of the rent of the holding of 36 *bighas 7 cottas* and 11 *dhurs*.

But then it is contended on behalf of the plaintiff that the conduct of the Hudsons' and the admissions made in the *kabuliyat* of the 19th April 1897 are inconsistent with this finding. It is necessary, therefore, to consider the document, Exhibit 1.

In this document the lessees, through Mr. Hamilton Hudson, admit that 36 *bighas* 7 *cottahs* 11 *dhurs* of *zerait* land lie in Mauza Etwarpur Jainti *Tauzi* No. 9507 and they agree they will give up possession of this land on the expiry of the lease and that they will have no right of occupancy therein. It is extraordinary that, having on the 16th April 1896 paid Rs. 138 as rent for an occupancy holding in the estate and having on the 8th April 1897 made an endorsement on the back of *wasilbaki* in which the rental and the area of the holding were clearly entered, Mr. Hamilton Hudson should, on the 19th April 1897, have agreed that the lessees would claim no occupancy rights on the expiry of the lease. Mr. Manuk on behalf of the defendants has contended that the clause renouncing occupancy rights refers to lands other than the lands in suit but, in my opinion, having regard to the schedule which gives the serial numbers of the plots and their areas, it is impossible to believe that the lessees did not intend to refer to the suit lands. From Mr. Hudson's evidence it would seem that he desires to throw the blame upon Kumar Lall who, he says, was the Factory Munshi and was responsible for settling the terms and drawing up the deed. He also suggests that he was himself inexperienced and did not understand the Persian language and that he did not realise the full meaning and importance of the admission. The Munshi in question was subsequently dismissed but

nevertheless, there can be no question that the *kabuliyat* must be held binding on the defendant until the contrary can be shown. With regard to the payment of Rs. 138 it is strange that Mr. Hundson was asked no questions at all ; the reason for this omission may be that he joined the Factory in 1897 and was not aware either of the payment or of the Factory's rights over the 36 *bighas* 7 *cottahs* and 11 *dhurs*. As he signed at the back of the *wasilbaki* he ought to have been aware of the entries in the body of the document but it is suggested by Mr. Manuk that the document being in the vernacular he had no knowledge of its contents. Indeed, this is his general explanation of the conduct of the European officials of the Factory. That may be the truth, but it is unfortunate and incomprehensible that no effort was made either by the parties or the Trial Court to clear up the obscurity. The European witnesses are all men of character and position and would, I feel certain, have told us the truth as to whether in 1897 or 1904 the existence of this occupancy right was known to them, and, if so, how they came to admit the land to be *zerait*.

Realising the difficulty of his position Mr. Manuk attempts to escape from the admission in the following way. His first submission is, that under section 120 of the Bengal Tenancy Act any admission made by a *raiyat* after the 21st March 1883 cannot be used against him in a suit where the landlord seeks to prove that the land is *zerait*. The authority in support of this proposition is *Sukan Sao* v. *Karu Mahton* (1) and, in my opinion, notwithstanding the earlier cases to the contrary decided by the High Court of Calcutta, it is binding upon this Court. But the learned Vakil for the plaintiff contends that in this case the landlord is not claiming the land as *zerait* within the meaning of section 120 of the Bengal Tenancy Act ; that he is claiming the land as part of the *mal* lands of his Zemindary ; that the burden of proving a tenancy lies on the defendant and that, therefore, an admission of fact by the defendant that he has not acquired any occupancy rights in this land is relevant against him although a stipulation that he will not acquire occupancy rights in the future would be illegal. The learned Subordinate Judge appears to have accepted this view and, in my opinion, he was right. The plaintiff, notwithstanding his attempt at the trial to show that the lands were *zerait* in the strict sense, in which no occupancy rights could ordinarily accrue, would still be entitled to succeed if they were merely *raiyati* lands now in the possession of the "*malik*" and if the defendant could show no right of tenancy therein. The defendant having given a complete history of the origin of the holding and the plaintiff being unable to deny that the holding consists of the holdings of Bhikari, Dema, Bulaki, Bhikan and Adam the plaintiff has thought fit to set up the case that the land is *zerait*, but that ought to be no reason for excluding the recital in the *kabuliyat*. The real question is not whether the lands are the proprietor's *sir* or private lands in the strict sense of the word but whether the plaintiff is entitled to resume them as a part of his Zamindary. I hold, therefore, that the wiser course was adopted by the Subordinate Judge in allowing the admissions to go in for what they were worth. If, upon a consideration of all the evidence, it is found that the admissions are incorrect or inconclusive or inoperative, I think the defendant is entitled to a decree.

In my opinion the first point to be noticed about the admissions in the *kabuliyat* of 1897 is that, while the document recites that 36 *bighas* 7 *cottahs* 11 *dhurs* are *zerait* and that at the end of the term of the *ticca* the *ticcadars* will claim no occupancy right in any land, it refers by implication to a tenancy held by the *ticcadars*. I refer to the passage in which the lessees agree to pay to the lessor a sum of Rs. 1,012 as representing the arrears due for 1304 from the tenants and undertake to realise this sum from the tenants and from themselves. If it was not intended that the lessees should pay something to the proprietors as rent the use of the words "I the *ticcadar* will get the same from the tenants of the village and from my own *Tahsil*" seem unintelligible. One explanation is that the lessees did not know their own rights and that they did not understand that an occupancy right once acquired could be relinquished except

(1) 54 Ind. Cas. 652; 5 P. L. J. 87; 1 P. L. T. 13; (1920) Pat. 131.

by surrender or abandonment. Another explanation is, that they knew their rights but intended to ignore the law. In the absence of evidence upon the point, it is impossible to speculate; all one can say is that the document itself shows that the tenancy was recognised in 1303.

In this connection it is material to consider the entries in the Survey and Settlement Record which was published on the 29th June 1896. In that document the lands in suit were described as *bakasht malik* but not *zerait*. It is contended on behalf of the plaintiff that if, on the 16th April 1895, the proprietors of the Factory had been recognised as occupancy *raiyats* they surely would have taken steps to contest the entry in the Record of Rights. There is some force in this contention, but one explanation is that the defendants were expecting to get a renewal of the leases and it was to their interest not to raise the question of their permanent rights, it being always open to them to rebut the presumption in a suit. Another explanation is that they were careless. A third explanation is that the entry must have been made some years before the final publication of the record and at that time the Factory had not been recognised by the proprietor as the successor of Nathu Lal Chaudhury. Mr. Richardson in his evidence states that while the Survey proceedings were going on the Factory did not exercise any efficient supervision. It is strange that this should have been so but there is evidence that the management was extremely lax and that the Hudsons were guilty of the most culpable negligence. I do not credit them with a cunning intention to deceive the lessors, *i.e.*, with that of obtaining the leases by making admissions which they knew would not be valid and operative in law. I do not think that either Mr. Hamilton Hudson or Mr. Ross said to themselves "we will make whatever admissions the lessors like but when the leases are determined we will set up our true rights as occupancy rights." The learned Subordinate Judge has taken into account the admissions in the leases executed by both these gentlemen and also the Record of Rights and has come to the conclusion that they were inoperative and could not extinguish the occupancy right of the defendant which was recognized in 1896. With this finding I fully agree.

It is a curious circumstance that plaintiff's account of the collection of the Rs. 138 by Matuk Lal from his tenants is not supported by a single *raiyat's* evidence. A *raiyat* called Basant Lal was in Court but was not called to support the document. Another curious feature is that the exact area of 36 *bighas* 7 *cottahs* and 11 *dhurs* which comes down from 1865 in the defendant's documents should appear for the first time in the plaintiff's lease of 1897. If such a holding had never been heard of and if its existence had not been discussed or recognised, from where did the plaintiffs get this area The Survey and Settlement Record makes no mention of it. It shows the area of the *bakasht* lands to be 34 *bighas* and some odd *cottahs* and the probability is that the area was supplied by the defendant and that the defendant did claim that he had some kind of tenant right in the land.

Holding, therefore, that the defendant has established his case as to payment of rent in the year 1896, the next question is what rights did he acquire thereunder.

This makes it necessary to go back to the origin of the tenancy.

The earliest document disclosing the origin of the tenancy is the *jamabandi* (Exhibit H) of 12 81, corresponding to 1863 and 1864. This was a document prepared by Dwarka Lal, the Patwari, and is proved by his grand nephew Baldeo Lal. It is a Zemindary paper showing the collections made by Sunder Sahay and has been produced from the custody of Baldeo Lal. Next Exhibit H1, is a similar *jamabandi* for 1273. These two documents show that five tenants, named Bulaki, Doma, Bikhan, Bikhari and Adam, sold either portions or the whole of their occupancy holdings to Nathu Lal Chaudhury, aggregating a total area of 36 *bighas* 7 *cottahs* 11 *dhurs* and carrying a rental of Rs. 197 14 0. Exhibits H2 and H3 the *jamabandis* for 1277 and 1281 corroborate the sale. Of the five tenants Bikari and Bulaki are the only two who are alive; they are very old men now and have given evidence in support of the purchase and the creation of Nathu Lal's holding,

Prayag Lal, who was the Munshi of the Factory for 8 or 9 years at or about that time, also gives corroborative evidence upon this point and so does Ram Charitra, witness No 3, who was the cousin of Sunder Sahay. Finally, Tilak Chaudhury a cultivator aged 75 deposes that he knows the 36 *bighas* of *kasht* land which were purchased by Nathu Lal Chaudhury and that in consideration for the sale to him of 21 *bighas* of thatching grass by Mr. Grant, the then Manager of the Factory, he did some digging work for the Factory on the 36 *bighas* in or about 1877. All this evidence obtains striking corrobration from Exhibit 22 which is the measurement *khasra* of the Collector's partition proceedings dated the 4th December 1865. That partition was made upon an application by Sunder Sahay and a separate estate corresponding to his 8-annas share was thereby created. Items Nos. 34 and 39 on this *khasra* show that Doma Sahay was then in possession of an area of 9 *cottahs* 15 *dhurs*. A reference to Exhibits H1 and H2 shows that this is the exact area which remained in Doma Sahay's possession after he had sold part of his holding to Nathu Lal. So, again, is this striking coincidence found in regard to Bulaki Lal. Exhibit 22 also shows that there was at that time an Indigo Factory in the village and that it held land in the village which was described in some places as "Indigo *zeriat* of the Factory" and in others as "Indigo *zerait*" only. The evidence shows that Nathu Lal had been carrying on the cultivation of Indigo under leases from Sunder Sahay's co-sharers of lands in their exclusive possession. Whether the sales by the five tenants above-mentioned were recognised by all the landlords is not clear but there is a letter, Exhibit E, dated the 15th December 1866, written by Sunder Sahay to Nathu Lal in which Sunder Sahay recognises Nathu Lal as the cultivator of 36 *bighas* 7 *cottahs* and 11 *dhurs* of *khudkasht* lands (occupancy holding) at an annual rental of Rs. 197.14.0 which had fallen within his proprietary interest and had been purchased by Nathu Lal from the tenants of the village. If this letter is genuine, it would seem that there had been some private arrangement by which the land fell within Sunder Sahay's *patti* and that he was the sole landlord.

The learned Vakil for the appellant has characterised this document as an audacious forgery. The document is in Persian, on a paper bearing an old impressed stamp of 1865, and carrying a Stamp Vendor's endorsement on the back of it in accordance with the rules in force at that time. The appellant asks us to compare Sunder Sahay's signature on this document with Sunder Sahay's admitted signatures in Exhibit 4, which is a *mokarrari patta*, dated the 22nd July 1867, Exhibit 14A, a *mukhtarnama* in the partition proceedings, dated the 22nd July 1868, Exhibit 14, a *mukhtarnama* in the same proceeding, dated the 17th May 1871 and Exhibit O, a petition in the partition proceedings, dated the 21st January 1868. The learned Subordinate Judge, after a careful comparison of the writings, came to the conclusion that while the signatures in the latter documents were in small writing Exhibit E was written in a flowing Persian style and in large letters and that there was nothing to show that it was not signed by Sunder Sahay as alleged. No expert testimony has been given in the case and I, for myself, am unable to say by a comparison of the writings that the learned Subordinate Judge was wrong. A witness called Ezid Baksh has been examined on behalf of the plaintiff to show that he knew Sunder Sahay's writing and that Exhibit E was not signed by him. The cross-examination of this witness shows that, if he knew Sunder Sahay at all, he must have been so young then that his evidence is of very little value. On the other hand, the appearance of the document, the condition of the paper, the fact that if the document had been a recent forgery the ink would certainly have soaked in and run, satisfy me that no forgery has been committed. It seems incredible that if the defendant had intended to support his case with a false document he would have produced a signature so utterly dissimilar to the admitted signatures.

Our attention has been drawn to the fact that the document states that the rental should be inclusive of road cess. It is said that in 1865 there was no Government demand known as road-cess which did not become leviable till 1871. It does appear to be the case that the first Road Cess Act was passed in 1871 and that the first Public Works Cess Act was passed in 1877; but Mr. Manuk urges that the probability is that

for some years before 1871, the proposal to levy road-cess was being widely discussed and that the intention of Government to legislate for this purpose was known to Sunder Sahay. The evidence does not show that there was not before 1871 any provision enabling a Zemindar to realize a cess for the upkeep of roads, and the materials upon which a charge of forgery can be based are wanting. It is curious that the document speaks of the "Road-Cess to be levied by the Government in the future." This seems to support Mr. Manuk's suggestion but, however that may be, I am not prepared to hold that the document is a forgery. It is inconceivable that an European of the education of Mr. Vincent would have made so stupid a blunder, if he was embarking on forgery, as to make mention of an impost which was neither in existence at the time nor contemplated.

The genuineness of Exhibit E is further established by Exhibit D which is a list of documents prepared by Nathu Lal or his agents in 1872. This is a very old and worm-eaten paper purporting to be a list of *pattas* forwarded to Nathu Lal by his Manager, Mr. Exshaw. Entry No. 27 in this list shows that there was a document dated the 19th December 1875 in the possession of the Factory acknowledging the purchase by the Factory of 36 *bighas* 7 *cottahs* 11 *dhurs* of *kasht* land from the tenants of Etwarpur. The appellants answer to this is that this document, too, is a forgery. Now Mr. Exshaw is either dead or cannot be found but his signature has been proved by Prayag Datta, the old Munshi, who is 85 years of age. I do not think there can be the slightest doubt that Exhibit E was prepared in 1865 and entered in Mr. Exshaw's list in 1872.

I cannot agree that Exhibits E, H, H1, H2, H3, and 22 have been forged. In my opinion they are genuine document which establish the origin of Nathu Lal's title in the suit lands.

It is necessary here to say a word about Exhibit N-1, dated the 21st April 1891, and Exhibit N, dated the 18th December 1892. These documents purport to be rent receipts given by Matuk Lal's agents to the Hudsons for the lands in suit and for other lands. The particular importance of Exhibit N lies in the fact that it purports to be a receipt for *kasht* lands in addition to other lands. The writer of the documents is a Mukhtar, named Rudra Prashad. He was called by the defendant but in the witness box he said that the words "*main kasht*" (including *kasht*) are interpolations. The learned Subordinate Judge accepted both documents as genuine but Mr. Manuk has declared before us that he will not rely on them as the appearance of the disputed part of Exhibit N is suspicious and that he prefers to base his case on the other evidence adduced by him. Rudra Prasad was evidently disbelieved by the Subordinate Judge and it seems to me that Mr. Manuk had no need to give up Exhibits N, and N-1. But I agree that he can afford to do so and that there is ample evidence to show that Nathu Lal did purchase 36 *bighas* 7 *cottahs* 11 *dhurs* and that his occupancy right therein was recognised by the proprietor.

The suggestion of the learned Vakil for the appellant that in or about 1865 Nathu Lal, on the strength of leases held under proprietors other than Sunder Sahay forcibly dispossessed the *raiyats* in Sunder Sahay's *patti* and so acquired the 36 *bighas* is not supported by any reliable evidence.

The plaintiff in regard to this part of the case relies on three Road Cess Returns filed by the Factory. The first two are Exhibits 13 and 13-A and were filed by Beni Prasad, Am Mukhtear to Mr. Henry Hudson, on the 27th October 1902. In these Mr. Hudson admits that an area of 36 *bighas* 7 *cottahs* 11 *dhurs* is *nij jote* land in his possession and that its annual value is Rs. 392-2. He does not show himself as a cultivating *raiyat* paying rent to himself as *ticcadar*. Exhibit 11 is a similar document filed by Iswar Lal Patwari on 19th November 1912. That document, too, shows that the Factory holds an area of 36 *bighas* 7 *cottahs* 11 *dhurs* as *serait*.

These declarations, in so far as they are admissions, must be taken into account against the defendant, but the explanation seems to be that they were, if at all incorrect, made under an excusable error. *Raiyati* land coming into the *khas* possession of the proprietor would ordinarily be shown as *serait* land, and I am by no means certain that the entry in this case was wrong. If it was wrong the error, in my opinion, was an excusable one.

I am satisfied, therefore, that the allegation that Nathu Lall purchased the lands in suit is correct.

The next question is, whether the *raiyati* holding thus created in 1865 merged in the proprietary right when Nathu Lal took his first lease from the proprietors on the 13th June 1876. In my opinion it did not; firstly, because he was an *ijaradar*, and, secondly, because he was not an *ijaradar* of the whole estate. The law previous to 1885 on this point was the same as that contained in section 22 of the present Bengal Tenancy Act and Nathu Lal's occupancy right did not merge in the proprietary right under Act X of 1859 [See *Maseyk* v. *Bhagabati Barmanya* (2)]. It follows, therefore, that in 1881 when Nathu Lal acquired the *ijara* of the whole Mauza his occupancy holding was still alive.

The next question is, whether Nathu Lal did in fact sell this holding to the Hudsons by his conveyance dated the 23rd July 1890 (Exhibit 12).

The learned Vakil for the appellant contends that the conveyance did not pass the occupancy holding. In the alternative it is contended that if it did, then, in the absence of evidence as to the saleability of occupancy rights, no title passed to Hudson.

It is true that the deed does not specifically mention the occupancy holding in question, but, having regard to the general words used in the document and the schedule of *ticcadari* villages, I agree with the learned Subordinate Judge that though the *touzi* number has been incorrectly given, the lands in suit were transferred as part of the 8-annas share of Mauza Etwarpur Jainti and were covered by Item No. 37 of the list. Indeed, before the learned Subordinate Judge there was no denial that the Hudsons did in fact purchase whatever right, title and interest Nathu Lal Chaudhury had in the suit lands. In the list of *kasht* lands attached to the schedule the only entry is one relating to 4 *bighas* 7 *cottas* held under a proprietor named Biteshwar Singh. What the meaning of this entry is has not been disclosed. This list certainly cannot be an exhaustive statement of all the *kasht* lands held by the Factory for we know from the Survey Records that there were other *raiyati* lands of which the Factory was in possession under proprietors other than Matuk Lal.

Upon his view of the facts it did not become necessary for the Subordinate Judge to decide the issue whether occupancy rights are saleable by custom in the locality. The defendant did give evidence upon this point and, having regard to the conduct of Sunder Sahay and Matuk Lal in recognising the transfer to Nathu Lal and Mr. Hudson respectively, I would, if it had been necessary, have held that the custom had been established.

Having now cleared the position as regards the existence of an occupancy right in the lands in 1865, I propose to examine the legal rights of the defendant. The learned Vakil for the appellant contends that as there is no evidence that Nathu Lal paid rent for the holding it must be presumed that the occupancy right ceased to exist and he relies upon section 6 of Act X of 1859 which prescribes that an occupancy *raiyat* shall be entitled to possession so long as he pays rent. The reply is that the actual payment of rent was not necessary under that Act. Payment of rent entitled the *raiyat* to possession, but it does not follow that the occupancy right was terminated as soon as the rent fell into arrears. It was necessary that the landlord should determine the tenancy before the tenant could be divested of his status [See *Narain Roy* v. *Opnit Misser* (3)].

It may be as well to consider here the alternative argument advanced by Mr. Manuk as to the status of Nathu Lal previous to 1873. He contends that, even if it be held not to have been established that Nathu Lal acquired an occupancy holding by purchase and by subsequent recognition by Sunder Sahay, he acquired such a right by 12 years' possession between 1863 and 1875, in which year he took a "*ticca*" of part of the village. Mr. Mitter's reply to this is that Act VIII of 1885 is not retrospective and that under Act X of 1859 possession without payment of rent does not confer a right of occupancy. In

(2) 18 C. 121; 9 Ind. Dec. (N. s.) 81.

(3) 11 C. L. R. 417; 9 C. 304; 5 Shome L. R. 133; 4 Ind. Dec. (N. s.) 852.

my opinion payment of rent must be presumed and, therefore, under section 6 of Act X of 1859 Nathu Lal must have acquired an occupancy right.

From 1876 to 1881 in which year Nathu Lal acquired the lease of the whole village and then down to 1890 the occupancy right was held in suspense. It is not necessary in this view to consider what would have been the position in 1881 if there had been no *ijara*. But if it were necessary to decide the point I would hold that the law of merger does not apply to the Mufassil in Bengal and that the view taken in *Thomas Sait* v. *Punchanun Roy* (4), *Lal Bahadoor Singh* v. *E. Solano* (5), *Hirendra Nath Dutt* v. *Hari Mohan Ghose* (6), correctly represents the law of this province. Therefore, whether Nathu Lal commenced his tenancy as a tenant-at will or non-occupancy *raiyat* or occupancy *raiyat* he was, in my opinion, in 1881 an occupancy *raiyat* and from 1881 to 1890 his occupation of Mirza Etwarpur Jainti as 16 annas *ijaradar* did not put an end to his occupancy right.

What, then, was the position when Nathu Lal sold to Hudson on the 23rd July 1890? Assuming still that there is no custom of transfer of occupancy holdings, Hudson became a trespasser but his recognition in 1896 legalised his position as the successor-in-interest of Nathu Lal. In my opinion it was a recognition of the occupancy right, and there is no suggestion that any new tenancy was created.

That being so, let us now examine the effect of the admissions made by the Hudsons in the leases Exhibit 1, dated the 19th April 1897 and Exhibit 2, dated the 8th September 1904.

I have already held that the admissions are relevant on the footing that the lands belong to the *raiyati* stock of the country and that though the plaintiff cannot give any information as to their previous occupation by any *raiyat* he is entitled to succeed unless the defendant can prove a tenancy from which he is not liable to be ejected.

Now, whether the admissions were foolish, fraudulent or induced by mistake, the fact remains that Act VIII of 1885 prescribes that a tenant cannot divest himself of occupancy right by contract.

This is admitted by Mr. Mitter but he argues that the deeds indicate that it was the intention of Mr. Hudson to relinquish or surrender or abandon his occupancy right and that the agreement to restore 36 *bighas* odd to the *khas* possession of the landlord after the indigo crop had been cut was legally sufficient to terminate the tenancy with effect from the 19th April 1897.

In my opinion the case of relinquishment, surrender or abandonment should have been specifically raised and pleaded; no such case appears to have been made before the Subordinate Judge and there is no finding of fact upon which the legal application of sections 85 and 87 of the Bengal Tenancy Act can be founded. I am not prepared in the Appeal Court to go into a question which is a mixed question of law and fact and upon which the learned Subordinate Judge was not asked to come to a finding.

Mr. Mitter next urges that Mrs. Hudson's sub-lease to Mr. Vincent practically amounts to a permanent lease at a fixed annual rental of Rs. 5 and that this being contrary to the provisions of section 85 of the Bengal Tenancy Act of 1885 the landlord is entitled to eject the defendant. Mr. Vincent has not produced the sale-deeds by which in 1909 and 1912 he purchased the right, title and interest of the Hudsons, but he produced Exhibit A the sub-lease dated the 30th January 1914, that is to say, his *ticca* lease had expired, in which Mrs. Hudson states that she did not sell her occupancy rights in the lands in suit to Vincent; and that there was an agreement at the time of the sale that in consideration of the purchase-money paid for the sale she would give Vincent a sub lease of all the lands appertaining to the Indigo Concern in which she had a right of occupancy and that, in accordance with the said agreement, she has executed a sub lease for a term of five years at a rent of Rs. 5 per annum with an option to the lessee of successive renewals.

(4) 25 W. R. 503.
(5) 10 C. 45; 12 C. L. R. 559; 5 Ind. Dec. (N. S.) 82.
(6) 22 Ind. Cas. 966; 18 C. W. N. 860.

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It is contended upon the authority of *Bipin Behari* v. *Amrita Lal Bhattacharji* (7) that this practically amounts to a permanent sub-lease and that the transaction is invalid. I agree with Mr. Manuk that the law has been correctly laid down in *Abdul Karim* v. *Abdul Rahman* (8) and that the lease is neither illegal nor invalid: it binds the occupancy *raiyat* and the under *raiyat* and, so long as the rent of the holding is duly paid and the land duly cultivated, I cannot see under what provision of law the superior landlord is entitled to re-enter. Mr. Mitter argues that Mrs. Hudson by living in England and by discontinuing the cultivation of the holding by herself or her servants must be taken to have abandoned within the meaning of section 87, but here again we have a mixed question of law and fact upon which it is impossible to come to a decision for the first time in the Appeal Court. Speaking for myself, I see nothing in the evidence which would justify the view that there was an abandonment. I do not, however, agree with Mr. Manuk when he says that the landlord cannot, except by following the procedure laid down in section 87, obtain relief against abandonment. If he can prove abandonment in fact and in law he would be entitled to succeed without resource to the special procedure of the Tenancy Act.

The result, however, is that I find that the occupancy right of Mrs. Hudson still subsists and that the defendant Vincent had a valid title to occupy the land as her under-*raiyat*.

Finally, let us consider what would be the position if it be held that Matuk Lal did not recognise Hudson as the purchaser of the occupancy right of Nathu Lal Chaudhuri but merely as a tenant for the year 1303. In that case, although it is nobody's case that a new tenancy was created, the status of Hudson would be that of a non-occupancy *raiyat* and the question is whether that status could be extinguished by the acquisition of the *ticca* in 1897. Being of opinion that the Law of Merger does not apply to the Mofussil, I think the non-occupancy right would continue to exist though suspended. This view is in accordance with the recent decision of this Court in *Pierpont Morgan* v. *Ramjee Ram* (9). On the expiry of the *ticca* lease in 1913 Mrs. Hudson's non-occupancy right would still be alive and it is not competent to the plaintiff to eject her without resort to the provisions of the Bengal Tenancy Act.

In my opinion, therefore, the suit has been rightly dismissed, but I cannot conclude my judgment without some reference to the conduct of the defendant and his predecessors.

Though it is impossible to speculate as to the state of Mr. Hamilton Hudson's knowledge it would seem that the existence of the tenancy was known to some at least of his subordinates. I think it is probable that Mr. Hamilton Hudson was entirely in the hands of his servants and that he was ignorant of the affairs of the Zamindary. I do not believe that he intentionally deceived the proprietor by an assurance that the occupancy right was surrendered. It has not been disclosed who drew up this lease. It is said that a man named Kumar Munshi was responsible for it and that he knew the facts and that he has been dismissed by the Factory.

Nor did Mr. Ross act with any greater care in 1904. Whether he knew anything about the occupancy holding is not disclosed. He says that the leases had been settled by Mr. Henry Hudson who was his predecessor and a proprietor and he suggests that he did not concern himself with the statements contained in the document. This gentleman was in charge of the Factory for nearly four years and he cannot plead the excuse of youth like Mr. Hamilton Hudson, and it is unfortunate that he was not questioned more fully as to the state of his knowledge.

Mr. Vincent who purchased a part of the proprietor's share in 1909 and the remainder in 1912 and who had become a manager in 1909 also does not say when he first became aware of the occupancy right, but from the recital in the sub-lease executed by Mrs. Hudson on the

(7) 3 Ind. Cas. 687; 9 C. L. J. 76.

(8) 13 Ind. Cas. 364; 15 C. L. J. 672; 16 C. W. N. 618.

(9) 56 Ind. Cas. 365; (1920) Pat. 163; 5 P. L. J. 394; 1 P. L. T. 310.

30th January 1914 it would seem that he certainly knew of it in 1912. Upon the proprietor's refusing to renew the lease in 1913 he asserted his right to occupy the 36 *bighas* 7 *cottahs* 11 *dhurs* as a tenant. There can be no doubt that it was then that Singharan Rai produced the important document Exhibits D, E, F and K from the Factory almirah. Possibly, Mrs. Hudson may have had doubts about her capacity to successfully assert her title as an occupancy *raiyat* and it may be that for this reason she in her sub-lease stipulated that Mr. Vincent would indemnify her against all liabilities incurred in the assertion thereof. But Vincent's attitude in the matter has been perfectly correct and if, notwithstanding the conduct of the Hudsons, he can establish his *raiyati* title, he is fully entitled to take advantage of the protection which the law allows.

Finally, there is a letter written by Mr. Richardson, marked Exhibit X, dated the 15th June 1885. Mr. Richardson was in the position of a supervisor to the younger Hudsons who were managing the Factory. He lived at a distance but appears to have been consulted in all serious matters. It will be remembered that in 1885 negotiations were going on for the renewal which eventually resulted in the lease of 1887. Mr. Richardson in the letter in question writes to the proprietor that he will agree to the exclusion from the lease of 2 *bighas* of *zerait* land. It is contended that Mr. Richardson admits thereby that there were *zerait* lands at that time. The use of that term, however, is not inconsistent with the existence of an occupancy holding within the demised area. Indeed, the Survey operations which were going on about this time show that the Survey Authorities were not satisfied that the area in suit was true *zerait*.

But the significance of Mr. Richardson's conduct lies in his failure to assert the occupancy right either before the proprietors or the Survey Authorities. Mr. Richardson, as in the case of the other European witnesses, has not been asked whether he knew of the existence of any such right. If he did, there is a very good explanation for his not disputing the Survey entry. For when the entry was made the Hudsons had not yet been recognised as *raiyats* and if the saleability of occupancy rights was doubtful their position was that of trespassers.

The position became different in 1887, but in my opinion the admissions made by the Hudsons then could not in law operate to divest them of their occupancy right. The case really turns upon the recognition of 1886 and I do not think that the learned subordinate Judge's estimate of the evidence bearing upon this point has been shown to be incorrect.

I would dismiss the appeal with costs.

JWALA PRASAD, J.—This appeal arises out of a suit in ejectment, and relates to 36 *bighas* 7 *cottas* 11 *dhurs* of land situate in Mauza Etwarpur Jainti. The predecessor-in interest of the plaintiff, Sunder Sahay, had 8 annas share in the Mauza. By Collectorate partition in December 1878, Sunder Sahay was allotted a separate estate bearing *touzi* No. 9507 representing his 8 annas share. The lands in suit have fallen into this Touzi of Sunder Sahay and he thus became proprietor of 16 annas of the lands.

After his death, his estate devolved upon one Manik Lal, who on the 13th July 1895 executed a conveyance of sale in favour of the plaintiff and his co-sharers defendants third party (1 to 11).

On the 23rd June 1909 by amicable partition the lands in suit were allotted to the plaintiff. The plaintiff is thus the 16 annas proprietor of the lands in suit.

One Nathu Lal established an Indigo Concern called Binkipur Factory in the year 1271 (1863-64). On the 30th June 1876 (Jaith 1283), he obtained a lease of 2 annas out of 8 annas share of Mauza Etwarpur Jainti, per Exhibit 23, from Shiu Prasad, successor of Sunder Sahay, for a period of seven years from 1284 to 1290.

The lease was renewed on the 28th July 1883, per Exhibit 19, for a further period of 9 years from 1291 to 1299 (1884 to 1892). The remaining six annas share of Sunder Sahay was also leased to Nathu Lal on the 20th November 1881 for a term of seven years from 1289 to 1295 (1882 to 1888). Nathu Lal continued to hold the lease of the entire 8-annas under an oral settlement up to 1302 (1895).

In the meantime, on the 23rd July 1890 (1297), Nathu Lal sold the entire Indigo

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Concern, then styled Pirakhpur Indigo Factory, to Mr. Henry William Hudson, who thus came to be in possession of the entire 8 annas share of Sunder Sahay in Mauza Etwarpur Jainti, *touzi* No. 9507, as a lessee thereof admittedly till 1302 when the oral lease is said to have expired. There was an *interregnum* during the years 1303 and 1304, corresponding to 1895-1896 and 1896-97. There is a dispute about this period.

The plaintiff's case is that Mr. H. W. Hudson held over and continued to be in possession as a lessee. The defendant's case is that Manik Lal collected the rent for this period.

On the 19th April 1897, Mr. Hamilton Hudson, Manager of the Factory, executed a *kabala* (Exhibit 1) on behalf of the proprietors, Mr. William Hudson and Mr. Henry Hudson, in favour of the plaintiff and his co-sharers for the entire 8-annas share of Etwarpur Jainti for a term of seven years from 1305 to 1312 (1898-1905). The *kabuliyat* (Exhibit 2) was renewed in 1904, for a term of 9 years from 1311 to 1321 Fasli by Mr. H. W. Hudson in favour of the plaintiff and his co sharers.

Mr. H. W. Hudson was succeeded by his sons Mr. H. W. Hudson and Mr. Percy Hudson, who after the death of the former in 1909 became the sole proprietor. Mr. Vincent, defendant No. 1, became Manager of the Factory in 1908 purchased 4-annas share from Mr. Hudson and in 1912, after the death of Mr. P. Hudson, he purchased the remaining share from his widow Mrs. Hudson. The defendant No. 1, Mr. Vincent, is, therefore, the proprietor of the 16-annas Factory from 1912. After the expiry of the last lease of Mauza Etwarpur Jainti, on 1st Kartick 1321 (5th October 1913), the plaintiff recovered *khas* possession of the Mauza, *touzi* No. 9507, but he did not get possession of the disputed lands in that Mauza and hence he has brought the present suit for recovery of the same with mesne profits.

The defendants first party and the fourth party only appear in the suit. The defendant first party, Mr. Vincent, resists the claim of the plaintiff to the *khas* possession of the land in suit on the ground that the disputed land was the occupancy holding of Nathu Lal Chaudhri, the former proprietor of Pirakhpur Factory, at an annual rental of Rs. 197 14-0; that after he acquired the *ticca* lease of the entire 8-annas share of Etwarpur Jainti, he continued to hold the land as an occupancy *raiyat* during the period of his *ticca*, and after he transferred the Factory in 1890 to Mr. H. W. Hudson, he and his successors continued to be in possession in the same right and title, and that now Mrs. Hudson, the defendant fourth party No. 12, is in possession of the same as an occupancy holder, and she on the 13th January 1914 executed a sub-lease in favour of defendant No. 1, Mr. Vincent, whereby the latter became an under-*raiyat* for a period of 9 years up to 1923 with an option of successive renewals at an annual rental of Rs. 5.

The defendant No. 1, therefore, contends that he is in possession of the lands in suit as a sub-lessee of the occupancy holder, Mrs. Hudson, and that the plaintiff on the expiry of the *ticca* lease of the village is not entitled to get *khas* possession of the same.

The vital question for consideration in this case is whether the disputed land formed the *kashtkari* land of Mr. Henry Hudson and Mrs. Hudson. The plaintiff is the proprietor of 13 annas of *touzi* No. 9507 in which the lands in suit are situate. The defendant and his predecessor have been lessees of a part of the village from a long time (from 1876) and from 1881 of the entire village. The lease ultimately terminated on the 5th October 1913 and the plaintiff is *prima facie* entitled to eject the defendants from the land in suit.

The defendants can resist the claim of the plaintiff for *khas* possession only on establishing their *kasht* rights in the lands as claimed by them. The Subordinate Judge has rightly held that the onus of proof lies upon defendants and he is certainly supported by the authorities quoted by him: *Dina Nath Das* v. *Ganesh Chandra Saha* (10), *Ambica Prasad Singh* v. *Baldeo Lal* (11) and *Narsing Narain Singh* v. *Dharam Thakur* (12).

(10) 20 Ind. Cas. 155; 18 C. L. J. 544.
(11) 36 Ind. Cas. 126; 20 C. W. N. 1113; 1 P. L. J. 253; 2 P. L. W. 47.
(12) 9 C. W. N. 144.

BHONU LAL CHAUDHURI v. VINCENT.

The defendants' case is, that the land in suit was acquired by Nathu Lal Choudhury, the original owner of the Pirakhpur Factory by purchase from tenants in the year 1271 (1863-1864) before he became a lessee of the village, and the *jamabandis* Exhibits H, H-1, H 2 and H 3 of 1271 (1864), 1273 (1866), 1277 (1870) and 1281 (1874), respectively show that Nathu Lal acquired some tenants' land amounting to 36 *bighas* 7 *cottas* 11 *dhurs*, at a rental of Rs. 133 odd which subsequently from the year 1273 was enhanced to Rs. 197 odd. In order to corroborate these *jamabandis*, reliance has been placed upon the *batwara khasras*, Exhibits 21 and 22, of 1868. But the rental mentioned therein is much less than that shown in the *jamabandis* of 1870 and 1874 (Exhibits H2 and H3). The rental mentioned in the *batwara* is at the rate of Rs. 3 per *bigha*, which would approximately correspond with that mentioned in the *jamabandi*, Exhibit H1, of 1864 prior to the *batwara*.

The defendants, however, rely upon the letter, Exhibit E, dated the 19th December 1865, said to have been written by Sunder Sahay to Babu Nathu Lal Choudhury. In that it is said that the writer Sunder Sahay recognised him as a cultivator of 36 *bighas* 7 *cottas* 11 *dhurs kabza kasht* of tenants purchased by him, with an annual rental of Rs. 197-14-0, including rent and road-cess to be levied by Government in future. The document is in Urdu and is written on a paper bearing an old impressed stamp of 1865. The appellant challenges the genuineness of this document and relies upon Exhibits 4, 14 (*a*) and O in order to show that the admitted signatures of Sunder Sahay on this document are different from that on Exhibit E. I have carefully compared the signature of Sunder Sahay on all these documents and have not the least hesitation in holding that the disputed signature on Exhibit E is widely different from his admitted signatures on the other documents referred to above. The style is different and each letter in Exhibit E differs in mode and style from the corresponding letters on the other documents. The Subordinate Judge has disposed of it by saying that the signature on Exhibit E is much larger than on the other document and that the expression "*bakalam khud*" in Exhibit E, instead of "*bakalam khas*" on the other documents may be due to his not being acquainted with the proper idiom "*bakalam khas*." But all the other documents are more or less contemporaneous. Exhibit 4 is dated the 22nd July 1867; Exhibit 14 (*a*) is dated 22nd July 1868, and Exhibit O is dated 21st January 1868. It is not likely that he would in one document sign as "*khud*" and in all the others as "*khas*." The Exhibit E is written in a flowing Urdu style and the language employed is idiomatic, showing that the writer was not so ignorant as the learned Subordinate Judge supposes him to be. To my mind, the Subordinate Judge did not carefully compare the signature. The words "Sunder Sahay" and "*bakalam*" are quite different in Exhibit E and the other documents. The letter "*kha*" of the word "*khas*" in the other documents is quite dissimilar from the same letter in the word "*khud*" in Exhibit E. In fact, none of the letters in the other documents resemble with those in Exhibit E, either in the body or in the signature portion of Exhibit E.

Exhibit 4 is a registered *mokarrari patta*. It bears three signatures of Sunder Sahay, one as an executant and the others taken before the Sub-Registrar. The signatures thereon are admittedly the genuine signatures of Sunder Sahay.

Exhibit O is a petition in the partition proceedings and is relied upon by the defendants. I, therefore, have no hesitation in accepting the evidence of plaintiff's witness No. 8, Fazl Baksh. He used to reside in the house of Sunder Sahay where his father was employed as a Moulvi. He had, therefore, occasions to know the signature of Sunder Sahay. He denies that the writing or the signature on Exhibit E is that of Sunder Sahay.

Admittedly, the first Public Works Cess Act had not come into operation until 1877, *i. e.*, 12 years after the document was written in 1865. Hence the words "Road-Cess" included in the *jama* of Rs. 197 show that the forgery was overdone. The writer forgot at the time that no road-cess was then leviable and the explanation offered by Mr. Manuk that the levy of cess might have been in contemplation and Sunder Sahay anticipating it wrote the words in the document in question, would be highly extraordinary and improbable. The writing in Exhibit E, which is an earlier document than others,

is more *pokhta* (finished) than that in the other documents. It is also strange why Exhibit E was written on a stamp paper. A letter of this kind is never written on such paper. The letter in question is sought to be corroborated by Exhibit D, a list of documents said to have been prepared by Nathu Lal Choudhury or his agent in 1872. This document is said to be a list of *pattas*. It is sought to be proved by Prayag Dutta, a witness examined on commission on behalf of the defendants. He says that the Factory was first started in Rauna in 1272 and was transferred to Pirakhpur in 1274, owing to flood, by Babu Nathu Lal Choudhury. He says that the rental was enhanced over the original rents paid by the tenants thus to explain the rental of Rs. 197-14 0 as mentioned in the letter, whereas the rents mentioned in the *jamabandi* (Exhibit H 1) of the tenants with respect to the lands sold by the tenants show a much smaller rental of Rs. 125 odd. But if the rents were enhanced in the year 1835 (1272) to Rs. 197-14 0, mentioned in the letter as well as in Exhibit H-1 of the year 1865-66 there is no reason why this enhanced rental should not have been mentioned in the *butwara khasra* (Exhibit 22) of 1868 (1275). His statement that Sunder Sahay had no *zerait* in his *putti* before and after the partition is falsified by Exhibit 22, the *butwara khasra*, which has been signed by all the *malikan* and which shows that Sunder Sahay had some *zerait* before the partition and was given some *zerait* proportionate to his share after partition.

Exhibit D is not properly proved and nobody had known it. Prayag Datt says that he prepared a list of documents, but he does not prove that the list in question is in his handwriting. It was not regularly prepared in the ordinary course of business, for the entries are not in order. Entry No. 27 mentions the letter in question (Exhibit E), dated the 19th December 1865, but the entries before that relate to the years 1866 and 1867. The manner in which the document has been produced is also suspicious. I do not, therefore, attach much importance to this list, Exhibit D. As shown above, it was not legally proved and I wonder how it was marked as an Exhibit in the case in face of the objection of the plaintiff. I have already shown that Exhibit E is not genuine. The internal evidence of the letter itself is against the actual state of affairs. It is also suspicious that Sunder Sahay, who was then only a part-proprietor and joint-holder of the lands in the estate, should have written the letter in question recognizing the purchase of Babu Nathu Lal Choudhury. He had no authority to do so. His right to exclusive possession of 8 annas *takhta* in the village arose only after the partition subsequent to the letter in question. This view is strengthened by the fact that no rent receipt has been produced by the defendant of the time of Babu Nathu Lal Choudhury either on behalf of the landlords or on behalf of Sunder Sahay.

Witness Balaqi (D. W. No. 8) says in his deposition that he and the other tenants made over the receipts which they had obtained from Sunder Sahay in respect of the *kasht* lands in question, to Babu Nathu Lal Choudhury. These receipts are not produced. Nathu Lal Choudhury was a lessee in respect of 2 annas out of the 8-annas share of Mauza Jainti from the year 1271. He was a lessee of a portion of 8 annas share from the year 1283 and of the entire share from the year 1289. We do not find any receipt of rent paid by him before he became a lessee of the entire 16 annas.

Thus, neither the receipts of the vendors, nor his own, in proof of having paid rents to Nathu Lal Choudhury, have been produced. These receipts must have been made over to the defendants when the Factory was sold to them in the year 1283, for, if he was careful to give the letter Exhibit E to the defendants' predecessors, certainly he would not have withheld the receipts.

Two rent-receipts (Exhibits N and N-1), dated the 18th December 1892 and 20th April 1891, respectively, have been filed. These purport to be rent receipts for Rs. 125 each given by Matuk Lal's Agent to the Pirakhpur Factory representing Mr. Hudson, on account of the rent of the *kasht* lands in Mauza Etwarpur Jainti, the former for the Aghan *kisht* of 1300 and the latter for the Phagun *kisht* of 1293. Rudra Prasad, witness No. 10 for the defendants, the writer thereof, denies that he wrote the words "*mai kasht*" (including *kasht*) and swears that "*mai*" is an interpolation and is not in his handwriting and that

the word "*kasht*" has been substituted for "*babat*" which he wrote. The Subordinate Judge says that his evidence is vague and, therefore, does not accept it. The witness is corroborated by the receipt (Exhibit N 1) in which there are no words as "*mai kasht.*" On the other hand, if this witness is unreliable his whole evidence must go out, in which case the receipts are not at all proved. If these receipts were in respect of *kasht* lands, certainly the lands must have been mentioned as is usually done in rent receipts. It is not shown how the Phagun *kisht* in Exhibit N and the Aghun *kisht* in Exhibit N-1 will each be Rs. 155 for then the rent of the lands will be much more than Rs. 250 which is not the case of the defendants. Mr. Manuk has very rightly abandoned these receipts as being suspicious and of no practical use. We cannot but accept Mr. Manuk's attitude in view of the evidence of Rudra Prasad. I, therefore, agree with him in discarding these receipts, for even if they be genuine they do not show that they relate to the lands in suit. The recognition of the defendants' *kasht* rights in the lands in suit on the basis of these receipts cannot be held to be proved. The only reliable document, therefore, on behalf of the defendant is the *butwara khasra* of 1868. As observed above, this Khasra shows some lands acquired by Nathu Lal Choudhury, but the rental shown there is at the rate of Rs. 3 per *bigha*, much less than that claimed for the lands in suit. Besides, the learned Subordinate Judge has held that there is nothing to show that the lands in the *butwara khasra* are identical with the lands in suit; so the *butwara khasra* does not help the defendants very much.

The case of the defendants is that Babu Nathu Lal Choudhury had acquired the lands in suit by purchase and when the Factory was sold to Mr. Henry William Hudson on the 23rd of July 1890, per Exhibit 12, the indenture of sale, the defendant succeeded to the Factory as well as to the lands in suit. By this sale-deed the vendor Nathu Lal purports to sell to Mr. Hudson "the Pirakhpur Indigo Concern together with all the Taluks, Mauzas, villages, lands, hereditaments and premises of which the particulars are set forth in the schedule hereto as on and from the 1st day of November one thousand eight hundred and eighty nine (1-89) for the price of rupees one hundred and sixty thousand". There are separate schedules attached to the sale deed showing in detail the villages, the *Thicadari* Mouzas and the *kasht* lands. In Etwarpur Jainti some *zerait* lands of 4 *bighas* 10 *cottas* are mentioned. In the list showing the *kasht-kari* of Nathu Lal only 4 *bighas* 7 *cottas* is mentioned. The schedules are very long and detailed, purporting to give a complete list of all lands pertaining to the Factory, yet these lands in dispute are not mentioned therein.

Thus, the Factory did not acquire the lands in suit by purchase from Babu Nathu Lal Choudhury and their claim to hold the lands as his successors falls to the ground. The previous history of the lands in question, and the question whether and how they were acquired by Babu Nathu Lal Choudhury do not, therefore, arise. Therefore, the Factory cannot claim the lands in suit as successors of Nathu Lal Choudhury.

The defendants base their claim upon the recognition by the proprietors in 1303 and 1304 (1896-97).

Baba Nathu Lal Choudhury was in possession of the 8-annas Patti of Sunder Sahay which had become 16-annas of *Touzi* No. 9507 by partition, originally under written leases (Exhibits 18 and 19), and on the expiry of the term thereof he was holding over under an oral settlement up to 1302. In the meantime, he sold the Factory to Mr. Henry William Hudson on the 23rd July 1890 who thus came to be in possession of Etwarpur Jainti on verbal settlement as a lessee thereof. The lease expired on 30th Bhado 1302 (4th September 1895).

A written lease was again executed in favour of the proprietors of the Factory, Mr. William Hudson and Mr. Henry Hudson, for seven years from 1305 to 1312 (1898 to 1905).

The defendant's case is, that he was not in possession of the village under any lease for the period 1303 and 1304, and during that period he paid rent for the lands in suit to Matuk Lal and whatever defect may have been in their title to their *kasht* right in the lands in suit, it was cured by the recognition of their right by the proprietors in 1303 1304. In support of this contention, Exhibits I and K of 16th April 1896 are

relied upon. Before 1303, on the 13th July 1895, (1302), Matuk Lal had executed a conveyance in favour of the plaintiff and his co-sharers, defendants third party 4 to 11, transferring his proprietary interest in the village. Thus, the receipts, Exhibits I and K, were granted after Matuk Lal had conveyed away his interest to the plaintiff. Exhibit I purports to be a receipt granted by Khub Lal, Patwari, in place of Dwarka Lal, Patwari, on behalf of Matuk Lal for Rs. 138 in respect of the current *kisht* 1303. Khub Lal's son, Baldeo Lal, has been examined, but he does not prove the signature of Khub Lal on this receipt. This receipt is not, therefore, legally proved in the case and was marked subject to objection. The Sub-Judge was bound to dispose of the objection of the defendants as to the admissibility of this document. Dwarka Lal was the registered Patwari as admitted by Baldeo Lal, and Khub Lal was his Naib. Khub Lal was not at all a registered Patwari and there is no evidence that he was in charge of the collections of the village. Dwarka Lal must have engaged him as his assistant in order to help him in the writing of village papers. There is a column in the receipt for the signature of the landlords or recognised agent. It is not proved whether any body signed in this column and, if so, who signed it and under what authority. The Patwari whose duty consists in making collections is not entitled to recognise tenancy rights. The landlord is not bound by the receipt given by the Patwari recognising a person as his tenant. This is clear from the pronouncement of their Lordships of the Judicial Committee in *Russo Chinese Bank* v. *Li Yau Sam* (13): "If the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised."

This view has also been adopted in this Court in several cases: *Janki Sahu* v. *Thakur Run Bahadur Singh* (14), *Wyatt, A. W. N.* v. *Sheo Gobind Sahu* (15) and *Juthan Lal* v. *Ram Dat Singh* (16).

It is not within the ordinary business of the Patwari to recognise new tenants or the transfers of tenancy or the splitting up thereof. These are very valuable rights for the landlord and, unless expressly given, he will not be bound by the acts of his servants. The onus is upon the person who relies upon the recognition by the Patwari to show that it was within his delegated authority to do so. In the particular case the receipt is not given by the registered Patwari and hence the principle applies with greater force and the defendant should have proved Khub Lal's authority to recognise tenancy right of the defendants. There is no reason why the landlord was not asked by the defendant to sign this important receipt in the column provided for it. Matuk Lal himself at that time was the outgoing proprietor.

No doubt, the sale-deed was executed in 1895. The balance of the consideration-money Rs. 11,500 was paid on the 29th August 1896, corresponding to the end of 1303, and the plaintiff came into possession of the property on that date. But the title in the plaintiff vested on the date the sale deed was executed and registered. The possession was deferred till the entire consideration money was paid up. Matuk Lal himself had no right, therefore, to create any incumbrance against the interest of the plaintiff-purchaser: *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (17). Matuk Lal being in possession was entitled to the income for the year 1303, the annual rent of which was Rs. 520. The sum of Rs. 138 received by him was given credit and the balance Rs. 382 was paid by the purchaser per receipt Exhibit 7 on the same date that the receipt for the consideration-money (Exhibit 6) was granted. The defendants continued to be in possession as before

(13) (1910) A. C. 174 at p. 184; 79 L. J. P. C. 60; 101 L. T. 689; 26 T. L. R. 203.

(14) 39 Ind. Cas. 398; 2 P. L. J. 231; 1 P. L. W. 658.

(15) 36 Ind. Cas. 777; 1 P. L. J. 414; 3 P. L. W. 88.

(16) 51 Ind. Cas. 996.

(17) 27 Ind. Cas. 465; 20 C. W. N. 51; 21 C. L. J. 253.

they were holding over. There is nothing to show that the receipt in question was shown to the plaintiff purchaser. All that is proved is that Rs. 138 received by Matuk Lal from the Pirakhpur Factory as rent was adjusted in the account. Exhibit K is a *wasilbaqi* prepared between the 1st and the 5th April 1897, of which the heading runs as follows :—

" *Wasilbaqi* account settled in the presence of the tenants of Etwarpur Jainti of Babu Matuk Lal Sahu, the present proprietors Dhanno Lal Choudhury, Sobnan Lal Choudhury, Bhanoo Lal Choudhury for the years 1303 and 1304, *sir* period. "

According to the defendants, this document was prepared by the *Moharrir* of the Factory, Bisheshar Lal, in the presence of the tenants and the agent of Matuk Lal for the purpose of preparing an account of the money collected from the *raiyats* of Etwarpur Jainti and the balance due for the years 1303 and 1304. Matuk Lal had already executed a sale-deed conveying his interest of Etwarpur Jainti to the plaintiffs on the 13th July 1895 previous to the said *wasilbaqi* about two years previous to the said account.

The consideration-money of the sale deed in question was paid on the 29th August 1896, corresponding to the 6th Bhadon 1303. In the case of *Narayan Venkap Ohetti* v. *Laxuman Shantaya Kini* (16) it was held that a registered deed comes into operation from the date of its execution and that it is immaterial whether it is accompanied by possession or not. This is also so under section 54 of the Transfer of Property Act whereby the ownership is transferred as soon as parties agree to do so, but the possession may be postponed till the payment of the consideration-money. If in this case the intention was that the plaintiffs-vendees would get actual possession of the property after they had paid the consideration-money, then Matuk Lal may be deemed to be in possession of the village in 1303. The verbal lease of the village to the Factory expired in 1302, that is, on the 4th September 1895, and before that the title in the property had passed on the 13th July 1895 by virtue of the sale deed to the plaintiffs. The position, therefore, is that, while the plaintiffs were the rightful owners of the property, Matuk Lal was in possession of it, and as negotiation for the renewal of the lease were going on, the *kabuliyat*, Exhibit 1, was ultimately formally executed on the 19th April 1897 by the Factory in favour of the plaintiffs as having taken a lease for seven years from 1305 to 1311.

The Factory, in anticipation of the lease, remained in direct possession of the property and will be deemed to have held over. In the account (Exhibit K) Rs. 1,150 is the total demand for the two years 1303 and 1304 including the arrears of Rs. 72 odd. Matuk Lal was entitled to get ¾ths of the rent for the year 1303, that is, up to Jaith *Kisht*, inasmuch as the consideration was paid in July and, therefore, he was entitled to get ¾ths of the rent of Rs. 575 odd for the year 1303. In other words, he was entitled to get Rs. 72 odd *plus* Rs. 432, that is, a little over Rs. 500.

Thus, in Exhibit 7, dated the 29th August 1896, after payment of the consideration-money as between the purchaser plaintiff and Matuk Lal, the account is made up showing the rent due to him to be Rs. 520 out of which Rs. 138, which he had received from the Factory direct, was deducted and the balance Rs. 382 was paid in cash by the plaintiff, and, therefore, out of Rs. 1,150 shown in Exhibit K as due for two years 1303 and 1304, Rs. 1,112, after deducting Rs. 138 paid to Matuk Lal, was made payable to the plaintiffs-purchasers. On the back of it Mr. Hudson noted "balance Rs. 1,150, to pay on demand Rs. 1,112."

All this clearly indicates that the Factory was recognised as a holding over the property during the years 1303 and 1304 on the expired lease. We are not, therefore, concerned with the account except for showing that Rs. 138 was paid by the Factory for occupation of the lands in suit during those years. The land was in their direct cultivation and certainly they had to pay rent for the years, whether the land was the *bakasht* of the landlord or the *kasht* of the Factory. The accounts, therefore, do not necessarily show that the defendant had *kasht* right in the lands.

The case, therefore, really hinges upon the receipt for the year 1303. This receipt, no doubt, shows rent for the land in suit realised by Matuk Lal. As already observed,

(16) 29 B. 42; 6 Bom. L. R. 687.

the receipt has not been proved, nor the authority of Khub Lal to grant it. The plaintiffs, admittedly, on the 16th April 1896, when the receipt was granted, were not in possession of the lands, and, therefore, they are not bound by it. They could be bound only when the receipt operated as a valid recognition by Matuk Lal as a landlord. Matuk Lal, who had already sold away his interest, had no right to recognise, and it has been shown above that there was no valid recognition against him even by the receipt given by Khub Lal, the assistant of the Patwari Dwarka Lal

The *kabu'iyat* (Exhibit 1), dated the 19th April 1897, executed by Mr. Hamilton Hudson soon after the aforesaid documents (Exhibits I and K) were executed, goes directly against the defendant's case both as to the direct possession of Matuk Lal during the years 1303 and 1304 and as to the recognition by him or by the plaintiffs of the *raiyati* interest in the village. This *kabuliyat* recites the account (Exhibit K) in the following words:—

"There was Rs. 1,150 on account of rent for 1303 and 1304 F. due by the tenants, out of this Rs. 138 had already been received by the former proprietors, and the remaining sum of Rs. 1,012 was found justly payable to the landlords by the tenants and by me the *thiccadar* which I, the *thiccadar*, have paid to them in cash and in one lump on getting receipts, and the landlords have brought it to their possession and appropriation, and I, the *thiccadar*, will get the same from the tenants of the village and from my own *tahvil*, and as regards the arrears due by the tenants, and by me, the *thiccadar*, for 1304 F which I have paid to the landlords I shall have no objection."

This clearly shows that, although there was no lease executed, the Factory held over the possession of the village under the expired lease and they undertook to pay rents due from the tenants to the landlord and in their turn to realise same from the tenants. It is noteworthy that 37 *bighas* 7 *cottas* 11 *dhurs*, the land in dispute, had been described in the very opening portion of the *kabuliyat* as the *zerait* of the proprietor. As to the occupancy right therein, the defendant clearly covenanted that the defendent would have no occupancy right in the land and that on the expiry of the lease the defendant would give up possession in favour of the landlord. Whatever anomalies might have been created before that, the Factory repudiated their claim, if any, to the lands in suit. The receipt (Exhibit I) and the account (Exhibit K) are inconclusive to confer a right of occupany upon the defendants.

No question arises as to whether the land was really *zera't* or *bakasht*. The onus is upon the defendants to establish their tenancy. The defendants cannot plead, as contended by Mr. Manuk, that they were ignorant of their own rights. They were in direct possession of the lands since 1890 and they must have known their own title with respect thereto. The previous documents might have created some confusion as to the rights of the parties. There was, therefore, a *bona fide* dispute and it was settled definitely between the new purchasers and the defendants that the land in suit will be the *zerait* of the landlords and that the defendant would not acquire any right of occupancy. The document does not purport to bar the acquisition of the occupancy right, nor does it extinguish any such if it was already acquired. It declares what the rights of the parties in the lands in suit were. It purports to describe the real state of affairs. It terminates any possible dispute that might arise after the termination of the lease. In this view, it is a good evidence of the fact that the lands were admitted to be the *zerait* or the *bakasht* of the proprietors and in which the defendants had not acquired any right of occupancy. The contemporaneous public record, namely, the Settlement Record of Rights, clearly shows that the lands were the *bakasht* of the landlords, and were not the *kasht* or occupancy holding. That document raises a strong presumption against the defendants and the presumption is confirmed by Exhibit J executed a few months later. Possibly from the history of this land, namely, that it was entered in the *butwara khasra* (Exhibits 21 and 22) as the land under the Indigo *zerait* of Babu Nathu Lal Choudhury and that Matuk Lal has realised Rs. 138 as rent or compensation of the land in the *interregnum* of 1303 and 1304, the plaintiff as new purchaser thought of clearing up the doubt regarding the status of the defendants and insisted upon having the land clearly stated as the *zerait* and the defendants

undertaking to give them up after the termination of the lease. The defendants were the applicants at that time for the taking of the lease of the village and but for the clear declaration in the *kabuliyat* it was not possible for them to take the lease. Therefore, the contract between the parties amounted to a relinquishment and release of any right that might have accrued to the defendants for the valuable consideration of the right acquired in return in the shape of the lease of the entire village. There is nothing in the statutory provisions in the Bengal Tenancy Act or in the general principles regulating the relationship of landlord and tenant invalidating the transaction in question: call it a relinquishment or surrender.

The Factory accepted their position as that of a mere lessee in the lands in suit and consistently dealt with the lands as the *zer it* or the *bakasht* of the landlord in which they had no right of occupancy. Only a few years after the execution of the *kabuliyat* and during the continuance of their *thicca*, on the 27th October 1903, the defendants filed Road Cess Returns (Exhibits 13 and 3 A) in the Collectorate under Act IX of 1880, in which they described the land 36 *bighas* 7 *cottas* 11 *dhurs* as *nij jote* in their use and cultivation with an annual rental of Rs. 398 2 0. They are bound by their admissions contained therein under the Road Cess Act and they are estopped from claiming contrary to that entry. Part I of the Return in the Road Cess Act is designed for return of lands which are *zerait* or *bakasht* of the proprietors. Part II is intended for lands which are the *kasht* of tenants. If it was the Factory's *kasht* it would have been mentioned in Part II. The Return filed by the Patwari Isher Lal (Exhibit 11) also shows the same thing, *i. e.*, the land was the *zerait* of the proprietors. The defendants knew that they had not purchased the land from Babu Nathu Lal Choudhury in the sale deed, dated the 23rd July 1890, (Exhibit 12), whereby the Factory was transferred to them, and, therefore, they were trespassers over the land if it was at all the occupancy holding of Babu Nathu Lal Choudhury. They had acquired no occupancy right and were, therefore, not relinquishing any or contracting about it contrary to the provisions of the Bengal Tenancy Act when they definitely declared that on the expiry of the term they would not claim any *kasht* right in the lands by virtue of their occupation during the term of the lease or on account of their having previous possession as trespassers. There was no dispute between the parties at the time when the Road Cess Returns were filed. These Returns clearly show that both the plaintiff and the defendants declared the lands to be the *zerait* of the *malik*. The defendants' *kasht* right in the lands in suit was separate from their rights as lessees of the proprietary interest in the village. If that is so, the *kasht* right should have been clearly transferred either by the sale-deed of 1890 or by a separate deed. But the sale-deed of 1890, as shown above, does not purport to transfer the *kasht* right of Babu Nathu Lal, if any, in the lands in suit. Whereas the lease of Eswarpur Jainti was expressly mentioned in the sale deed, the *kasht* right in 36 *bighas* 7 *cottas* 11 *dhurs* in the suit does not find any place in the schedules which are the detailed description of all the premises and hereditaments transferred to the defendants. The possession of the defendants over the lands in suit was, therefore, only as lessees of the proprietors, and not as tenants thereof.

No particular mode is prescribed under the Bengal Tenancy Act (sections 85 and 87) for "abandonment" and "relinquishment" of an occupancy holding and there is nothing wrong in abandoning it by means of a contract. So, even if the defendants were recognized in 1303 as the tenants of the land, they clearly abandoned their rights therein in 1897 and in the Road Cess Returns filed by them.

The plaintiff claims recovery of possession and it is for the defendants to prove their title in order to successfully resist the claim of the plaintiffs, they rely upon the *kabuliyat* (Exhibit 1) dated 1307, as their title-deed. If, upon a true construction of it, it is found that, even if they had previously acquired that right, they abandoned and relinquished that right, the plaintiff will be entitled to recover possession of the same whether abandonment was specifically pleaded or not.

Again, the defendants claim their right

in the land as separate from their lease of the village, and as not passing with the lease. By the sale deeds of 1909 and 1912 Mr. Vinsent is said to have acquired only the interest of the Hudsons as lessees of the village, and not the occupancy right in the lands in suit, and after the termination of the lease, Mrs. Hudson the successor-in-interest of the Hudsons and the owner of the Factory purports to excute a sub lease (Exhibit A) dated the 30th January 1914, in favour of the defendant. This, of course, is a nominal document, for such a valuable right, the annual value of which is Rs. 397, could not be transferred at an annual rental of Rs. 5 only. This is simply with a view to show that the *kasht* right was separate from the *thica* right in the village. In the second place, the sub-lease in question is a permanent lease and under the authority of *Bipin Behari* v. *Amrita Lal Bhattacha,i* (7) Mr. Hudson had no right to grant a sub-lease. In my view the case reported in *Abdul Karim* v. *Abdul Rahman* (8) has no application. Mrs. Hudson had practically abandoned the holding and has transferred her residence from this country to England. She has ceased to cultivate the land and she has, therefore, lost any right in the land and the plaintiff is entitled to re-enter.

The defendants' right to hold the land terminated with the lease and they became trespassers after the expiry thereof and ceased to be tenants, either occupancy or non occupancy, or of any other kind. I do not think that the ruling reported in *Pierpont Morgan* v. *Ramjee Ram* (9) applies to this case. The abandonment in this case is proved by the documents themselves. I do not for a moment conceive that the ignorance or carelessness of the defendants of their title places them in a better position. Under the law they will be charged with the knowledge and admittedly their agents knew it full well. They cannot disassociate themselves from the knowledge acquired by their agents in the regular course of business.

I, therefore, hold that the defendants have failed to prove that they acquired tenancy right in the lands in suit and to rebut the presumption of the Record of Rights.

The result is, that I would set aside the judgment of the learned Subordinate Judge, decree the appeal and consequently decree the suit of the plaintiff for *khas* possession.

I regret that I have to differ with the view taken by my learned brother for whose views I have very great respect. I am in a still unfortunate position that I have to differ with his views which are in agreement with those of the learned Subordinate Judge. I have, therefore, given my best thought and consideration before I could venture to take the contrary view. I tried my best but could not persuade myself to agree with my learned brother.

Messrs. *Hasan Imam*, *S. C. Mitter*, *S. A. Hussain*, *S. N. Bose* and *S. S. Bose*, for the Appellant.

Messrs. *P. C. Manuk*, *C. S. Banerji* and *A. N. Das*, for the Respondents.

JUDGMENT.

DAWSON-MILLER, C. J.—The appellant instituted this suit on the 5th December 1914 claiming to recover possession from the defendants of an area of 36 *bighas* 7 *cottas* 11 *dhurs* of land in Mauza Etwarpur Jainti in the District of Muzaffarpur. It is admitted that the plaintiff is the proprietor of the Collectorate estate bearing *touzi* No. 2507 which originally formed an 8-annas share in the Mauza and that the lands in suit form part of his estate. Mr. W. A. Vincent, the principal defendant, claims *khas* possession of the land as sub-lessee of Mrs. Hudson, the defendant No. 12, who claims to be the occupancy *raiyat* at an annual *jama* of Rs. 197-14-0 including road-cess. These two defendants alone contest the suit. The suit was originally tried before the Subordinate Judge of Muzaffarpur who by his judgment, dated the 17th February 1917, found in favour of the defendants and dismissed the suit. The plaintiff preferred an appeal to the High Court which was heard by Mullick and Jwala Prasad, JJ., who by their judgments dated the 18th August 1920 took different views, the former being of opinion that the appeal should be dismissed and the latter that it should be allowed. Consequently, the present appeal is brought before this Bench by the plaintiff under clause 10 of the Letters Patent. The facts out of which the dispute arises are fully set out in the judgments of the Courts

below but the points which have been urged before us on behalf of the respective parties make it necessary to bear in mind certain dates in the chain of transactions under which the parties acquired the respective interests claimed by them.

Up to the year 1868 Mauza Etwarpur Jainti formed part of a permanently settled estate held by a number of joint proprietors. In that year Sunder Sahay, one of the proprietors, by a Collectorate partition, obtained an 8-annas share in Etwarpur Jainti as a separate estate bearing *touzi* No. 9507, and there is some evidence to show that, even before that date, he was in possession under a private partition. The lands in suit formed part of that estate. Sunder Sahay died in about 1874 and his estate passed into the hands of Matuk Lal and Sheo Prasad. Sometime between 1883 and 1890, Matuk Lal acquired Sheo Prasad's share and became the sole proprietor of the estate. On the 15th July 1895 Matuk Lal, by an instrument in writing of that date, conveyed his proprietary interest to the plaintiff Bhanu Lal Choudhary and his three brothers. Matuk Lal, however, retained possession until the 29th August 1896 when the purchase money was paid and possession transferred to the purchasers. On the 23rd June 1909 by a partition between the plaintiff and his brothers the estate in question was allotted to the plaintiff who is now the sole proprietor.

The defendants' claim to the occupancy interest in the disputed holding rests on a series of transactions which began in the year 1854 (1271 F) when Sunder Sahay was either sole or joint proprietor of the Mauza. In that year Nathu Lal Choudhury who owned an Indigo Factory, now known as the Pirakpur Factory, purchased from five tenants of Sunder Sahay the whole or protions of their respective occupancy holdings measuring altogether 26 *bighas* 7 *cottas* 11 *dhurs* of land which constitutes the subject of this suit. It is not disputed that the land formed part of the occupancy holding of Nathu Lal's vendors or that Nathu Lal took possession, but it is contended that the holding was not transferable and that the purchaser was never recognised by the landlord. It is said that from 1864 to 1876 Nathu Lal remained in possession of this holding ostensibly as an occupancy tenant and growing indigo thereon for his Factory, but no rent receipts are forthcoming for that period. After Sunder Sahay's death, Sheo Prasad and Matuk Lal being the proprietors, Nathu Lal on the 30th June 1876 took an *ijara* lease from Sheo Prasad of his interest in the Mauza for a term of seven years. In 1881 he also took from Matuk Lal an *ijara* of the latter's interest in the Mauza and thus became the *ijaradar* of the whole estate comprised in *touzi* No. 9507. It is conceded that the *raiyati* interest, if it existed, over the 36 *bighas* would not become merged in the *ijara* interest. These leases were renewed from time to time and were still in existence on the 23rd July 1890 when Nathu Lal sold his whole interest in the Factory to Mr. H. W. Hudson, the father-in law and predecessor in-title of the defendant No. 12. The appellant contends that Nathu Lal's *raiyati* interest, if any, did not pass by that sale and that, in any case, Hudson was never recognised as an occupancy tenant by the landlord. Mr. Hudson who was admittedly the *ijaradar* thereafter remained in possession until the *ijara* leases expired on the 4th September 1895. It will be remembered that about two months earlier, on the 13th July 1895, Matuk Lal, then the sole proprietor, had executed a conveyance of his proprietary interest in favour of the plaintiff and his brothers but possession was not made over to the purchasers until the 29th August of the following year. About eight months later, in April 1897, the new landlords granted a new *ticca* lease to Mr. Hudson for a period of seven years. It is the appellant's case that on the expiration of the old *ijara* the right of possession to the whole estate including the disputed land reverted to the landlord. The defendants contend that the right of possession remained in Mr. Hudson as the occupancy tenant by purchase from Matuk Lal Choudhury, and that he was recognised as occupier by Matuk Lal, the outgoing landlord, and, further, that his interest as an occupancy *raiyat* was also recognised by the appellant who about that time acquired Matuk's proprietary interest.

In 1904, the lease of 1897 having expired, a new *ticca* lease was granted to Mr. Hudson of Etwarpur Jainti, together with other property not previously included, for a term of nine

years which expired in 1913 and was not renewed. In the meantime, Mr. H. W. Hudson died and his estate devolved upon his two sons, Harry Hudson and Percy Hudson. In 1909 the former died and Percy Hudson became the sole owner of the Factory and of the occupancy tenancy, if it existed. In the same year Mr. Vincent, the then Manager of the Factory, acquired a 4 annas share of the Factory from Percy Hudson, and in 1912, Percy Hudson having died, he acquired the remaining interest from Percy's widow, the defendant No. 12. The transfer to Mr. Vincent did not include the *raiyati* interest which, if it existed, had passed to Percy Hudson and afterwards to his widow, but Mrs. Hudson, when she transferred her interest in the Factory to Mr. Vincent, had agreed to grant him also a sub-lease of the occupancy holding and on the 13th January 1914 she executed a sub-lease of the holding in favour of Vincent who claims to be an under-*raiyat* of Mrs. Hudson.

It was contended that Mrs. Hudson had relinquished her *raiyati* interest, if any, by going to England before 1914, but her agent was always on the spot and no question was raised in the pleadings or by the issues upon this point and the matter was not gone into in the evidence. Mullick, J., in the Court below, declined, in the circumstances, to go into this matter which was one of mixed law and fact and we consider that he was right in so doing.

The first question which arises for decision is, whether Nathu Lal Choudhury acquired an occupancy holding in 1864 and whether he was recognised by the landlord. The fact that he purchased the disputed land from Bhikhari Raut and Bulaki Choudhury and other occupancy tenants of Sunder Sahay and remained in possession paying rent to Sunder Sahay for a period of something like 12 years before he acquired a *ticca* lease of any part of the village is proved, in my opinion, beyond all reasonable doubt. Of his vendors the two above mentioned were alone alive at the date of the trial and gave evidence of the facts above mentioned. Their evidence was corroborated by Pryag Dutta, an old man of 80, who was Munshi of the Factory for seven years from 1272 F to 1279 F, and the evidence of these witnesses finds some corroboration from Ram Charita Sahai, a cousin of Sunder's. The evidence of these witnesses leaves no doubt in my mind that Nathu Lal purchased the disputed land from the tenants and was in occupation as an occupancy holder from the date of his purchase. It is contended, however, that the holding was not transferable and that Nathu Lal was never recognised by the landlord. It is for the defendants to prove either that the holding was transferable by custom, or, failing that, that the transfer was recognised by the landlord. In my opinion there is no evidence of such a custom, but I am satisfied that the Subordinate Judge and Mullick, J., were justified in finding on the evidence that Nathu Lal was recognised as an occupancy tenant by Sunder Sahay and so acquired an occupancy right in the disputed land before he became the *ijaradar* of the Mauza. A letter, dated the 19th December 1865, purporting to be signed by Sundar Sahay recognising Nathu Lal as cultivator of 36 *bighas* 7 *cottas* 11 *dhurs* of occupancy holding, was produced by the defendants and proved by Pryag Datta who knew Sunder Sahay's handwriting. The two surviving vendors, as already stated, were also called and proved that, before 1868, when the *batwara* partition took place Sunder Sahay held the proprietary interest by private partition, which would account for the fact that the letter of the 19th December 1865 was signed by Sunder Sahay alone and not by the others co-sharers. The exact date of the private partition is not definitely deposed to, but from contemporaneous documents it would appear to have been not later than the year 1864. In my opinion the matter is not of much consequence as Sunder Sahay was sole proprietor in 1868, and the recognition given earlier, if genuine, must be deemed to have held good when he acquired the sole interest under the *batwara* proceedings of that year and permitted the new tenant to remain in possession without objection until he died in 1874. The authenticity of the letter in question was challenged partly on the ground that the signature was different from other admitted signatures of Sunder Sahay and partly on the ground of internal evidence. The letter refers to Road Cess to be levied by the Government in future, whereas the first Road Cess Act was not passed until five or six years later, which fact, it is contended, casts the greatest suspicion upon

the genuineness of the document. As to the signature the document was produced from the proper custody and is over 30 years old and may be presumed to be genuine until the contrary is proved. No expert evidence was given as to the handwriting and I am not prepared to differ from the view of the Subordinate Judge and Mullick, J., on this point. The fact that the rental therein named of Rs. 197-14-0 is said to include any Road Cess to be levied by the Government in future seems to point rather in favour of the genuineness of the document than otherwise. It is not a violent assumption to suppose that the imposition of Road Cess by Government was in contemplation some years before the first Act was passed. If the document is supposed to have been fabricated at the date which it bears and which the stamp on it shows, the reference to Road Cess was *ex hypothesi* a natural thing to include as no person, forger or otherwise, would refer to a tax which was not in any one's contemplation at the time. If it was farbicated recently for the purposes of this case, there seems to have been no object in introducing it at all. It would have been sufficient to say "including "road cess" without any reference to a future Government tax. Cesses were at that time frequently claimed by the landlord in addition to rent although they were usually disallowed unless expressly mentioned in the contract creating the tenancy, but a forger at the present day would hardly be likely to introduce into a document purporting to be dated 1865 a reference to Government road cess when he must have known that no Government road cess was imposed until several years later. There are, however, other documents which support the defendants upon this part of their case. The *jama wasilbaki* papers for 1271, 1273 and 1277 F. which are landlord's papers show how the 36 *bighas* 7 *cottas* 11 *dhurs* passed from the previous tenants to Nathu Lal Choudhury as purchaser. If the purchaser was not recognised it is inconceivable that he would be mentioned in these documents as the new tenant. These documents also describe Sunder Sahay as the *malik* under a private partition in 1271 and 1273 F. (1864 and 1866 A. D.) and as *malik* under a Government partition in 1277 F. (1870 A. D.). This indicates that the private partition mentioned by the defendants' witnesses took place not later than 1864 and explains why Sunder Sahay alone signed the letter of acknowledgment of the 19th December 1865. Further corroboration is afforded by the measurement *khasra* of the *batwara* proceedings dated the 4th December 1868 which shows, as pointed out by Mullick, J., a quantity of land as indigo *zerait* or indigo *zerait* of the Factory, a term in common use to designate *kasht* land of the Factory on which indigo is grown. The same document shews that Bulaki and Doma Sahu, two of Nathu's vendors, no longer held that portion of their holdings which they had transferred to Nathu. That the letter of acknowledgment by Sunder Sahay was in existence in 1872 is proved by a list of documents (Exhibit D) forwarded to Nathu Lal by his then Manager Mr. Exshaw whose signature it bears on its back. This document has also been challenged as spurious, but I am unable to accept that view. It follows, therefore, that if Sunder Sahay's letter of acknowledgment is a forgery the forgery took place before 1872 and long before any dispute arose as to the tenant's occupancy rights in the land and at a time when there was no apparent object in fabricating such a document. From the evidence as a whole, I am satisfied that Nathu Lal acquired by purchase from the former tenants of the land in suit, and that he paid rent to the proprietor Sunder Sahay as the witnesses allege and that he was recognised as tenant by Sunder Sahay. There was nothing but the merest suspicion to cast any doubt upon the genuineness of the document relied upon except the word of one witness Ezid Bakhsh who says he lived in Sunder Sahay's house for 8 or 9 years and that the signature was not that of Sunder Sahay. He was, however, only 11 or 12 years old at the time and I do not consider his evidence sufficiently reliable to disprove the signature when weighed against the other evidence in the case.

I have had an opportunity of perusing the judgments about to be delivered by my learned colleagues and have given them my earnest consideration. I regret that I have been unable to arrive at the same conclusion. It is true that the names of the tenants in the *jamabandi* papers do not agree in all respects with the names in the *batwara khasra*. The latter paper, however, clearly

shows that the Factory was a recognised tenant of between 8 and 9 *bighas*, and there is further indigo *zerait* shown of about 29 *bighas* without the name of any tenant. The tenants are not bound by the Khasra and there may have been reasons why the whole 36 *bighas* were not definitely stated by the landlord as the Factory's *zerait* which it is impossible to explain after this lapse of time. I am unable to impute a wholesale forgery to the predecessors of the defendants and to disbelieve the verbal evidence in the case merely because the *batwara khasra* and the *jamabandi* papers are not in all respects similar. The tenants vary from year to year both in name and number as appears from the *jamabandi* papers themselves. The fact that the *jamabandi* papers show the original rent of the transferred land as less than the agreed rent in the acknowledgment of 1865, is in accordance with the verbal evidence and the very fact that the latter shows an increase of rent seems to point to the genuineness of the document as there was nothing to be gained by introducing a greatly increased rental into the acknowledgment. Nor can I see why the acknowledgment of Nathu Lal as a transferee from previous tenants, if it be genuine, should be taken to be the creation of a new tenancy merely because the rent was increased. The document is precise in its terms as a recognition of a transfer from previous tenants and does not purport to create a new tenancy.

The next question is, whether Nathu Lal, by the conveyance of the 23rd July 1890, transferred his occupancy right to Mr. Hudson. I confess that this question is one of some difficulty. It depends upon the construction of the document. Mr. Hudson, the transferee, is dead and cannot be called as a witness and there is nothing to show whether at the time when he purchased the Factory he was even aware that his vendor had an occupancy holding in the disputed land. It seems fairly clear, however, from the document that it was the intention of the parties that all the interests of the existing proprietor in the property held by him in connection with the Factory's business should pass. The deed recites that the vendor has contracted for the sale of the Pirakpur Indigo Concern together with all the Talukas, Mauzas, villages lands, hereditaments and premises, of which particulars are set forth in the schedule. The schedule, a very long document, refers to the *ticcadari* interest in Mauza Etwarpur Jainti but does not specially include the occupancy right in the 36 *bighas*. The operative part of the deed purports to grant, transfer, assign, etc., unto the purchaser all and every the said Talukas, Mouzas and lands or parts or shares therein of which particulars are contained in the schedule "and also all other, if any, the hereditaments and property belonging to or forming a part of or held with the said Talukas, Mauzas, and lands..... .....and all manner of rights, liberties, easements privileges, profits, commodities, emoluments, advantages and appurtenances whatsoever to the said Talukas, Mauzas, land, Indigo Concern, and hereditaments belonging or in any wise appertaining." The construction of these words is not free from difficulty but in my opinion they were intended to pass to the purchaser all rights which the vendor possessed in the Mauzas, lands, etc., referred to, whether such rights were expressly set out in the schedule or not. The occupancy right in the disputed land in Mauza Etwarpur Jainti was certainly a right of property held with the *ticcadari* right in that Mauza although it did not belong to or form part of the interest of the *ticcadar* as such. It was also a right belonging in a sense to the Indigo Concern. The Indigo Concern, it is true, was not a legal entity and, therefore, in law was not capable of exercising rights of property but the term Indigo Concern as there used seems to me to have been used as synonymous with the proprietor of the Factory as such. And even the recitals refer to an agreement to transfer the Indigo Concern. For these reasons, I am of opinion that the occupancy right of Nathu Lal Choudhury did pass to Mr. Hudson by the conveyance. It is said that where there is ambiguity in the operative part of the deed one should look back to the recitals and be guided by what is therein contained in interpreting the ambiguity. This canon of construction, however, cannot in my opinion, apply in all cases where there is a doubt or difficulty in the construction of a document. If one is satisfied upon the natural construction of the operative part of the deed that certain property passes, notwithstanding that the construction may be difficult, I do not think that the recitals have any binding

forse. The same difficulty, to some extent, arises in construing the recitals. In the present case, although the construction is not free from difficulty, I think it was the intention of the parties that all interests of the vendor in the Factory and in the land referred to should pass, and that the words of conveyance are wide enough to include the disputed land.

It next becomes necessary to determine whether Mr. Hudson was recognised as tenant of the occupancy holding by the landlord. It is well-established that the receipt of rent by the landlord from the transferee of a holding, not transferable by custom, will validate the transfer. But the *gomastha* or Patwari of the landlord although authorised to collect rents on his behalf has no authority by taking rent from a transferee to create the relationship of landlord and tenant between his master and the transferee. In such cases the landlord would not generally be bound unless he accepted the rent knowing the source from which it came. The absence of rent-receipts from which any inference can be drawn in the present instance arises from the fact that from the year 1876 up to 1913, except for a short period between September 1895 and April 1897, the occupier had also a *ticca patta* over the Manza including the disputed land and no separate rent-receipts for the 36 *bighas* in question would be necessary. There are, however, two receipts for the *ticca* rent for the Falgun *kist* of 1298 F. and for the Aghan *kist* of 1300 F. dated, respectively, the 20th April 1891 and the 18th December 1892 and marked Exhibits N 1 and N. These were granted by Matuk Lal when he was proprietor and which, if accepted, purport to show that the Factory had *kasht* lands in the Manza. I shall refer to these presently. There was also a receipt (Exhibit 1) for Rs. 138 dated the 18th Bysack 1303, corresponding to the 16th April 1896, signed by Khub Lal, a nephew of Dwarka Lal, the Patwari, which if brought to the notice of the landlord clearly shows that he recognised the Pirakpur Factory then owned by Mr. Hudson as the tenant of a holding in Eswarpur Jainti at a rental of Rs. 197-14 0, which could only be the holding in dispute in this suit. This document is important as it relates to the short period when there was no *ticca* lease in existence and when the defendants claim that Mr. Hudson was in possession and paying rent as an occupancy tenant. It is necessary to consider with some care the acts of the parties and the nature of the transactions which took place between the expiry of the old *ijara* lease of the 4th September 1895 when Mr. Hudson was in possession, and the 19th April 1897 when a new *ticca patta* was granted to him by the new proprietors whose interests are now represented by the appellant. The situation which existed at that time was as follows. Matuk Lal had executed a conveyance of his proprietary interest to the plaintiff and his brothers on the 13th July 1895 but the vendor remained in possession as the purchase-money was not paid. Mr. Hudson was at that time the *ijaradar* of the Manza, but his lease was about the (to ?) expire and did expire on the 4th September that year. His lease was not renewed until 1897 but, in the meantime, he remained in possession of the Factory and of the disputed land pending the completion of the transfer of the proprietary interest to the new purchasers. The only sum which was paid for rent during that time by anybody was admittedly the sum of Rs. 138. The defendant's case is, that Mr. Hudson paid this sum on the 16th April 1895 to Khub Lal who was authorised to collect rents on behalf of Matuk Lal who was still in possession as proprietor. It is further their case that this sum was paid on account of rent due by him as occupancy tenant, and was accepted by Khub Lal as such. There was, during this period, a sort of *interregnum* in the proprietorship of the estate and in the *ticcadari* interest. The instrument conveying the proprietary interest had been executed but possession was withheld pending the payment of the consideration money. The *ticcadari* lease of Mr. Hudson had come to an end and no new lease had been granted. The position was, therefore, somewhat unusual and the rights of the parties were not clearly defined. Mr. Hudson being no longer *ticcadar* was no longer entitled to collect rents from the tenants. The only person entitled to receive rents would be the registered proprietor Matuk Lal, and Mr. Hudson, as occupier of the 36 *bighas* which he claimed, would be liable to the proprietor for the rent of that holding. In support of the defendants

contention that Mr. Hudson paid rent on account of his holding the defendants have produced the rent receipt above-mentioned of the 18th Bysack 1303 (16 April 1896) signed by Khub Lal. This shows that the total annual rental including road-cess was Rs. 197.14 0 and it shows that Rs. 138 on account of that rental were paid by the Treasurer of the Pirakpur Factory. Its authenticity has been disputed but I see no reason to doubt the genuineness of the receipt. The payment of this sum is proved by the witness Bhutan Misser, a servant of the Factory of 25 years standing. He says that the money was paid to Khub Lal who was Patwari under Matuk Lal and that the receipt was signed by Khub Lal in his presence. He further says that the money was paid on behalf of the Factory by Jogendra Babu, as the receipt shows, and that Jogendra was dismissed by the Factory some 15 years ago, which would be about 1902. He further says that the disputed lands were the *kasht* lands of the Factory and not the *malik* lands. That Khub Lal had authority to collect rents on behalf of the *malik* is proved to my satisfaction beyond all reasonable doubt. His son Baldeo Lal was called and from his evidence as well as that of other witnesses it appears that Dwarka Lal, his grand-uncle and uncle of his father Khub Lal, both of whom were dead, was the Patwari of the *malik* Matuk Lal and that a few years before Dwarka's death which occurred in 1306 F. (1899 A. D.) Khub Lal who was Dwarka's Naib performed the duties of Patwari on behalf of his uncle. I am satisfied in the evidence that this sum was paid to Khub Lal by the Factory as rent of the holding to the person who at that time was authorised to receive rents. The appellant contends that this sum of Rs. 138 was not paid by the Factory at all but was collected from a number of other tenants and has produced two documents in support of his contention. I shall deal with these presently. It does not follow, however, because Khub Lal received rent from Mr. Hudson, that, therefore, the landlord recognised him as a tenant. It must be shown that the landlord had knowledge of the transaction and ratified it either expressly or by implication. The only other receipts of any importance are the Exhibits N 1 and N above referred to. These were of earlier date and granted when the Mauza was held under the *ticca* lease, and are for the *ticcadari* rent after Hudson became *ticcadar*. They purport to show that the proprietor of the Factory had some *kasht* lands in the village. They are dated the 20th April 1891 and the 18th December 1892 respectively. Their authenticity as rent-receipts is not impugned but it is said that the important words showing that the Factory had a *jote* in the village have been interpolated. The scribe of the later in date, Exhibit N, was called by the defendants and said they were signed by Matuk Lal and in cross-examination said the word "*mai*" before "*kasht*" was not in his handwriting and he doubted if the word "*kasht*" was. It is, therefore, clear that Exhibit N cannot be relied upon as showing that Mr. Hudson was recognised as an occupancy tenant. It does show, however, that Khub Lal was a person through whom the landlord was receiving rents. The other document is a receipt also signed by Matuk Lal and there is nothing to show that it is tampered with except a suggestion that the important words "with *jote*" have been interpolated. No expert evidence was called about it and I am not prepared to hold that it has been tampered with. By itself, it does not amount to much. If it were the only evidence in the case, I should certainly hold that it was not sufficient to prove that Mr. Hudson was recognised as an occupancy tenant of the disputed land.

The defendants contend, however, that the events which took place after September 1895 and which culminated in the grant of a new *ticca* lease in April 1897 prove that both Matuk Lal and his transferee recognised Mr. Hudson as the occupancy tenant. During this period, presumably, the Factory's business was going on as usual but the situation was, as already stated, somewhat peculiar. Mr. Hudson could not collect any rents as he was no longer *ticcadar*, and for the same reason he was not liable for *ticcadari* rent, and the only sum in fact paid was the Rs. 138 which I have already held was, in my opinion, paid by Mr. Hudson as tenant of the holding. But if and when a new *ticca* lease of the Mauza should be granted the question would arise as to how much should be paid, and by whom, to the landlords for the intervening period. Before the old *ticca* expired negotiations had been going on between Mr. Richardson on behalf of the

Factory and Matuk Lal for a renewal as appears from the former's letter of the 19th June 1895. These negotiations appear to have been renewed when the new owners took over from Matuk Lal. I may mention here that this letter is relied on by the appellants as showing that Mr Richardson at all events did not consider that the Factory had an occupancy interest. Mr. Richardson was the proprietor of the Bikhampore Indigo Factory in the same district. He appears to have had some sort of partnership agreement with Mr. Hudson and used to supervise the management of the Pirakpur Factory which at that time was being managed by Mr. Harry Hudson, the son of the proprietor, then a young man without much experience. From the letter in question it appears that Matuk Lal wished to exclude from the new lease in addition to some *kasht* land of one of the tenants a plot of two *bighas* of the indigo *zerait*. Mr. Richardson replied that the land of the tenant named might be excluded but adds, "I cannot allow you to deduct from the *patta* the other two *bighas* of *zerait* land." This, no doubt, refers to a part of the disputed land and it is argued that if Mr. Richardson knew that the Factory had occupancy rights over it he would have replied that the landlord could not deprive him of it even if it were excluded from the *ticca*. This is not a necessary inference as Mr. Richardson firmly declined to exclude the land and his reasons for so doing may have been presumed by him to have been within the landlord's knowledge. Mr. Richardson was unfortunately not asked about it. But even Mr. Richardson's ignorance would not disprove the defendants' title. I may mention here that the term indigo *zerait* or even *zerait* is common in Factory parlance to denote land in the home cultivation of the Factory as distinguished from land held by other tenants and would include land over which the Factory had occupancy rights. This is proved by several witnesses and is supported by a passage in Amir Ali's Bengal Tenancy Act (2nd Edition, page 538) which states that in Bihar the term *zerait* is used to denote all lands in direct cultivation of indigo planters for cultivation of indigo as distinguished from cultivation of indigo by *raiyats*. The factory may hold the land as proprietor, tenure holder *raiyat*, or under-*raiyat* and whatever the interest may be the land is still called *zerait*. The word used in this sense has no connection with the term *zerait* as used in the Bengal Tenancy Act and meaning proprietor's private lands. Indeed, the appellant does not contend that the disputed land was landlord's *zerait* over which occupancy rights could not be acquired but merely *bakasht*. Nor is it contended that the term *zerait* when used in the documents in the case signifies landlords' *zerait*. The negotiations appear to have been renewed later on and the question was then gone into as to the payment of rent to the proprietors for the period when there was no *ticca*. According to the defendants' evidence a *jama wasilbaki* was prepared on the 8th April 1897 by Biseswar Lal, the *muharrir* of the Factory, in the presence of the tenants and Matuk Lal's agent Haji Gowsan Mian. Biseswar is dead but the document then prepared was proved by Gopal Lal who was present on the occasion. This document shows the amount of rent due to the landlords from the respective tenants including profit from trees and other sources for the two years in question and the sums paid on account for that period. It gives the area of the holdings and the annual *jama* and includes the Pirakpur Factory as the *kashtkar* of 36 *bighas* 7 *cottas* 11 *dhurs* at the annual *jama* of Rs. 197-14-0. The total amount due is shewn to be Rs. 1,150 for the two years less Rs. 138 paid by the Factory, none of the other tenants having paid anything. The document is endorsed by Mr. E. H. Hudson, who was then the manager, the endorsement showing the balance due to be Rs. 1,012. Mr. Hudson says the document was made preparatory to the new lease being executed. The new lease was executed 11 days later by the new proprietors and shows that Rs. 1,012 was the balance due from the tenants for the two years in question after crediting the Rs. 138. It is the defendants' case that the arrangement made between the parties when the new lease of the 19th April 1897 was granted was that for the two years corresponding to 1303 and 1304 F., when there was no *ticca* lease, the *ticcadar* should pay not at the *jama* of Rs 600 per annum payable under the new lease nor at Rs. 500 per annum payable under the old lease but Rs. 1,150 for the two years being the actual amount of rent as stated in Exhibit K payable by the tenants

for those two years including the Rs. 197-14-0 the rent of the disputed holding less the sum of Rs. 138 already paid to Matuk Lal and that the *ticcadar* should collect the arrears, *viz.*, Rs. 1,012, from the tenants himself with a stipulation that if he should fail to collect the rents from the tenants for the year 1303 F. the landlords should reimburse him.

The suggested reason for this arrangement is, that in the absence of a lease the landlord is entitled to collect the actual rents payable by the tenants including that of the disputed holding, but that, as a matter of convenience, Mr. Hudson should advance to the landlords the balance still due for the period and reimburse himself from the tenants. This was obviously a convenient course and would ensure continuity in the mode of payment by the tenants, but as Matuk Lal had been in possession during 1303 F. and might have collected some further rents, there was an express stipulation that the new landlords should be responsible if any of these rents could not be collected. We, therefore, find in the *kabuliyat* executed on behalf of Mr. Hudson in respect of the lease for 1897 a clause relating to the arrangement mentioned for the rents of the two previous years. The *kabuliyat* was put in evidence by the appellant himself and admittedly represents the terms of the *patta* which was not produced. The clause in question reads as follows :—

"There was Rs. 1,150 on account of rent for 1303 and 1304 F. due by the tenants, out of this Rs. 138 had already been received by the former proprietors, and the remaining sum of Rs. 1,012 was found justly payable to the landlords by the tenants and by me the *ticcadar* which I the *ticcadar* have paid to them in cash and in one lump on getting receipts, and the landlords have brought it to their possession and appropriation, and I the *ticcadar* will get the same from the tenants of the village and from my own *tahvil*, and as regards the arrears due by the tenants, and by me the *ticcadar* for 1304 F. which I have paid to the landlords I shall have no objection. If, as regards the arrears of 1303 F., I the *ticcadar* suffer any loss, then the landlords will be responsible therefor."

This clause clearly indicates to my mind that the landlords—that is, the appellant and his co-sharers knew that the rental payable by tenants for the two years was Rs. 1,150 and that Rs. 138 had been paid to their vendor and that the balance Rs. 1,012 was payable to the landlords from the tenants including in that category the *ticcadar*. It further shows that the *ticcadar* having paid this balance by arrangement to the new landlords should collect it from the various tenants including himself or as the *kabuliyat* puts it "from the tenants of the village and from my own *tahvil*." These figures correspond exactly with the *jama wasilbaki* papers made up by Biseswar Lal in the presence of the tenants and the old landlords' agent. The inference is, to my mind, irresistible that the appellant recognised the *ticcadar* as the tenant of a holding in the village and it is not contended that he had any other holding. It is necessary, therefore, to see how the appellant explains the clause in the *kabuliyat*. He says that when the old *ticca* lease expired he permitted the Factory to remain in possession as *ticcadar* by an oral agreement, with Mr. Hamilton Hudson, at that time the manager, and that the annual rent was to be Rs. 575 for the years 1303 and 1304 F. This, he says, was done without going into any accounts and presumably was not based upon the actual amount due or which would become due from the tenants, and which as appears from the *wasilbaki* papers was a varying quantity each year. It is significant that the sum so arrived at should be the exact figure which at the end of the period turned out to be the actual rent recoverable. It is also significant that Mr. Hamilton Hudson whose evidence was taken in January 1917 about a month before the appellant himself was examined was not asked a word in cross-examination as to any such oral agreement although the appellant was present in Court at the time. I confess that this latter consideration should not be given too much weight, as in the present case it is a regrettable fact that the Vakils on either side, either through lack of instructions or for some other reason, failed to elicit from the witnesses both in examination and cross examination evidence on many matters which it was manifestly desirable to elucidate. It is the more regrettable as Mr. H. W. Hudson who was

then the proprietor of the Factory was dead and unable to give evidence. The appellant further says that Matuk Lal did realise Rs. 138 from tenants for the year 1303 F. and that he paid him a balance of Rs. 382 making Rs. 520 altogether as the rent for that year. He presumably treated Matuk Lal, his vendor, as entitled to the income for that year, the consideration-money not having been paid until about the end of 1303 F. This story is quite inconsistent with the clause just cited from the *kabuliyat*. The Rs. 1,150 is there stated to be the rent due from the tenants and payable to the landlords, whereas, if the Factory was in fact the *ticcadar* for those years under an agreement, oral or otherwise, the *ticcadar* alone would be responsible to the landlords and would take his chance of collecting the *raiyati* rents. It would not concern the landlord as long as he was paid the *ticca* rent whether the *ticcadar* could recover from the tenants or not Further, as this risk would be on the *ticcadar*, it is difficult to suppose that he would have made no attempt to collect any rents from the tenants during the intervening period and again we find that such rents as were paid, *viz*, Rs. 138 were paid not to the *ticcadar* but to the landlord Matuk Lal and this is not disputed. This sum the appellant says was collected in small sums from various tenants not including Mr. Hudson and produces a document in support of this which I shall refer to in a moment. The appellant's story cannot be reconciled with the stipulation as to the landlords' responsibility if the *ticcadar* should fail to collect the rents for 1303 F. If the oral agreement existed these rents were the *ticcadar's* affair and if he failed to collect them he alone would suffer the loss. The appellant in cross-examination contradicted the story he first told as to an oral lease for the two years in question and said that there was no oral lease for the second year. This, however, would not explain why he should assume any responsibility for the failure to collect rents for the first year. He further says that neither Dwarka Lal nor Khub Lal were ever Patwaris for his predecessor. The only object that I can see for this manifest untruth is to cast discredit on some of the documents relied on by the respondents. I am quite unable to assent his story and think that the Subordinate Judge and Mullick, J., were amply justified in rejecting it. It is admitted that the sum of Rs. 138 was paid to Matuk Lal and that the appellant was so informed by him. I am satisfied that this sum was paid by the Factory on account of rent for the holding. Now, having regard to the fact that Matuk Lal was aware of the payment of Rs. 138, as he communicated this fact to the purchasers, can it for a moment be doubted that he at least well knew the source from which it came? Matuk Lal is dead and Mr. Hudson, the proprietor of the Factory in 1897, is dead and direct evidence as to Matuk Lal's information is not before us. But it must be remembered that this rent was accepted by Matuk Lal and credited in account between himself and his purchaser. It was important for him to know at that time exactly which, if any, of his tenants had made any payments. In my opinion the proper inference to draw is that Matuk Lal knew that the Factory had paid this sum as a tenant at a time when they had no *ticca* lease. In any case, I think the onus would rest upon him and upon his successors to rebut the inference and this they have failed to do. In fact, the document Exhibit K made in the presence of Matuk Lal's agent corroborates the inference that Matuk Lal had knowledge. When the payment of the Rs. 138 was made in April 1896 Matuk Lal was still in possession and the ownership in the property had not, in my opinion, passed from him. The sale under the deed of the 13th July 1895 to the plaintiffs was to be in consideration of the purchase price and on receipt of the consideration-money in cash, but the consideration never passed until the following August and I can see no reason why, if Matuk Lal who still remained the owner, recognised the Factory as tenant, this should not bind his transferee if and when the latter should ultimately complete the sale.

Unless Matuk Lal deliberately deceived the purchasers, they also must have known the source from which the rent was derived. Moreover, the *kabuliyat*, in my opinion,

establishes the fact that the appellant knew that Mr. Hudson had a holding in the village. A receipt, Exhibit 7, given by Matuk Lal to the appellant for Rs. 3-2 on the 29th August 1896 when the balance of the purchase-money was paid was relied on by the appellant. It shows the total rent due for the year 1303 F. as Rs. 520 of which Rs. 138 had already been received. There is nothing to show how the Rs. 520 was arrived at. The document came into existence before the *wasil-baki* papers (Exhibit K) was made up and the sum of Rs. 520 may have been a rough estimate made by Matuk Lal. Exhibit K shows that the rent for that year, including Rs. 194 14-0 payble for the disputed holding, was in round figures Rs. 557. This sum includes the profits of the mango trees, salt sayer and other items which varied from year to year, and it may well be that the Rs. 520 was an estimate based upon insufficient material. It may, on the other hand, be, as suggested by the learned Counsel for the appellants, the *ticca* rent of Rs. 500 with the added sum of Rs. 20 for rental of the holding of Haji Gowsan Mian not included in the *ticca*. There is nothing in this document which contradicts the respondents' story and it shows at least that Rs. 138 had been collected by Matuk Lal from tenants, etc. The appellant also produced a document, Exhibit 8, which he says he received at the same time from Matuk Lal and which shews details of collections from 36 tenants amounting to Rs. 126 7 3 for the year 1303 F. which, together with a verbal loan made to Haji Gowsan Mian, the *gomasta* of Matuk Lal, of Rs. 12-2-3, makes Rs. 135-9-6. It also shows how this sum has been spent in payment of Government revenue and cesses. This is relied upon as indicating that Rs. 138 had been collected from tenants other than the *ticcadar*. How it came into existence is not explained and the writer was not called; nor were any of the tenants called to say that they had paid the sums attributed to them although one of them at least was present in Court at the trial. No one takes any responsibility for it and it is not signed by any one. Moreover, the sum stated therein as collected from tenants is not Rs. 138, the admitted amount, but Rs. 126-7-3. In the circumstances, I think, it would be very dangerous and indeed impossible to rely upon this document as proving anything at all.

There are, however, certain other features appearing in the *kabuliyat* of 897 which have been urged upon our attention by the learned Counsel for the appellant and which he contends are inconsistent with the conclusion that his client recognised Mr. Hudson as his tenant. The second paragraph of the *kabuliyat* reads: "I have obtained *ticca patta* of the whole and entire 8-annas of the Collectorate partitioned *patti* including 36 *bighas* 7 *cottas* 11 *dhurs* of *zerait* land lying as per boundaries given below in Mauza Etwarpur Jainti," and towards the end of the document there is a covenant in these words: 'In Assin 1312 F. S. I will cut down the indigo crops that may be standing on the *zerat* lands on payment of 10-annas instalment of rent, and without waiting for any notice I will relinquish possession of the lease-hold property and in that circumstance I shall have no right to interfere in the lease-hold property nor shall I have any right to occupancy in the *zerait* lands, etc."

As already stated, the use of the words "*zerait* land" in the earlier part of the document is quite consistent with the same having been the Factory's indigo *zerait* over which they had a right of occupancy, and, if this land were excluded from the *patta*, the *raiyati* rent for the same, if the *ticcadar* was occupier, would be payable in addition to the *ticca* rent. There had been some negotiation as to exclusion of a portion of these lands and it was, therefore, natural to find their inclusion expressly mentioned although perhaps it was not strictly necessary as they would be included unless excluded. It is not contended, however, that the expression *zerait* means landlords' private land and the suggestion that the land in suit was ever landlords' *zerait* within the meaning of the Bengal Tenancy Act was abandoned in argument before us. It had never in fact been in the landlords' cultivation. It might, on the other hand, be argued with much greater plausibility that, as the disputed land was never landlord's *zerait*, the use of the term is an admission that the land was indigo *zerait* in the private cultivation of the Factory as a tenant, there being no suggestion that it was cultivated by any one else. The use of the term is certainly not, in my opinion, any admission by the *ticcadar* that the land in suit was landlords'

zerait. The point made, however, is that the covenant to relinquish possession of the lease-hold property and claim no right of occupancy in the *zerait* lands at the termination of the tenancy as well as to pay 10-annas instalment of rent for cutting the crops on the *zerait* land in Assin 1312 F. S. is quite inconsistent with the claim of an occupancy right on such land, and negatives the suggestion of recognition. If the covenant could be interpreted as referring only to the 36 *bighas* mentioned at the beginning of the document and to nothing else, even though such an undertaking would in law not bind the *ticcadar* to relinquish his occupancy holding, if he had one, it might indicate that Mr. Hudson was not at the time putting forward any claim to an occupancy holding at all, and that his attitude was inconsistent with that of a person asserting such a claim. It is not, however, necessary to interpret this undertaking as having any reference to the *zerait* land mentioned in the beginning of the document. And, having regard to the context, the undertaking may equally well be satisfied by reference to what immediately precedes it. It is immediately before provided that if the *ticcadar* should have to sue the tenants for arrears of rent and sell their lands in execution of decrees and purchase them, or if he should acquire occupancy rights in any way, then, after the expiry of the *ticca*, he will give up possession without objection; that the *ticcadar* will not obtain from any tenant *kurtaola patta* or any deed for any term beyond the term of this deed, and, if he should do so, it will be deemed invalid and intructuous after the expiry of the term of this *patta*; that within the *mahal* he will not purchase the entire occupancy holding or any portion of it and if he does so it will pass into the possession of the landlords as their *zerait* land. Then follows the passage quoted above. Now, stipulations of this nature are extremely common in such leases and are meant to protect the landlord from the acquisition by the *ticcadar* of occupancy rights during the currency of the lease which would bind the landlord on its termination. They merely express what the law implies but they are, nevertheless, in common use. One finds in the *ticca pattas* of 1851 and 1853 granted by Manik Lal and Sheo Prasad to Nathu Lal Choudhury a stipulation as to payment of a proportionate amount of 10-annas instalment of rent for cutting the crops on the *khud kasht* land after the termination of the lease, at a time when it is clearly proved that Nathu Lal had admittedly an occupancy right in the disputed holding of at least eight *bighas*. As these leases were renewed no question could arise as to whether the undertaking covered crops on the *ticcadar's* occupancy holding. There is no express covenant in those leases for relinquishing the lands at the termination of the lease but although such a covenant is usual it is unnecessary. It is not contended that the covenant to give up possession is legally enforceable in respect of any lands over which the *ticcadar* had an occupancy right, and, therefore, it seems to me that it was intended to apply and apply only to the land that might be acquired during the currency of the lease in any of the ways mentioned immediately above and which land is referred to as *zerait*. This applies equally to the covenant to pay the 10-annas instalment of rent. Whether the covenant could be enforced in respect of the disputed land depends entirely upon whether the *ticcadar's* right of occupancy existed or not and the covenant itself cannot, in my opinion, legitimately be read as an acknowledgment of the absence of such a right.

The appellant further relies upon the presumption in his favour arising from the Record of Rights which was finally published in April 1896 and which describes the disputed land as *bakasht* of the *ticcadar* but not *zerait*. If we are satisfied that there was an acknowledgment of the occupancy interest by the landlord in 1897 the Record of Rights becomes immaterial. It is relied on, however, to show that, during the preparation of the record and up to 1896, there was apparently no claim by the Factory or Mr. Hudson to have the lands recorded as the Factory's occupancy holding. The reason for this, I think, is not far to seek. From 1894 up to 1897 there were repeated changes in the management of the Factory. In 1894 Harry Hudson, a young man of 24, without much experience was manager. At the end of 1896 or beginning of 1897 Mr. Hamilton Hudson (E H. Hudson) took over charge. It was the first occasion on which he had independent charge of a Factory and he was quite new to the work. He was followed sixteen months later by Percy Hudson, also a young man

without previous experience. The Survey and Record of Rights was the first in Bihar and it can hardly be a matter of surprise if these inexperienced Factory managers failed to attach to such proceedings the same importance as one would now after 25 years experience of the utility and value of Survey Records. It is, therefore, not suprising to find that the entry in the record was allowed to go unchallenged at the time.

One other document was also much relied on by the appellant, *viz*, the Road Cess Return dated the 27th October 1902. This document was prepared by Beni Prasad Singh the Am-Mukhtar of Mr. Hudson. It consists of two parts. The first part should contain details of lands in the actual occupation and cultivation of the person submitting the return whilst the second part should contain details of land held by cultivating *raiyats* paid direct by the persons submitting the Return. At first sight, therefore, part I ought to contain details of the disputed land in the actual occupation and cultivation of the *ticcadar* on whose behalf the Return is made whereas it seems, at all events, doubtful whether it could properly be entered under part II. The disputed land was in fact entered in part I as well as 2 *bighas* 9 *cottas* of another tenant which was apparently under the direct cultivation of the *ticcadar*. There is a note, however, in small print at the bottom of part I to this effect- "In the body of the statement should be entered only *nij jote* land and such uncultivated lands in the use and occupation of the maker of the Return as are capable of assessment on their annual value." It is contended that by making this Return the *ticcadar* acknowledged that the land in suit was *nij jote* land or, at all events, that it is evidence indicating that he considered it as such. According to section 116 of the Bengal Tenancy Act, proprietors' private lands are known in Bangal as Kamar, *nij* or *nij jote* and in Bihar as *zerait*, *nij*, *sir*, or *kamat*. It is argued from this that the inclusion of the disputed land in part I of the Road Cess Return must be taken as having been made after due deliberation and with full knowledge of the exact phraseology of the sections of the Bengal Tenancy Act. I am quite unable to attach any importance to this entry. The land had to be entered in one or other of the schedules and even if it was placed in the wrong schedule according to the instructions at the bottom of the page it was a very natural mistake to make. It is a mistake also, if it be such, which applied to the 2 *bighas* 9 *cottas* of the other tenant's land and it is not suggested that this was landlords' *zerait*. The document was put in on behalf of the plaintiff and it was not drawn to the attention of any of the defendants' witnesses nor were they asked to explain it. It may well be that just as the word "*zerait*" in Bihar is an apt term to designate indigo *zerait*, so the *ticcadar*, if he thought about it at all, considered that *nij jote* which is a synonym for *zerait* had the same significance. It is, moreover, nobody's case that the land is *nij jote* in the sense in which it is used in the Bengal Tenancy Act and this document, in my opinion, affords no evidence from which any inference can be drawn. In the Road Cess Return, dated the 19th November 1912, also put in by the appellant, under the heading of "area of the *zerait* and the *bakasht* lands" is entered 36 *bighas* 7 *cottas* 11 *dhurs zerait* which negatives the suggestion that the disputed land was *bakasht*. That Return was made before the last *ticca* lease expired and indicates that at that time, at all events, the *ticcadar* considered the disputed land as such.

In the view I take as to the recognition of Mr. Hudson as an occupancy tenant in 1857 it is not strictly necessary to determine whether Nathu Lal's occupancy right was included in the conveyance of the 23rd July 1880 although I have already expressed my opinion upon this point. It is clear that Nathu Lal after 1880 made no attempt to exercise any rights of occupancy over the land or to dispute his transferee's claim thereto. It is equally clear that in 1857 the Factory was in possession and asserting a right of occupancy and if my conclusion is accurate that the occupancy right in the Factory was then recognised it is immaterial whether it passed by the conveyance from Nathu Lal.

In my opinion the appeal should be dismissed with costs.

DAS, J.—I regret that I am unable to agree with my Lord the Chief Justice. The important events connected with this litigation have all been stated by my Lord, and I do not purpose to recapitulate them.

On the arguments that have been advanced before us, three important questions arise for consideration; first, did Nathu Lal purchase 34 *bighas* 7 *cottas* 11 *dhurs* of occupancy holding and was his purchase recognised by Sunder Sahay the then landlord? Secondly, did Nathu Lal convey these lands to Mr. Hudson by the indenture dated the 23rd July 1850; and thirdly, was Mr. Hudson recognised as an occupancy tenant in respect of these lands by the plaintiff who had purchased the interest of Matuk Lal, the successor in title of Sunder Sahay?

In regard to the first question, the defendants base their case upon Exhibit E, a letter dated the 19th December 1862, alleged to have been written and addressed by Sunder Sahay to Nathu Lal and upon the *zamabandis* of Sunder Sahay, Exhibits H, H1, H2 and H3. They also rely upon Exhibit D and Exhibit 22, the former as establishing the genuineness of Exhibit E and the latter as strongly corroborating their case as to recognition. The plaintiff denies the genuineness of Exhibits E, D and H, H1, H2 and H3. As to Exhibit 22, he says that, far from corroborating the case of the defendants, it completely destroys it.

As may be anticipated, the main arguments of the parties were directed to the letter, Exhibit E on which the defendants strongly rely. The defendants' case is that Nathu Lal obtained a transfer of these occupancy holdings in his favour sometime between 1271 (September 1863 to September 1864) and 1272 (September 1864 to September 1865) and that the transfer was distinctly recognised by the landlord by his letter dated the 19th December 1865. It is this letter which has been challenged as a forgery by the plaintiff.

In my opinion it is necessary to see whether the *jamabandis* Exhibits H, H1, H2 and H3, can be regarded as genuine documents. If they can be so regarded, then there is no reason to reject the letter Exhibit D as a forgery, since the *jamabandis* clearly establish that Nathu Lal was a tenant in respect of 34 *bighas* 7 *cottas* 11 *dhurs* of land at a rental of Rs. 197-14-0. In order, again, to see whether the *jamabandis* can be accepted as genuine, it will be necessary to consider them in connection with the *Batwara Khasra*, Exhibit 22, which was the *Khasra* of a Collectorate partition between Sunder Sahay and his co-sharers. If the *jamabandis* can stand the test of the comparison with Exhibit 22, the *Batwara Khasra*, then the defendants' case on the first point urged by the parties must succeed.

I propose then to consider the *jamabandis*, Exhibits H, H1, H2 and H3 and the *Batwara Khasra*, Exhibit 22, at the outset. These *jamabandis*, which, it must be remembered, were Sunder Sahay's private papers and should have been produced from the custody of Sunder Sahay's heirs, were in fact produced in Court by one Baldeo Lal, son of Khub Lal, who was the nephew of Dwarka Lal, the Patwari of Sunder Sahay. Baldeo Lal admits that he has an uncle who looks after the business of the family, but he says that he "got" these papers "away" and that they have been in his custody. These *jamabandis* are for the years 1271 (September 1863 to September 1864), 1273 (1865-1866), 1277 (1869-1870) and 1281 (1873 to 1874), respectively. They purport to show that in 1273 Rs. 197-14-0 was realised as rent from Nathu Lal in respect of 34 *bighas* 7 *cottas* 11 *dhurs* of land. They also purport to show that between 1271 and 1273 there was a reduction of area held by five tenants, Bilaki Kalwar, Doma Sahu, Bhikhari Rabut, Bikan Teli and Adham Dhanuk to the extent of 36 *bighas* 7 *cottas* 11 *dhurs* for which they became entitled to a reduction of rent amounting in all to Rs. 107 3 8. These *jamabandis*, therefore, strongly corroborate the letter Exhibit E upon which reliance is placed by the defendants; but, in my opinion, there are conclusive reasons for holding that these *jamabandis* are not genuine. I have already referred to the mode of their production in Court. It is certainly a remarkable coincidence that the *jamabandis* of the most critical period in the history of the Factory in relation to the disputed lands should have been "got away" by Baldeo Lal. The *jamabandis* purport to be the *jamabandis* of the privately partitioned estate of Sunder Sahay. It is relevant to enquire whether there was a private partition between Sunder Sahay and his co-sharers for, if there was not, then it is impossible to rely upon the *jamabandis*. Now, it is admitted that in 1868 there was a Collectorate partition between Sunder Sahay and his co-sharers, and that on such partition, an 8-annas share of the village,

including the lands in dispute, was allotted to Sunder Sahay as a separate *touz.*; but it is contended by the defendants that prior to the Collectorate partition, there was a private partition between the parties and that the Collectorate partition did nothing more than confirm the private partition which had already been effected by the parties. The plaintiff's case is that in 1864 Sundar Sahay was not the sole proprietor of the village; he had only an 8-annas share in it, the remaining 8-annas being in the possession of certain other persons. He contends that a separate estate was allotted to Sunder Sahay only in 1868 by the Collectorate partition and that accordingly the *jamabandis* produced by the defendants must be rejected as forged and fabricated documents, the reason for the forgery being to support the case of the defendants that in 1864 Sunder Sahay had a separate estate and was competent to recognise Nathu Lal as an occupancy tenant in respect of the lands in dispute. It is material then to consider, as I have already stated, whether there was a private partition between Sunder Sahay and his co-sharers prior to the admitted Collectorate partition of 1868.

Now, the *batwara khasra*, Exhibit 22, shows that all the co sharers were applicants for the partition and that a field to field survey of the entire Mauza took place before the partition was effected between the parties. The partition took place under Regulation XIX of 1814, which was the Statute in force in 1868 respecting the partition of estates paying revenue to Government. Section 4 of the Regulation required the applicants to state in their application to the Collector that they were desirous to have separate possession of their respective shares, and it was necessary to have their applications attested by four credible witnesses. It seems to me incredible that, having effected a private partition, Sunder Sahay and his co-sharers, for no reason whatever, should solemnly go to the Collector and ask for a Collectorate partition. Cases constantly come before the Court where after a private partition a party who has been prejudiced by the private partition applies before the Collector for a Collectorate partition, concealing entirely the fact of the private partition between the parties; but then those parties who have not been similarly prejudiced by the private partition dispute the right of the applicant to claim a Collectorate partition and the first question which the Collectorate has to determine is, whether there has, in fact, been a private partition between the parties But this was not a case of this nature. Here all the parties were applicants for a Collectorate partition and it is relevant to enquire why they should solemnly have asked for a Collectorate partition if in fact there was already a private partition between them and if the object of the Collectorate partition was merely to confirm the private partition which had already been effected between them. This is not all; the document, Exhibit 22, shows, as I have already pointed out, that there was a field to field survey of the entire Mauza. This certainly suggests the inference that there was not a private partition between the parties. The arguments of the defendants involve this, that not only did Sunder Sahay and his co sharers go through the expense and the trouble of a wholly unnecessary Collectorate partition, since they were already in possession of their respective shares, but that they made false declarations in their petition to the Collectorate and were supported in their false declarations by four credible witnesses. Under section 12 a creditable Ameen was to be appointed to make a division who was to receive a percentage on the amount of the *jama* of the whole estate for his trouble and the expenses of establishment. Section 17 contained comprehensive rules under which the proprietors were required to furnish the Ameen with the accounts on the gross produce of each village, and all other accounts and information requisite to enable him to assess the public revenue on each of the estates into which the property was to be divided. The third of these rules required the proprietor to cause the Patwaris and other Zemindari officers to attend the Ameen to explain the accounts and furnish him with such information as he may require for dividing the estate and apportioning the public *jama*. It is not necessary to go through the various sections of the Regulation; it is sufficient to say that various proceedings had to be taken before the partition could be effected and that these proceedings

had to be taken in the presence of the proprietors and their Patwaris.

Exhibit 22, as I have mentioned, is the measurement *khasra* of the partition, and the opening words are as follows:—"Certified copy of *khasra* showing measurement plot by plot of the fields of each tenant of Manza Etwarpur Jainti prepared in 1868 on the application of Sunder Sahay, share holding proprietor of 8 annas, Raghubans Sahay, Jadubans Sahay, Narain Sahay, Shankar Sahay, Maharaj Kumar, Babu Tapeswar Singh, defendants, in the presence of Khaderan Mahto, Jath Raiyat, Udharan Pashai, Gorait of the entire 16 annas, Dwarka Lal *karpardaz* of the applicant No. 1 Jitulal, *karpardaz* of defendants and under the supervision of Lala Shimbhu Dayal, partition Ameen, and Juniat Raot, Chairman, with a Lugga of 6 cubits and 6 Angals on the 4th December 1868." It ought to be pointed out that, though Raghubans Sahay and the others are described in the opening words as defendants, that was only so because the proceedings required an applicant and opposite parties; the *khasra* itself shows that all the parties were applicants for the partition. Now, it will be noticed that Sunder Sahay was described in 1868 as the share holding proprietor of 8 annas. That was his statement to the Collector in 1868 and it was on the footing of this statement that partition was effected between the parties. It is impossible to accept the *jamabandis* of a date prior to 1868 in so far as they describe Sunder Sahay as the sole proprietor of a privately partitioned *patti*. In the second place, it may be asked, why was the measurement of the fields of each tenant with the help of an Ameen and chainman necessary, if in fact the parties had already effected a partition between themselves and the object of the Collectorate partition was merely to confirm the private partition? In my opinion, it is difficult, if not impossible, to credit the story of a private partition.

Now, it is obvious that the *jamabandis* were not and could not have been produced before the Ameen as they should have been under the Batwara regulation. Their mere production would have disclosed to the Collector that there was already a private partition between them; and, as a matter of fact, these documents do not bear the seal of the Collector as they should if they had been produced in the *batwara* proceedings of 1868. Lastly, a comparison of the *jamabandis* for 1277 (September 1869 to September 1870) with the measurement *khasra* will demonstrate the utter impossibility of relying on the *jamabandis* as genuine documents. The measurement *khasra* in connection with the Collectorate partition was prepared on the 4th December 1868, and it was prepared, as the document Exhibit 22 shows, in the presence of Jeth Raiyat and the Gorait of the entire 16 annas and Dwarka Lal the *karpardaz* of Sunder Sahay. The *jamabandi* for 1277 also bears the name of Dwarka Lal as the Patwari of Sunder Sahay. As I have said before and as the document shows, the *khasra* was the result of the measurement plot by plot of each tenant, and the presence of the Jeth Raiyat, the Gorait, and Dwarka Lal guaranteed the correctness of the statements made in the *khasra*. The *khasra* must, in my opinion, be accepted as correctly stating the facts as they existed in December 1868. The *jamabandi* for 1277 is the *jamabandi* for the year immediately after the partition and ought to substantially agree with the measurement *khasra*; but, as a matter of fact, there is far greater conflict than agreement between the two documents. We find, for instance, 51 tenants assigned to Sunder Sahay by the partition of 1868. Now, if the *jamabandi* for 1277 (September 1869 to September 1870) be a genuine document, then we would expect to find the names of these 51 tenants in that *jamabandi* but, as a matter of fact, that *jamabandi* shows that Sunder Sahay had only 33 tenants. Lest it should be argued that there may have been transfer of interests between December 1868 and December 1869, I ought to point out that all the transfers that did take place are shown in the *jamabandi* and afford no explanation whatever for the conflict that exists between the two documents. The first column in the *jamabandi* gives the old area of the tenants, and the second column the old rent. These two columns simply carry forward the results from the *jamabandi* for the previous years. The third and fourth columns give the reduction in area and the reduction in amount of rent respectively, and show the transfer

of interests that may have taken place since the preparation of the *jamabandi* for the preceding year. The fifth and sixth columns give the balance of area and the balance of amount of rent respectivaly and are designed to show the interest still retained by the tenant after taking note of the transfers that may have taken place. The seventh and eighth columns give the present area and the present amount of rent of the transferees. In the *jamabandi* for 1277 we find only two such transfers. The ninth and the tenth columns give the total area and total amount and purport to give the exact position after taking note of the transfers. The first column in the *jamabandi* for 1277 ought to state the position correctly as to the total area held by the tenants in 1276. In other words, the first column in the *jamabandi* for 1277 ought to be a mere reproduction of the ninth column of the *jamabandi* for 1276, the year of the Collectorate partition between the parties. We have not the *jamabandi* for 1276 before us, but we are entitled to assume that the first column of the *jamabandi* for 1277 has correctly reproduced the ninth column of the *jamabandi* for 1276. But then there ought to be no conflict between the first column of the *jamabandi* for 1277 and the list of tenants as is to be found in the *batwara khasra*; and there is all the less reason for the conflict since we know that the *khasra* was prepared by the Collector's agent in the presence of the agents of the landlord and the tenants, and, as was required by the Statute, on an examination of the *jamabandi* kept by the landlord and on an exhaustive local inspection. The conflict between the two documents is far more serious as I shall presently show. There are no less than seventeen names mentioned in the first column of the *jamabandi* for 1277 which do not appear in the *batwara khasra* at all. There are no less than 34 names mentioned in the *batwara khasra* as tenants of Sunder Sahay who find no place in the *jamabandi* for 1277. When the two documents are critically examined and compared, it will be found that there are only 17 names common to the two documents. But the most remarkable conflict arises in regard to the position of the Factory The *jamabandis* both for 1273 and 1277 show that the Factory was recorded as tenants in respect of 36 *bighas* 7 *cottas* 11 *dhurs* of land; and indeed the respondents strongly rely on these *jamabandis* in support of their case of recognition. Now, if the *jamabandis* are genuine documents, and if Dwarka Lal, Patwari, the Jeth *Raiyat* and the Gorait were all aware of the rights of the Factory, and if the partition was effected on a field to field survey of the entire area, we would expect to find the Factory mentioned in the *batwara khasra* as holding 36 *bighas* 7 *cottas* 11 *dhurs* of land. The *batwara khasra*, however, shows that there were 38 *bighas* 19 *cottas* $\frac{3}{4}$ *dhurs* of indigo *zerait* land of which 8 *bighas* 6 *cottas* 5 $\frac{1}{2}$ *dhurs* were in the possession of the Factory. The position is shown with such clearness and precision in the *batwara khasra* that it is impossible, in my opinion, to make any mistake about it. I cannot regard the argument as serious that, wherever any land is shown in the *batwara khasra* as indigo *zerait*, it must be assumed that it was the occupancy holding of the Factory for that there is no substance in the *batwara khasra*, since it also shows the occupancy holdings of the Factory. In my opinion, the *batwara khasra* establishes conclusively that on partition between the parties an area of 30 *bighas* 12 *cottas* 13$\frac{1}{4}$ *dhurs* of indigo land was allotted to Sunder Sahay as his share of what would now be called *bakasht* lands. They are described in the document as *zerait* lands; but it must be remembered that the word '*bakasht*' did not come into use till much later, and the description of 30 *bighas* 12 *cottas* 13$\frac{1}{2}$ *dhurs* of land as indigo *zerait* lands indicated that these lands were allotted to Sunder Sahay as his share of the private lands for direct cultivation by him. I have myself no doubt as to what the true position was. Nathu Lal had 8 *bighas* 6 *cottas* 9$\frac{1}{2}$ *dhurs* of tenancy lands within the *touzi* that was allotted to Sunder Sahay. Sunder Sahay the proprietor had 30 *bighas* 12 *cottas* 13$\frac{1}{4}$ *dhurs* of what would now be called *bakasht* lands. In course of time 2 *bighas* 11 *cottas* 15$\frac{3}{4}$ *dhurs* of the *bakast* lands of Sunder Sahay were converted into tenancy lands. When Nathu Lal subsequently took a *pacca* lease of the *touzi* he came into direct possession of the *bakasht* lands of Sunder Sahay. He amalgamated his tenancy holdings with the *bakasht* lands of Sunder Sahay and treated the entire area of 36 *bighas* 7 *cottahs* 11 *dhurs* of land as his tenancy

holdings. In order to strengthen his position with reference to these lands and in order to meet a subsequent attack upon his title as to the lands other than 8 *bighas* 6 *cottahs* 9½ *dhurs* as to which he had a good title he fabricated Exhibit E and the *jamabandis* in order to make it appear that there was a private partition between the parties antecedent to the Collectorate partition and that Sunder Sahay was competent to and did in fact recognise him as an occupancy tenant in respect of the entire area. In my opinion, the *jamabandis* cannot be regarded as genuine and I hold on an examination of the *batwara khasra* that in 1868 all that Nathu Lal had was 8 *bighas* 6 *cottas* 9½ *dhurs* of occupancy holdings.

I now come to the letter, Exhibit E, which is strongly relied upon by the defendants. It is, in my opinion, always dangerous to come to any conclusion on the question of forgery on a mere comparison of the writing in a disputed document with the writings in admitted documents. The plaintiff relies upon the admitted signature of Sunder Sahay in Exhibits 4, 14 and 14A and contends that a mere comparison of the signature of Sunder Sahay in Exhibit E with his admitted signatures in Exhibit 4, 14, and 14A will demonstrate that his signature in Exhibit E has been forged. That the style of the signature in Exhibit E is different from the style in Exhibits 4, 14 and 14A can admit of no doubt whatever. The learned Subordinate Judge concedes that the signature in Exhibit E is much larger than the signatures in the admitted documents; but he thinks that there is no essential difference. Mr. Justice Jwala Prasad, with his knowledge of the Persian script, has recorded an unhesitating finding to the effect that "the signature in Exhibit E is widely different from his admitted signature in the other documents" I attach very great importance to the view which has been expressed in this Court by Mr. Justice Jwala Prasad, but I prefer to rest my decision on the unimpeachable evidence furnished by the letter itself.

The letter runs as follows:—"I have on your application recognized you as cultivator of 36 *bighas* 7 *cottas* 11 *dhurs* of occupancy holding having annual *jama* of Rs. 197 14.0 including rent and the road-cess to be levied by the Government in future lying in Mauza Etwarpur Jainti constituting my proprietary interest, that you have purchased from the tenants of the village Yours sincerely, Sundar Sahay, *bakalam khud* (by my own pen)." Mr. Hasan Imam has argued that the inclusion of road-cess to be levied by the Government in future in the *jama* of Rs 197-14-0 is highly suspicious because admittedly the first of the Road Cess Acts was not introduced till the 3rd June 1871. That may be so, but it may well be that legislation as to the imposition of a road-cess was in the contemplation of the Government for many years prior to the actual introduction of the Bill in the Council and I would not be prepared to hold that the letter has been forged merely on the ground that there is a reference in it to the road cess to be levied by the Government in future. But it is impossible to rely upon the letter in so far as it asserts, first, that the Mauza was his proprietary interest, and, secondly, he had recognised Nathu Lal as his occupancy tenant in respect of 36 *bighas* 7 *cottas* 11 *dhurs* of land purchased by Nathu Lal from the tenants. I have shown from the *batwara khasra* that the Mauza did not constitute the proprietary interest of Sunder Sahay in 1 64 and I have also shown that Nathu Lal had only 8 *bighas* 6 *cottas* 9½ *dhurs* of occupancy holdings in 1868. There is another point in connection with this letter which is worthy of our consideration, the use of the expression '*bakalam khud*' to convey the idea that the signature in the letter was made by his own pen. Now, there are two expressions which may be used to convey the same idea; '*bakalam khud*' and *bakalam khas*.' In the documents which bear the admitted signatures of Sunder Sahay, the expression used is *bakalam khas*. This is the only document in which the other expression is used. The view of the learned Subordinate Judge is that "*bakalam khas*" which is an idiomatic expression may have been written at the suggestion of better scholars than himself and "*bakalam khud*" of his own motion." I am wholly unconvinced by the argument which has been employed by the learned Subordinate Judge. One of the most useful tests in considering a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all. The judicial mind has

constantly taken advantage of the characteristic peculiarities of individulas when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formation of an idea or in the mode of spelling particular words. The test is a useful one and there is no reason why we should not apply it here. Having anxiously considered the internal evidense furnished by the letter itself in the light of admitted facts and circumstances as to which there can be no dispute whatever, and giving due weight to the opinion of Mr. Justice Jwala Prasad, I have come to the conclusion that Exhibit E is not genuine and ought not to be relied upon. Exhibit D stands on no better footing. It purports to be a list of documents kept by Nathu Lal and is dated the 14th January 1869. If, as I hold, Exhibit E is not a genuine document, I cannot rely upon Exhibit D at all. The important questions which arise in connection both with Exhibit D and Exhibit E are these; first, whether Sunder Sahay was the sole proprietor of an estate in 1864? And, secondly, whether in 1864 Nathu Lal did have 36 *bighas* 7 *cottas* 11 *dhurs* as his occupancy holdings? The admitted Collectorate partition in 1868 and the *batwara khasra*, Exhibit 12, clearly establish that Sunder Sahay was not the sole proprietor of the estate in 1864 and that in 1864 Nathu Lal could not have had 36 *bighas* 7 *cottas* 11 *dhur* of occupancy holdings. The *batwara khasra* not being open to any suspicion whatever it must follow that any document which contradicts the *batwara khasra* cannot stand. I hold that Nathu Lal did not have 36 *bighas* 7 *cottas* 11 *dhurs* of occupancy holding.

The next question is, assuming Nathu Lal acquired occupancy rights in these lands, did he convey these rights to Hudson by the Indenture dated the 23rd July 1890. The operative words here are, "all and every the said Talooks, Manzas and lands or parts or shares therein of which the particulars are contained in the said schedule hereto and also all other if any the hereditaments and property belonging to or forming part of or held with the said Talooks, Manzas and lands.....and all manner of rights liberties easements privileges profits and commodities emoluments advantages and appurtenses whatsoever to the said Talooks Manzas land Indigo Concern and hereditaments belonging to or in anywise appertaining or therewith usually held used occupied possessed or enjoyed....." It is conceded that the particulars of the disputed lands are not to be found in the schedule of the "Talooks Manzas and lands" annexed to the deed of conveyance; but it is argued first, that they fall within the description "and also all other if any the hereditaments and property belonging to or forming part of or held with the said Talooks, Manzas and lands;" and secondly, that they are covered by the conveyance of "all manner of rights liberties easements privileges profits commodities emoluments advantages and appurtenances whatsoever to the said Talooks Manzas land Indigo Concern and hereditaments belonging to or in anywise appertaining or therewith usually held used occupied possessed or enjoyed."

The latter argument is a short one and may be disposed of at once. I think it is well understood that the words upon which reliance is placed were intended to pass and in fact did pass only those rights which are known as incorporeal hereditaments, that is to say, such rights as are not accompanied by actual possession. But it was argued that a right of occupancy such as is claimed in the disputed lands is an incorporeal hereditament and must be deemed to have passed by the words employed. From one point of view Mr. Manuk is correct, for a right in the land is, in strictness, like any other right, incorporeal. The truth is that there always has been some confusion between the right of property and subject of property, a confusion which it was necessary for the conveyancers to avoid. It is, therefore, more relevant to enquire whether in conveyancing there is any distinction between corporeal and incorporeal hereditaments than whether logically there ought to be any distinction between them. Now, the old modes of conveyancing under which an estate accompanied by possession passed by livery, while future estates and other rights in land passed by grant, gave a practical rule for distinguishing between corporeal and incorporeal hereditaments. The old conveyancing test is now obsolete; but the distinction is still maintained, and such rights as are not accompanied by exclusive possession are classed

amongst incorporeal hereditaments whereas those rights which entitle the owner to the present possession of the land or to receipt of rent and profit are classed as corporeal hereditaments. It is quite true that a right of occupancy, looked at from the point of view of right of property and not subject of property, is incorporeal in its nature; but the actual possession of the land, to which a person having a right of occupancy is entitled, attracts it to the class of corporeal hereditaments. I am of opinion that the disputed lands are not covered by the words upon which reliance has been placed by Mr. Manuk.

I have now to consider whether the disputed lands are covered by the words, "and also all other if any the hereditaments and property belonging to or forming part of or held with the said Talooks Manzas and lands." Now it will be noticed that the recital is far more specific and certain, in that it confines the operation of the deed to "the Talooks Manzas villages lands hereditaments and premises of which the particulars are set forth in the schedule." *Prima facie*, the operative part not only covers the Talooks, Manzas and lands or parts or shares therein of which the particulars are contained in the schedule, but extends the operation of the deed to "also all other land, if any, the hereditaments and property belonging to or forming part of or held with the said Talooks, Manzas and lands." The critical question is whether the operative part is so clear that it must prevail over the recital. It is quite true that the recitals in a conveyance are subordinate to the operative part and that, consequently, where the operative part is clear, it is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals; but it is well-established that where the operative part is doubtful and it is impossible to say, on a mere reading of it, to which properties it refers, then the recitals can and ought to be used to explain its meaning, and that while, for the purpose of construing the operative part, the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its true construction than the subsidiary clauses of the deed. For instance, parcels of a deed described with certainty are not cut down by recitals showing that something less was intended to pass; but the recitals assist the construction of the operative part where there is an ambiguity in the operative part as to the property affected.

The case of *Walsh* v. *Trevanion* (19) may be usefully considered in this connection. The deed, which was a marriage settlement, recited a mortgage to the Bank of England of certain of the lands belonging to the Trevanions and then it recited the intended marriage of Trevanion with Miss Trelawney, and it recited further that, "upon the treaty of the said intended marriage," it was "agreed that such of the hereditaments.....as are comprised in the said recited indentures of mortgage... ...should be settled to certain uses, etc." The deed then went on: "Now, therefore, for carrying into execution the said agreement.....they, the said.....Trevanions" direct limit and appoint that "the messuages or tenements, lands and other hereditaments, hereinafter granted, released and confirmed, or expressed as intended so to be," "shall be and remain (but subject and charged as hereinbefore is mentioned) to the uses, etc." It was agreed that, so far as the recitals went, only those properties belonging to the Trevanions; (father and son) which were subject to the mortgage in favour of the Bank of England were intended to be conveyed; but then the operative words were these: "All and singular the messuages, lands, tenements and other hereditaments of them the said.....Trevanion and..... Trevanion situate, lying and being within the manor of Carhaie, and also within the several parishes of St. Michael, Carhais, Cuby, Goran Probus, Veryan, St. Teath and St. Lenie, in the said County of Cornwall, and which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained." The schedule annexed to the deed specified and contained such of the messuages lands and hereditaments lying the manor of Carhais and

(19) (1850) 15 Q. B. 732; 19 L. J. Q. B. 458; 14 Jur. 1134; 117 E. R. 636; 81 R. R. 775.

the several parishes mentioned in the deed as were specified and contained in the schedule to the mortgage in favour of the Bank of England. The plaintiffs relied upon the recitals and the schedule and contended that such messuages, lands and hereditaments only as were mortgaged to the Bank of England, and no others, passed by the deed. The defendants, on the other hand, relied upon the operative part and especially upon the statement that the schedule was not intended to abridge or affect the generality of the expressions used in the operative part, and contended that all the messuages, lands and tenements situate lying and being within the manor of Carhais and several parishes mentioned passed, and not only such of them as were mortgaged to the Bank of England. Stopping here for a moment, I may ask myself the question, whether the words employed in the deed upon which reliance is placed by Mr. Manuk have any larger operation than the words upon which the defendants relied in the case cited. In the case before us, certain properties are conveyed by a schedule, and there is no conflict whatever between the recitals and the schedule; but then the deed conveys "also all other, if any, the hereditaments and property belonging to or forming part of or held with" the properties described in the schedule. In the case cited, the conveyance was also by a schedule which also agreed with the recitals; but then the deed provided that the schedule was not intended to abridge or affect the generality of the expressions used in the operative part. In my opinion, no distinction on principle can be drawn between the words on which the defendants in the case cited relied and the words upon which Mr. Manuk relies.

Patteson, J., delivering the judgment in the case thought that the rule of construction was this that, when the words, in the operative part of a deed were clear and unambiguous, they could not be controlled by the recitals or by the other parts of the deed; but that when these words were of a doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words. Taking, then, the words upon which the defendants relied, namely, "but which schedule is not intended to abridge or affect the generality of the expression hereinbefore expressed and contained," the learned Judge said as follows: "These words are not clear and unambiguous they may either include all the lands of the parties situate in the manor and parishes mentioned whether these lands be specified and described in the schedule or not, or they may include only such lands in the same manor and parishes as are virtually and in substance specified and described in the schedule, though they may be imperfectly and inaccurately so specified and described The latter meaning is the more sensible and probable one to be collected from the words used, independently of any supposed intention of the parties, or any other parts of the deed. At any rate, the former meaning is not clear and unambiguous. We must, therefore, look to the recitals and other parts of the deed; and when we do so, it is utterly impossible to doubt but that the parties intended to confine the operation of the deed to the lands which were in mortgage to the Bank of England."

Are the words on which Mr. Manuk relies any more clear and unambiguous than the words upon which the defendants relied in the case cited? They may include, on one interpretation, every bit of land lying within the ambit of the Taluks, Manzas and lands conveyed; but then the conveyance would include much that did not belong to the grantor, for instance, the occupancy holdings of tenants other than the grantor; or they may include only such lands in the properties conveyed as are virtually and in substance specified and described in the schedule though they may be imperfectly and inaccurately so specified and described. For instance, such tenancy lands as were purchased by the grantor during the subsistence of the *ticcā* and which became an accretion to the *ticcā* would pass under these words—though they may not have been specified in the schedule, if the *ticcā* itself was so specified. I am of opinion that the latter interpretation is correct, and that the words relied on were added for greater safety, in order to guard against any possible misapprehension as to the true position. But, if the latter interpretation is not correct, there is at least some ambiguity in the words employed. We are then entitled to look to

the recital and other parts of the deed and when we do so, it is impossible to doubt but that the parties intended to confine the operation of the deed to the properties specified in the schedule.

Apart from any other consideration, I do not see how the occupancy holdings of a tenant can be said to belong to or form part of or be held with a *ticcadari* village It is only on the hypothesis that occupancy holdings purchased by a *ticcadar* prior to the commencement of the *ticca* do not belong to or form part of the *ticca* village that the *ticcadar* is entitled to retain the occupancy holdings on the expiry of the *ticca*. If they do belong to or form part of or are held with the *ticcadari* village, then there is no escape from the conclusion that they should be made over to the landlord on the expiry of the *ticca* lease. But in truth an occupancy holding forms a property by itself and is capable of being held and is in fact held distinct and apart from the estate, within the ambit of which it may happen to lie. Even a cursory examination of the Bengal Tenancy Act will establish this point. An occupancy holding is heritable; it is transferable with the consent of the landlord. The *raiyat* is entitled to cut down trees, provided there is no local custom to the contrary. Section 65 protects the tenant from ejectment for non-payment of rent, but allows the landlord to bring the holding to sale with the result that the surplus sale proceeds are available to the tenant. This is a clear recognition of property in the *raiyat* distinct and apart from the parent estate. Section 76 and section 77 entitle the *raiyat* to effect substantial improvements including the erection of a suitable dwelling-house for himself and his family. Section 85 authorizes sub letting subject to certain restrictions. Section 160 treats a right of occupancy as a protected interest not liable to be annulled by a purchaser of the superior tenure at a sale in execution of a decree for arrears of rent. The last mentioned section is itself a conclusive answer to the contention of Mr. Manuk; for, if an occupancy holding belonged to or formed part of or was held with a superior tenure, it is difficult to understand how it could exist as a separate property after the purchase of his superior tenure at a sale in execution of a decree for arrears of rent. I am of opinion that the words relied upon by Mr. Manuk did not pass the occupancy holdings in question and that Mr. Hudson did not acquire the disputed lands by the conveyance of the 23rd July 1890.

The last question is—Was Mr. Hudson recognized by the plaintiff as an occupancy tenant. Now, before dealing with the evidence on the point, it is well to examine the principles upon which the doctrine of recognition rests. When all the cases are analysed, it will be found that the doctrine is merely the application of the rules of acquiescence or waiver, preventing a party who has acquiesced in a state of things from turning round and alleging a different state of things. It is not an artificial rule entitling a person to the status of an occupancy tenant on mere proof that money paid by him has found its way to the landlord's pocket; but, as the rule is founded on reason and good sense it must be shown as a condition precedent for the applicability of the rule, that the landlord accepted the money as the rent of the holding and the person paying it as the occupier of the holding and as paying on his own account. [See the decision of the Judicial Committee in *Nuba Kumari Deb* v. *Behari Lal Sen* (20)]. It is well established that parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them, and that, where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. Recognition, like waiver, must be an intentional act with knowledge.

In the case of *Mritunjoy* v. *Gopal Chunder* (21) the facts were these: the holding stood in the name of Jobeeruddin and the landlord brought a rent suit against Jobeeruddin and caused the holding to be sold in execution of the decree which he obtained for arrears of rent. The plaintiff thereupon brought a suit for recovery of the holding on the allegation that he and Kalee Kumar had purchased the holding before the rent suit in which the holding was sold and had been recognized by the landlords as tenants. He proved several

(20) 34 C. 902 at p. 908; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L. T. 483 (P. C.).

(21) 10 W. R. 466; 2 B. L. R. A. C. 131.

deposits of rent into the Collector's office in the joint names of Joheeruddin, Kalee Kumar and himself and he alleged that the landlord had withdrawn those rents from the Collector's office. On these facts, the Calcutta High Court had to consider the question whether there was a sufficient recognition of the tenancy of the plaintiff, and it had no difficulty in answering the question in the negative. The following passage from the judgment of Loch, J., may be usefully cited: "On referring, however, to the mode in which these deposits are entered, we find that they have been made in the joint names of Joheeruddin Mirtunjay (the plaintiff) and Kalee Kumar, but there is nothing to show what was the particular interest belonging to the plaintiff in the tenure.....nor is it shown to us that any notice in which the plaintiff claimed to be the purchaser of the tenure was served on the defendant; so that even if defendant have, as alleged, taken all the money in deposit, it is impossible to say that he took it knowing that plaintiff had any interest in the tenure, or that he was thereby admitting plaintiff's title as a tenant. We think that when a party wishes to make known to the Zamindar that he has a right to a tenure the rent of which the Zamindar refuses to take from him, he should distinctly state what is the interest he claims and the notice to the Zamindar should comprise this information. It is not sufficient for a man wishing to protect his special interests of which the Zamindar may have no knowledge, to put money into the Collector's office in the name of the recorded tenant along with his own, without stating what his claim is; for unless he do so, the Zamindar is not obliged to enquire as to his status. The payments as made by plaintiff might have been voluntary payments or payments such as that of a mortgage to save his own interest which a Zamindar is not bound to recognize."

The case of *Robert Wilson* v. *Radha Dulari Kuer* (22) is to the same effect. There a non-transferable holding was advertised for sale in execution of a decree for arrears of rent and the judgment-debtor put in the money due under the decree stating that he had procured the money by selling his holding to the person who was subsequently cited as defendant No. 1 in the action by the landlord. The landlord took out the money out of Court and subsequently sued to eject the transferee. It was held that it could not be inferred from the above circumstance that the landlord had given his consent to the transfer, inasmuch as the plaintiff had a right to draw the money out of Court without regard to the manner in which or the source from which the judgment-debtor had procured it. In the case of *Digbijoy Roy* v. *Ata Rahaman* (23) the facts were these,—On the 17th March 1905, the plaintiff instituted a suit for rent against the tenant. On the 9th April 1908, the tenant filed a written statement in which he alleged that he had transferred his interest in the holding to the present defendant on the 26th March 1905. The transferee appeared in Court at the same time and prayed that he might be added as a defendant. The Court granted the application and the result was that the transferee was treated as a party defendant. On the same day the transferee made a payment of the amount claimed in the suit to the Pleader of the plaintiff who certified the payment to the Court, but it appears that, in his petition to the Court, the Pleader stated that he had received the rent from the transferee as agent of the tenant. It was not disputed that the sum paid to the Pleader was on that very day made over by him to the plaintiff. On these facts the Court, presided over by Mukerrji and Carnduff, JJ., had to decide whether there was a recognition by the landlord of the transferee, as a tenant, and they answered the question in the negative. This case is an authority for the proposition that the fact that the transferee pays the rent as such transferee does not decide the question; he must establish that the landlord accepted rent from him as a tenant. In other words, it is the act of the landlord that decides the question, and not the act of the person who claims the status of the tenant.

These being the principles upon which the doctrine of recognition rests, I have

(22) 2 C. W. N. 63.

(23) 15 Ind. Cas. 156; 17 C. W. N. 156.

to consider whether on the facts of this case, the defendants have established that Mr. Hudson was recognised as a tenant by the plaintiff. In support of his case, Mr. Manuk relies upon Exhibits N and N1, rent receipts granted to him by the landlord on the 20th April 1891 and 18th December 1892 respectively, and upon Exhibit 1, the rent receipt dated the 18th Baisakh 1303 (16th April 1896), upon Exhibit K, the *wasilbaki* paper for 1304, and upon the recitals of the lease, Exhibit I, taken by Mr. Hudson on the 19th April 1897. The plaintiff, on the other hand, relies upon Exhibit 7, Exhibit 8 and upon the terms of the lease Exhibit 1.

The argument in regard to Exhibits N and N1 is a short one and may be disposed of at once. Exhibit N1 is a receipt for *thikadari* rent and does not touch the case of either party. Exhibit N, however, stands on a different footing; and, if genuine, completely establishes the defendants' case. It purports to be a receipt for *kasht* lands in addition to other lands. The defendants called Rudra Prashad, the writer of the document, and he asserted that the word '*mai*' (meaning "with") was not in his handwriting and that it was doubtful whether the word *kasht* was in his handwriting. After examining the document, he said that "it may be that the word formerly was '*babat*' (meaning 'on account of') and that it has been changed to *kasht*" An inspection of the document has satisfied me that it has been deliberately tampered with; and I can place no reliance on it. It is only necessary to add that, at the hearing of the appeal before Mr. Justice Mullick and Mr. Justice Jwala Prasad, Mr. Manuk stated that he would not rely either on Exhibit N or N-1 as the appearance of the disputed part of Exhibit N was suspicious. I must, therefore, reject these documents entirely from my consideration.

I now come to the other documents on which reliance is placed by the parties. In order to understand and appreciate these documents, it is important to consider the rival cases that have been put forward in this Court. It will be remembered that the last lease taken by Nathu Lal expired in 1304, and that it was during the pendency of that lease that Nathu Lal conveyed the Indigo Concern to Mr. Hudson. It will also be remembered that the first lease taken by Mr. Hudson (Exhibit 1) is dated the 19th April 1897 and was to run from 1305 to 1312. The defendants' case is that in 1303 and 1304 the Factory was not in possession of the Mauza as the *thikadar*, but retained the disputed lands as an occupancy tenant, for which Mr. Hudson, on the 16th Baisakh 1303 (16th April 1896), paid Rs. 138 out of the total rent of Rs. 197-14-0 due by him to the landlord for 1303 and received a rent receipt, Exhibit 1, by which the landlord recognized him as an occupancy tenant.

They say that during the negotiation for a fresh *ticca* lease which ultimately resulted in the lease of 19th April 1897, it was agreed between Mr. Hudson, and the plaintiff that he, Mr. Hudson, should make himself responsible for the rents due by the *raiyats* to the landlord for the years 1303 and 1304 and recover them from the *raiyats*, and that, in pursuance of this arrangement and in order to determine what was due by the *raiyats* for these two years, an adjustment of account took place between Mr. Hudson and the *raiyats*. This adjustment of account, according to the defendants, was evidenced by Exhibit K, which established that Mr. Hudson was the only "cultivator" who had paid rent during those two years, the amount paid by him being Rs. 138. That document shows that, after deducting Rs. 138 already paid by Mr. Hudson, there was a balance of Rs. 1,012 due by the *raiyats* (including Mr. Hudson) which Mr. Hudson undertook, in the first instance, to pay to the plaintiff. The defendants contend that this arrangement is completely borne out by the recitals of the lease Exhibit 1 which, read in conjunction with Exhibits I and K, completely establish that the plaintiff recognized Mr. Hudson as a *raiyat*.

The plaintiff's case is this: that he granted an oral lease to Mr. Hudson for the years 1303 and 1304 and that Rs. 138 was collected by Matuk Lal from the tenants and not from Mr. Hudson. He strongly relies upon Exhibits 7 and 8, and upon the terms of the lease Exhibit I. It will be remembered that though the title passed to the plaintiff on the 13th July 1895 by virtue of his purchase still, as he could not pay the full consideration-money, he did not get possession until the

29th August 1896; and the plaintiff's case is that it was arranged betwe n him and the outgoing proprietor Matuk Lal that, in lieu of interest due on the purchase-money which remained unpaid, he would pay Matuk Lal such income as he did receive from the conveyed property, namely, Rs. 500 as *ticca* rent, and Rs. 20 as rent of the occupancy holding of Gowsan Mian which had always been excluded from the *ticca*, Rs. 520 in all. Exhibit 7, according to the plaintiff, sets out the arrangement between him and Matuk Lal, and shows that, after giving a deduction for Rs. 138 which, according to Exhibit 7, Matuk Lal had received from the tenants there was a sum of Rs. 382 due by the plaintiff to Matuk Lal, which the plaintiff paid to Matuk Lal and for which he received the receipt Exhibit 7. Exhibit 8 purports to give a list of the *raiyats* from whom Rs. 138 was collected.

Now, as is usual in these cases, each side challenges the documents on which the other side relies. The plaintiff says that Exhibits I and K have been fabricated by the defendants in order to make it appear that Rs. 138 was paid by Mr. Hudson as rent of the occupancy holdings, and the defendants retort that Exhibits 7 and 8 have been fabricated by the plaintiff in order to make it appear that that sum of money was collected by Matuk Lal from the *raiyats*, of whom Mr. Hudson was not one. Now the common case of the parties is that Rs 138 was in fact collected by Matuk Lal at a time when he was in actual possession of the Zamindari, though he had executed a sale-deed in favour of the plaintiff. They differ as to the source from which the collection was made, the plaintiff asserting that it was made from tenants of whom Mr. Hudson was not one, the defendants insisting that it was made from Mr. Hudson himself.

Now, the genuineness of Exhibit 7 has been proved beyond dispute by one of the witnesses examined on behalf of the defendants. Exhibit 8, however, stands on a different footing. It is a document which could be prepared at any time by any enterprising Zamindar, and I agree with Mr. Manuk that we ought not to attach any importance to it. Now Exhibit 7 establishes that Matuk Lal had received Rs. 138 from the tenants. The word is used in the plural, reyayanangayraya, and certainly throws suspicion on the defendant's case that that sum of money was collected from Mr. Hudson himself. It conclusively establishes, in my opinion, that, so far as Matuk Lal is concerned, he was not aware of the fact that the collection had been made from Mr. Hudson, though it does not establish that Mr. Hudson in fact did not pay it.

I now come to Exhibit I, which, after the exclusion of Exhibits N and N1, constitutes the only documentary evidence of receipt of rent by Matuk Lal from Mr. Hudson. It purports to be a rent receipt dated the 18th Baisak 1303 granted on behalf of Matuk Lal to Mr. Hudson in respect of *raiyati* lands. The receipt is for Rs. 138, and was actually signed by Khub Lal Pa wari, nephew of Dwarka Lal Patwari. The plaintiff asserts that this rent-receipt has been fabricated by the defendants, and he relies upon Exhibit 7 containing the statement of Matuk Lal himself that he had collected Rs. 138 from the tenants. Now the defendants have undoubtedly put forward forged and fabricated documents in support of their case, Exhibit E. Exhibit D, Exhibits H, H1, H2, H3 and Exhibit N. I am bound, therefore, to look upon any document produced by the defendants with suspicion and require the strictest proof of its genuineness. Now there are three points that at once arise in connection with this rent receipt. In the first place, according to what calculation and on what basis was Rs. 138 paid on the 8th Baisak 1303? The defendants' own case is, as shown by Exhibit R, that the rent was payable in two *kists* of Rs. 98-15 0 each. Now every rent-receipt ought to show in respect of which *kist* the rent is paid. The form of receipt as given in the Bengal Tenancy Act, Schedule II, requires the *kist* in respect of which the rent is paid to be stated. So far as the form is concerned, Exhibit I complies with the provisions of the Bengal Tenancy Act, but it is remarkable that only the year is mentioned in that portion of the receipt where the *kist* in respect of which the rent was paid ought to have been stated. The reason is not far to seek: for, if the rent was payable in two *kists*, then the payment of Rs. 138 on the 18th Baisak 1303 was

certainly an over-payment. Now, in making this point, I must make it clear that no portion of the rent alleged to have been paid on the 18th Baisak was appropriated towards arrears of rent. The receipt, Exhibit I, shows that the whole of Rs. 138 was appropriated towards current rent. But then there is this difficulty that the current rent could never exceed Rs. 98-15-0, if, as Exhibit R shows, the rent was payable in two *kists*. If it be argued that the statement as to the *kists* in Exhibit R was a mistake on the part of the Pleader of the respondents, then the respondents are in a worse position; for if there be no agreement between the parties or established usage to the contrary, a money rent is payable, under section 53 of the Bengal Tenancy Act, in four equal instalments falling due on the last day of each quarter of the agricultural year, and the current rent, in the present case, could never exceed Rs. 49-7-6. Now the only argument of Mr. Manuk is that, if he were forging a document, he would have forged it so as to make it consistent with the agreement between the parties as to the instalments in which the rent was payable. But there is an obvious weakness in the argument. The one fact established beyond all reasonable doubt is that Matuk Lal did collect Rs. 138. The plaintiff was in possession of Exhibit 7, the receipt granted by Matuk Lal to him and of the lease, Exhibit 1, in which it was recited that Rs. 138 had been collected by Matuk Lal. That being so, it was obviously impossible for him to make any other case but this that that Rs. 138 had been collected by Matuk Lal from him.

Secondly, the non-production of the books of account by the defendants ought to have an important bearing on the question. The defendants must have known that the genuineness of Exhibit 1 would be the critical question in the case, and it was possible for them to establish the payment of rent by them beyond all reasonable doubt by the production of their account-books. I wholly disbelieve the explanation which has been offered, namely, that the books of account are not in existence; and the inference which I draw from the non production of the books is that, if produced, they would not support Exhibit I.

Lastly, I am suspicious of the person who actually signed the rent-receipt on behalf of Matuk Lal. Now the Bengal Tenancy Act requires a rent-receipt to be signed either by the landlord or his authorised agent. Exhibit I was in fact signed by Khub Lal who described himself as "Patwari, nephew of Dwarka Lal Patwari." Now it is admitted that Dwarka Lal was the only registered Patwari of Matuk Lal: but it is contended by Mr. Manuk that Khub Lal had authority from Matuk Lal to grant rent-receipts, and he relies upon the evidence of Prayag Dutt, Baldeo Lal and Bhootan Misser. Now all that Prayag Dutt says is that Khub Lal was the nephew of Dwarka Lal and that "he used to work with Dwarka Lal." This does not establish that he was the authorised agent of Matuk Lal. It is one thing to work with a Patwari, and quite another thing to have the same power as a Patwari in relation to the landlord. Baldeo Lal is the son of Khub Lal and he says that his father collected rent from Matuk Lal up to 1304. That may be so; but the authority to collect rent does not carry with it the authority to grant rent-receipts. The question is not one of technicality, but of substance; for it may well be that Khub Lal, as the nephew of Dwarka Lal, used to help Dwarka Lal in the matter of collection of rent just as many other persons must have helped Dwarka Lal. But "an authorised agent" for the purpose of granting rent-receipts differs widely from a collecting peon such as Khub Lal might have been. The last witness on this point is Bhootan Misser who asserts that Khub Lal was the Patwari of the *putti* under Matuk Lal, but in cross examination he admits that he has seen no Parwana authorising Khub Lal to collect rent for Matuk Lal. In view of the admitted fact that Dwarka Lal was the registered Patwari of Matuk Lal, I altogether disbelieve this witness. Mr Manuk also relied upon Exhibit N as showing that Khub Lal used to collect rent on behalf of Matuk Lal. I have no doubt that he did; but the important fact to remember is that Exhibit N was signed as a rent-receipt, not by Khub Lal, but by Matuk Lal himself. That document makes it quite clear that Khub Lal was in the position of a collecting peon, and I

have no doubt on the evidence of Prayag Dutt and Baldeo Lal that that was his position. I have examined the entire evidense connected with Exhibit I with great anxiety and I have come to the conclusion that it is not a genuine document and ought not to be relied upon. I have no doubt whatever that it has been fabricated in order that the defendants may take advantage of the admitted fact that Matuk Lal had collected Rs. 138 from the tenants. I have also no doubt that they induced Khub Lal to make over the rent-receipt to them, just as later on they induced his son Baldeo Lal to produce the *jamabandis* Exhibits H, H1, H2 and H3 in Court.

I have next to consider the effect of Exhibit I on the fortunes of the case, assuming it to be a genuine document. All that this document establishes is that Mr. Hudson paid Rs. 138 to Khub Lal and received a rent receipt from Khub Lal. But the question is not whether Mr. Hudson paid Rs. 138 as the rent of the disputed lands, but whether a landlord having the right to recognize a trespasser as the tenant did recognize him as such. Exhibit 7 is very important from this point of view, for Matuk Lal's statement in Exhibit 7 is that he had realised Rs. 138 from the tenants. Now with reference to Exhibit I two questions arise; first, whether Khub Lal had any authority to bind Matuk Lal by recognizing Mr. Hudson as a *raiyat*, assuming Khub Lal was the Patwari of Matuk Lal; and, secondly, whether Matuk himself could have recognized Mr. Hudson as a *raiyat*. On the first question, the decisions of this Court are conclusive. The late Chief Justice of this Court discussed the identical point in the case of *Wyatt, A. W. N.* v. *Sheo Gobind Sahu* (15). In the course of his judgment, he said as follows: "The position and duties of a Patwari are well-known. He is a poorly paid underling employed only to collect rents due to his master and to grant receipts for the same. His implied authority would extend to all subordinate acts which are necessary or incidental to his express authority..... In my opinion it is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager. I cannot accept the suggestion which has been made that it lay on the landlord in this case to prove that the Patwari had not authority to consent to the transfer. Landlords would be in a very difficult position if it were held that Patwaris and other underlings should be presumed, till the contrary is shown, to have the power to sign away their master's rights." The same view was taken in the case of *Janki Sahu* v. *Thakur Run Bahadur Singh* (14). There is no injustice in the rule propounded in these cases, for, as was pointed out in *Russo-Chinese Bank* v. *Li Yau Sam* (13), "the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised." I am of opinion that Exhibit I did not bind Matuk Lal and does not bind the plaintiff.

But even if it be assumed that the receipt granted by Khub Lal bound Matuk Lal, I do not see how it can be argued that it also bound the plaintiff. It will be convenient, at this stage, to consider an argument which was suggested rather than formulated by Mr. Manuk, namely, that the title in the *Touzi* passed to the plaintiff, not on the 13th July 1895, the date of the conveyance, but on the 29th August 1896, the date on which the plaintiff paid the purchase-money to Matuk Lal, and that consequently the recognition of the transfer of the tenancy by Matuk Lal on the 16th April 1896 the date on which the rent receipt was granted by Khub Lal to Mr. Hudson, completely bound the plaintiff. The argument, in my opinion, proceeded upon a complete disregard of the essential distinction between a sale and a contract for sale, a distinction which it was the object of section 54 of the Transfer of Property Act to recognize and preserve. Now it will be noticed that it is not an essential condition for a sale that the purchase-money should be paid; all that is necessary is that there should be a transfer of ownership in exchange for a price paid or promised or part paid and part promised and that the transaction, in the case of tangible immoveable property of the value of one hundred rupees and upwards, should be evidenced by a registered

instrument. Here the document of the 13th July 1895 purports on the face of it to create a transfer. It is a conveyance and not an agreement to convey, and it was executed, delivered and duly registered in accordance with law. What, then, is the position? I cannot do better than quote the weighty observation of Farran, C. J in *Tatia* v. *Bob ji* (24): "I am not, however," said the distinguished Chief Justice, "as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the Mofussil perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem...to have been sufficiently borne in mind throughout the judgment." In my opinion, the document operated as a conveyance on the date of its execution, unless indeed it could be shown by the vendor that there was a separate oral agreement constituting a condition precedent to the attaching of any obligation under the document. But such a separate oral agreement could be proved only by the vendor or his representative in interest. For this proposition, the decision of the Judicial Committee in the case of *Achal Ram* v. *Hakim Husain Khan* (25) is conclusive. The defendants are not the representatives-in-interest of Matuk Lal, and consequently it is not open to them to contend that, though the document was executed on the 13th July 1895, and though it purported, on the face of it, to be a conveyance and not an agreement to convey, title nevertheless did not pass until the payment of the purchase-money by the plaintiff to Matuk Lal. But, even if it be open to the defendants to raise the contention, I am of opinion that they have not shown that the intention of the parties was that title should not pass until the payment of the purchase-money. The only circumstance upon which the defendants rely is that the purchase-money was not paid till the 29th August 1896. But it has been held in a series of cases that that circumstance is wholly immaterial; see, *Umedmal Motiram* v. *Davu* (26), *Sagaji* v. *Namdev* (27), *Shib Lal* v. *Bhagwan Das* (28), *Baijnath Singh* v. *Paltu* (29), *Manogi Singh* v. *Sarat Lal Mahto* (30), *Nilmadhab Parhi* v. *Haran Prosad Parhi* (31). On the other hand, Mr. Hudson certainly accepted the position that the plaintiff had a good and valid title to the *Touzi* from the beginning of 1303 (8th September 1895). By the *kabuliyat* which Mr. Hudson executed in favour of the plaintiff, he agreed to be responsible to the plaintiff for the rent due to him by the tenants for the years 1303 and 1304, he could only have agreed to be so responsible on the hypothesis that the title had passed to the plaintiff on the execution of the conveyance. It must follow, then, in the view which I take, that the alleged act of Matuk Lal in recognizing Mr. Hudson as an occupancy tenant cannot operate to the prejudice of the plaintiff. Mr. Manuk, then, relies upon section 60 of the Bengal Tenancy Act and argues that the only person who could give a valid receipt for the rent was Matuk Lal as he was admittedly the registered proprietor on the date when the rent-receipt was granted. That may be so, but it is one thing to give a valid receipt for rent and quite another to recognize a person as having a right of occupancy in the disputed land. The question only arises on the hypothesis that the defendant apart from the recognition has no title to the lands in dispute. If he has, the question of recognition does not arise. The question is—can a person who has conveyed his proprietary interest to another person but whose name is still

(24) 22 B. 176; 11 Ind Dec. (N. s) 639.
(25) 27 A. 271; 15 M. L. J. 197; 9 C. W. N. 477; 8 Q. C. 155; 8 Sar. P. C. J. 772; 32 I. A. 113 (P. C.).
(26) 2 B. 547; 3 Ind. Jur. 119; 1 Ind. Dec. (N. S.) 787.
(27) 23 B. 525; 1 Bom. L. R. 5; 12 Ind. Dec. (N. S.) 349.
(28) 11 A. 244; A. W. N. (1889) 96; 6 Ind. Dec. (N. S.) 583.
(29) 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96.
(30) 4 C. L J. 334.
(31) 20 Ind. Cas. 325; 17 C. W. N. 1161; 19 C. L. J. 146.

borne on the Collector's register by giving a rent-receipt recognize a person as having a right of occupancy in the land who otherwise has no such right. I am of opinion that it is impossible to uphold the contention of Mr. Manuk. I must, therefore, hold that Exhibit I does not establish any recognition of the defendants' status by the plaintiff.

I now come to Exhibit K. This document purports to evidence an adjustment of account between Mr. Hudson and the *raiyats* to which the plaintiff is not a party. It describes the proprietor of the Factory as a cultivator and discloses the fact that Rs. 395-12-0 was the rent due by him to the landlord in respect of the years 1303 and 1304 out of which Rs. 138 had been paid by him. It is an *ex-parte* statement by Mr. Hudson and stands on the some footing as Exhibit 8 which I have refused to take into consideration. This document, in my opinion, must stand or fall with Exhibit I; and as I have come to the conclusion that Exhibit I is not a genuine document, I can place no reliance whatever on Exhibit K. But, apart from any other consideration, I do not see how this document establishes a case of recognition, since the statement made in Exhibit K is that of Mr. Hudson and not that of the plaintiff. It is elementary that an assertion by a tenant does not establish a case of recognition. It must be established that such an assertion was made to the knowledge of the landlord and that the landlord acquiesced in the assertion deliberately and with knowledge as to its effect. Now is there any proof that the plaintiff or his authorised agent was present at the transaction which resulted in Exhibit K or that Exhibit K was brought to the notice of the plaintiff or his authorised agent? The defendants have examined two witnesses in order to prove Exhibit K: Mr. E. H. Hudson whose writing appears on Exhibit K and Gopal Lal, witness No. 11, who is alleged to have been present at the transaction. Now either of them says that the plaintiff or his authorised agent was present when Exhibit K was drawn up and prepared and there is no evidence at all to suggest that Exhibit K was ever brought to the notice of the plaintiff or his authorised agent. Now if in fact the plaintiff or his authorised agent, was present at the transaction of Exhibit K had at any time been brought to the notice of the plaintiff, we would expect to have evidence on this point since two witnesses, one of them being Mr. Hudson, have given evidence in connection with Exhibit K. It is, in my opinion, an inevitable inference from the failure on the part of the defendants to give any evidence on the point that the plaintiff was not present at the transaction which resulted in Exhibit K and that it was never brought to his notice. It has been suggested, however, that Haji Gowsan was present at the transaction and that is sufficient to affect the plaintiff with notice of the contents of Exhibit K; but Haji Gowsan, as Exhibit 8 shows, was the *gomasta* of Matuk Lal the outgoing proprietor and not the *gomasta* of the plaintiff. That being so, it is impossible to affect the plaintiff with notice of the contents of Exhibit K by the mere proof that Haji Gowsan was present at the transaction

I now come to the lease. The opening words are very important and run as follows: "I have obtained *ticca patta* of the whole and entire 8-annas of the Collectorate partitioned *patti* including 36 *bighas* 7 *cottas* 11 *dhurs* of *zerait* land lying as per boundaries given below.....at a consolidated uniform annual *jama* of Rs. 600" It is conceded that the 36 *bighas* 7 *cottas* 11 *dhurs* mentioned in the lease are the disputed lands in the suit; but it is contended by Mr. Manuk that the description of these lands as *zerait* lands does not conclude the defendants. I quite agree that the description does not conclude the defendants; but still it is evidence in the case and cannot be wholly ignored. *Bhagtu Singh* v. *Raghu Nath Sahai* (32). But quite apart from any other consideration, it is difficult to see why these lands should be specially included in the *ticca* to be held by the *ticcadar* along with other lands at a *jama* of Rs. 600 per annum, if in fact the Factory had a pre-existing title to these lands which gave it the right to hold these lands as their *kasht* lands at a *jama* of Rs. 197-14-0 per year. Now the reason for not concluding a tenant by his description of land

(32) 1 Ind. Cas. 571; 9 C. L. J. 15; 13 C. W. N. 135.

as *zerait* land is this: that if in fact it were *raiyati* land, such a description if it were conclusive on the point, might have the effect of barring in perpetuity the acquisition of an occupancy right in the land. But the reason does not operate where the case of the tenant is, as it is here, that by the lease itself the landlord recognised the tenant, as a tenant having rights of occupancy in the land. I think, therefore, that when we are considering, not whether the tenant can by lapse of time acquire a right of occupancy in the land but whether his status as an occupancy tenant has been recognised by the landlord by a series of transactions culminating in the lease itself, it is important to consider how the land has been described in the lease itself and whether there is a demise in respect of that land within the *jama* mentioned in the lease.

The next important passage in the lease runs as follows:—"There was Rs. 1,150 on account of rent for 1303 and 1304 F. due by the tenants. Out of this Rs. 133 had already been received by the former proprietors, and the remaining sum of Rs. 1,012 was found justly payable to the landlords by the tenants and by me the *ticcadar* which I the *ticcadar* have paid to them in cash and in one lump on getting receipts, and the landlords have brought it to their possession and appropriation, and I, the *ticcadar*, will get the same from the tenants of the village and from my own *tahvil*."

The passage is so important that it is necessary to consider it line by line to see if it establishes a case of recognition by the plaintiff. To start with, it certainly does not establish the case of the plaintiff that the Factory was in possession of the *Touzi* as *ticcadar* under the oral lease during the years 1303 and 1304; but I am not prepared to dismiss the evidence on this point of the plaintiff Bhanna Lal Chowdhury as deliberately false. The Factory was in possession under a lease which expired in 1302. Meanwhile, Matuk Lal had sold his proprietary interest to the plaintiff. Documentary evidence conclusively establishes that negotiations were proceeding with the Factory for a fresh lease. The position of the Factory as *ticcadar* for 1303 and 1304 was clearly recognised by the lease Exhibit 1; for on no other hypothesis could the Factory make itself liable for the entire rent due to the landlord for 1303 and 1304 and recover those rents from the tenants. If their status as *ticcadar* for 1303 and 1304 has not been recognised by the plaintiff, then it would have been impossible for the Factory to realise the rents from the tenants in respect of those years. The question, in my opinion, is not really one of fact, but an inference from certain admitted facts and, though I agree that there was no definite oral lease in favour of the Factory in 1303 which entitled the Factory to retain their *ticcadari* interest for the years 1303 and 1304, I cannot ignore the arrangement that was arrived at between the plaintiff and the Factory by which the status of the Factory as *ticcadar* for the years 1303 and 1304 was clearly recognised by the plaintiff. Mr. Manuk, I think, is right in saying that when the Factory wanted to take a lease the plaintiff made this condition with the Factory: "You make yourself liable to me for the rents due from the tenants for the years 1303 and 1304". Such a condition was necessary, as the plaintiff was a new landlord and was not acquainted with the local conditions; whereas the Factory, having been the *ticcadar*, knew exactly what the position was. As a result of the arrangement between them, the Factory made itself primarily liable to the plaintiff for Rs. 1,012, irrespective of the question whether it could or could not collect it from the tenants, subject only to this that if the Factory suffered any loss in respect of the arrears for 1303, the plaintiff would be responsible therefor.

Now, is there anything in the passage cited which proves that the plaintiff accepted the position that the Factory was an occupancy tenant having succeeded to the interest of Nathu Lal in his occupancy holdings? For nothing short of that will do, as the cases to which I have referred establish. The document recites that "there was Rs. 1,150 on account of rent for 1303 and 1304 due by the tenants." There is no suggestion here that Mr. Hudson was one of the tenants or that any portion of Rs. 1,150 was due from him. It was argued

that it is this recital in the lease which establishes that Exhibit K was brought to the notice of the plaintiff. I am unable to accede to this argument. I quite agree that if it is a necessary inference from the recital that Rs 1,150 on account of rent for 1303 and 1304 was due by the tenants to the plaintiff, that the plaintiff must have seen the contents of Exhibit K, then we must make that inference; but, in my opinion, the inference is not a necessary or an inevitable one. It was possible for the defendants to establish by evidence that Exhibit K was brought to the notice of the plaintiff. They have examined two witnesses to prove Exhibit K, one of them being Mr. Hudson himself. It is, in my opinion, very significant that neither of these two witnesses says that Exhibit K was ever brought to the notice of the plaintiff. It was argued before us that it was impossible for the plaintiff to assert that Rs. 1,150 was due from the tenants unless he had seen Exhibit K. This, in my opinion, assumes the genuineness of Exhibit K. The argument of the plaintiff is that Exhibit K has been fabricated on the basis of this very recital in order to lend support to their case that a portion of Rs. 1,150 was due from them in respect of their occupancy holdings. Even if we accept the genuineness of Exhibit K, there is nothing in the recital to which I have referred to establish that Exhibit K must have been brought to the notice of the plaintiff. The utmost that can be argued is that the recital is consistent with the case of the defendants on whom, it must be remembered, the onus lies; but then it is equally consistent with the case of the plaintiff. Three different theories may be advanced as to how the plaintiff came to accept the position that Rs. 1,150 was due to him on account of rent for 1303 and 1304. One of the theories undoubtedly is that he accepted the correctness of Exhibit K. Another theory may be that he accepted the statement made by Mr. Hudson on the point; and as the sum of Rs. 1,150, the rent said to be due to him from the tenants for 1303 and 1304, exceeded the *ticca* rent that was hitherto paid by the *ticcadar* to the landlord which *ticca* rent was Rs. 500 per year, he accepted the statement without further question. Another theory may be that he accepted the figure from Matuk Lal who was the outgoing proprietor and who, as Exhibit 7 shows, gave the information that Rs. 138 had already been received by him as rent from the tenants. The question, in my opinion, is one of entire speculation as to how the plaintiff accepted the position that Rs. 1,150 was due to him from the tenants from 1303 and 1304; and I must respectfully decline to be drawn into a speculation on this point. There is no direct proof that the plaintiff was aware of the contents of Exhibit K. The circumstances in connection with the recital, to which I have already referred, are equally consistent both with the case of the plaintiff as with the case of the defendants. In such circumstances, the defendants on whom the onus of proof as to recognition lies, must fail. The following passage from the judgment of Lord Halsbury, L. C., in the case of *Wakelin* v. *L. & S. W. Ry.* (33) may be usefully cited in this connection:—"My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; '*Ei qui affirmat non ei qui negat incumbit probatio*'" In my opinion, therefore, it is not a necessary or an inevitable inference from the recital to which I have referred that the plaintiff was aware of the contents of Exhibit K. Then the lease recites that "Rs. 138 had already been received by the former proprietors." Here, again, there is no suggestion that that sum of money had been paid by Mr Hudson and not by the tenants other than Mr. Hudson. In fact, Exhibit 7 shows

(33) (1887) 12 App. Cas. 41; 56 L. J. Q. B. 229; 55 L. T. 709; 35 W. R. 141; 51 J. P. 404.

that Matuk Lal had received that sum of money from *Rayanaugharaya*, that is to say, from tenants (in the plural). Then comes the critical passage on which Mr. Mannk strongly relies; "and the remaining sum of Rs. 1,012 was found justly payable to the landlord by the tenants and by me the *ticcadar* which I, the *ticcadar*, have paid to them in cash and in one lump on getting receipts and I, the *ticcadar*, will get the same from the tenants of the village and from my own *tahvil*." I confess that when the arrangement between the plaintiff and Mr. Hudson is remembered there is no difficulty in understanding what the passage means. Mr. Hudson was primarily liable to the plaintiff for Rs. 1,012, though he was entitled to recoup himself from the tenant; and the statement that the sum of Rs. 1,012 was found payable by the tenants and by him the *ticcadar* does not, in my opinion, carry with it an assertion that he was an occupancy tenant having a distinct liability for rent to the plaintiff in respect of the occupancy holdings. Nor does the recital that Mr. Hudson would recover the sum paid by him to the plaintiff from the tenants of the village and from his own "*tahvil*" carry the case any further, for admittedly the loss would fall on his "*tahvil*" if he failed to recover any portion of the rent from the tenants. If I may appropriate the language of the learned Judges in the cases to which I have referred, there is nothing to show in this passage what was the particular interest belonging to the defendant, for he does not distinctly state what is the interest he distinctly claims. Nor does it amount to more than this, that he paid the money or undertook to pay it in the names of the admitted *raiyats* along with his own. Recognition, as I have said before, is a deliberate act with knowledge of its effect; and there is, in my opinion, no injustice in declining to found recognition on the recitals, if they are consistent with the case made by the plaintiff. The passage, which I have already cited from the judgment of Lord Halsbury, L. C., supports this proposition, and the cases to which I have referred recognise the principle. In my judgment, there is no assertion in these recitals that Mr. Hudson was an occupancy tenant having succeeded to the interest that belonged to Nathu Lal. In the second place, even if there was such an assertion and the plaintiff took away Rs. 1,012 paid by Mr. Hudson, there was no acceptance by the plaintiff of the position of Mr. Hudson as an occupancy tenant, since the plaintiff was entitled to that sum from Mr. Hudson and he had a right to take the money, to quote the language employed in *Robert Wilson* v. *Radha Dulari Kuer* (22), "without regard to the manner in which or the source from which" Mr. Hudson had procured it. The plaintiff had the right to assume that Mr. Hudson's admission of liability arose out of the agreement between him and Mr. Hudson preliminary to the lease, by which Mr. Hudson made himself liable for the entire rent due from the *raiyats* in respect of the years 1303 and 1304; and if he was entitled to the entire rent from Mr. Hudson, it clearly made no difference to him whether Mr. Hudson recouped himself from the tenants or paid it out of his own "*tahvil*". In my opinion, the principles laid down in the cases to which I have referred, are equally applicable here, and I must hold that there is nothing in the recitals from which it can be legitimately inferred that the plaintiff recognised Mr. Hudson as an occupancy tenant.

But if there is nothing in the recitals to establish a case of recognition by the plaintiff, there is, in the concluding portion of the lease, a statement which, in my opinion, directly negatives the defendants' case. But, as an ingenious attempt has been made to give an explanation to that passage by reference to those passages which precede it, it will be necessary for me to consider all these passages as a whole. These passages are as follows: "If for the arrears due by the tenants I have to institute suits and if I obtain decrees and by enforcing them I put to sale their occupancy holdings and purchase them or if I acquire occupancy rights in any way, then, after the expiry of the term of *ticca*, in my favour, I will on receipt of the sale-proceeds make over to the landlords the possession thereof without any objection whatever on my part. I will give up possession of the lands as regards which I may acquire the right of occupancy and to this I will not raise any objection or contention whatever and if I

do so, it will be deemed null and void and improper. Within the *mahal* I will not purchase the entire occupancy holding or any portion of it. If I do purchase, then, on the termination of the term hereof, it will pass into the possession of the landlords as their *serait* land and to this I, the *ticcadar*, have not and shall not have any objection or contention whatever." Now, stopping here for a moment, there can be no doubt whatever that the passages which I have cited refer to the acquisition of occupancy rights by Mr. Hudson either by private contract or in execution of rent-decrees that may be obtained by him as *ticcadar* against the tenants, and the agreement between the parties expressly provides, what the law implies, that such occupancy rights belong to the landlord, and must be made over to the landlord on the expiry of the *ticca* lease. Then occured the passage on which reliance is placed by Mr. Hassan Imam on behalf of the plaintiff. "In Assin 1312 F. S. I will cut down the indigo crops that may be standing on the *zerait* lands on payment of 10 annas instalment of rent, and without waiting for any notice, I will relinquish possession of the leasehold property, and in that circumstance I shall have no right to interfere in the leasehold property nor shall I have any right of occupancy in the *zerait* lands, etc." Now, it will be remembered that the lease was for seven years and that it expired on the last day of 1311. But, in order to secure to Mr. Hudson the indigo crops grown on the disputed land, the lease provided that Mr. Hudson would have the right to retain possession of the disputed land up to Assin 1312 on the payment of ten-annas instalment of the rent. Now, if this passage is referring to the lands in dispute, the condition is utterly inconsistent with the case set up by the defendants. Now I quite understand that any condition in a cultivating lease which bars in perpetuity the acquisition of an occupancy right by the *raiyat* is wholly void and does not operate to prevent the accrual of such right. If the fact of the tenancy had been established independantly of the lease, then I agree with Mr. Manuk that we ought to wholly ignore the covenant of surrender contained in the lease. But the whole argument of Mr. Manuk is,—I am quoting the exact words used by Mr. Manuk:—"By this lease, the plaintiff adopted and ratified the transactions as evidenced by Exhibits I and K." In other words, the lease itself amounts to a recognition of the occupancy rights of the defendants in the disputed lands. Now, if Mr. Manuk is relying upon the lease itself in support of his case as to recognition, it is surely relevant to ask how is it that by the same lease the landlord is providing for the extension of the term up to Assin 1312 and stipulating for relinquishment of possession by Mr. Hudson on the expiry of the month of Assin 1312? It is, in my opinion, open to the defendants to argue that the covenant as to relinquishment of possession is wholly void and inoperative, but then they must be prepared to establish their tenancy rights by independent evidence and without reference to the terms of the lease containing the covenant. But it is not open to them to say, "we rely upon the lease to establish recognition of our tenancy rights by the landlord, and we ask you to hold that the covenant as to relinquishment of possession is wholly void and inoperative." The same document cannot, in my opinion, constitute both recognition and non-recognition. In my opinion, in order to see whether there was a recognition by the lease itself, I ought to look at the whole lease, and when I do so, I find it impossible to hold that the plaintiff deliberately recognised,—for the act of recognition must be a deliberate one,—that the plaintiff deliberately recognised Mr. Hudson as an occupancy tenant, when I find in the same lease conditions which are incapable of explanation on the hypothesis that there was a recognition of the status of Mr. Hudson as an occupancy tenant by the plaintiff.

But then an ingenious argument was advanced by Mr. Manuk. The argument was that the clause containing the covenant for relinquishment of possession of the *zerait* lands was intended to apply and apply only to the lands that might be acquired during the subsistence of the lease either by private contract or in execution of rent decrees that might be obtained by the *ticcadar* against the tenants. With all respect, the argument is wholly inadmissible. In the first place,

the clauses as to acquisition of occupancy rights during the currency of the lease contain their own covenants for relinquishment of possession. In the second place, it is impossible to ignore the clear distinction made in the lease between occupancy rights and *zerait* lands. Occupancy rights are such rights as may be purchased by Mr. Hudson during the currency of the lease, and these Mr. Hudson agrees to surrender on the expiry of the lease. *Zerait* lands are also defined with sufficient clearness in the lease, and they comprise, and comprise only the 36 *bighas* 7 *cottas* 11 *dhurs* of land which are in dispute in this suit. The opening lines of the lease make this clear and the Survey members and the area of the *zerait* lands are given in the schedule to comprise an area of 36 *bighas* 7 *cottas* 11 *dhurs* of land. In my opinion, the lease contains its own interpretation as to the term *zerait* lands, and by no possible construction of the lease can it be held that the term "*zerait* lands" used in the clause on which Mr. Hasan Imam relies means occupancy rights purchased from the tenants during the currency of the lease. In my opinion, the lease Exhibit 1, far from establishing the defendants' case, entirely destroys it; and I hold that there is no evidence in the record from which it can be legitimately inferred that the plaintiff recognized Mr. Hudson as an occupancy tenant in relation to the lands in dispute. It must follow that the defendant was bound to make over the disputed lands to the plaintiff on the expiry of the lease.

I would allow the appeal, set aside the decree passed by the learned Subordinate Judge and give the plaintiff a decree for possession of the properties claimed in the suit with mesne profits and costs throughout.

ADAMI, J.—It is not necessary for me to set out in detail either the facts of the case or the points for consideration for they have been most clearly explained in the judgments of my Lord the Chief Justice and DAS, J.

Firstly, with regard to the acquisition of occupancy holdings by Nathu Lal, the defence case was that Nathu Lal acquired the occupancy holdings, 36 *bighas* 7 *cattas* 11 *dhurs* in area, between 1863 and 1865 and obtained an express recognition of the transfer from the landlord at the end of 1865 by a letter dated the 19th December 1865 (Exhibit D). To support this case the letter and certain *jamabandis* are produced. It is not proved that in the locality occupancy holdings are transferable without the consent of the landlord, and, in the first place, the question arises whether Sunder Sahay, the landlord, had authority to recognise the transfer. He was an eight-anna sharer in the estates, but it is the defendants' case that previous to 1865 there had been a private partition of the estate and under it Sunder Sahay became sole landlord of the Mauza within which the 36 *bighas* 7 *cottas* 11 *dhurs* are situated, and thus had authority to sanction a transfer. To support this case the defence rely on the headings of the *jamabandis* (Exhibits H and H1) for 1271 (1863-64) and 1273 (1865-1866) which described the *putti* as the private partitioned *putti* of Sunder Sahay. In 1868 there was a Collectorate partition of the estate on the application of all the share-holders and the *jamabandis* produced for the years 1869-1870 and 1873-1874 show that the *putti* had been partitioned off by Collectorate partition. In any case, it would be very surprising that, after all the co-sharers had agreed on a private partition, they should all apply for a Collectorate partition and be ready to undergo the trouble and expense it would entail, but when we find that there is reason to suspect the genuineness of the *jamabandis* whose headings are used to support the case of private partition, great doubt must arise whether there ever was a private partition, and, therefore, whether Sunder Sahay in 1865 had authority to recognise a transfer of occupancy holdings.

The *jamabandis* are depended upon to support the case that Nathu Lal purchased occupancy holdings of an area of 35 *bighas* odd. A comparison of these papers with the *batwara khasra* (Exhibit 22) of 1868 throws the greatest doubt on their genuineness, and the *batwara khasra* is an admittedly genuine and authoritative document. My learned brother DAS, J., has just dealt exhaustively with this point and it is not necessary to repeat the grounds he sets forth; the conclusion must be that the *jamabandis* cannot be relied on. The *khasra*

shows that the *jamabandis* do not contain correct entries of the amount of land held in occupancy right by Nathu Lal as proprietor of the Pirakpur Indigo Factory. Nathu Lal, according to the *Khasra*, held 8 *bighas* 6 *cottas* 9½ *dhurs* only in occupancy right, and Sunder Sahay held 30 *bighas* 12 *cottas* 13¼ *dhurs* of *zerait* or *bakasht* lands. After the partition Nathu Lal took *ticca* lease of the village and most probably amalgamated the remaining *bakasht* land of Sunder Sahay, out of which 2 *bighas* 11 *cottas* 11¾ *dhurs* had been let out to a tenant, with his 8 *bighas* 6 *cottas* 9½ *dhurs* and treated the whole 33 *bighas* 7 *cottas* 11 *dhurs* as his tenancy lands.

There are other points in connection with the letter of recognition (Exhibit D) which gave rise to some suspicion and these taken with the clear untrustworthiness of the *jamabandis* make it impossible to decide either that Nathu Lal acquired occupancy rights in the 33 *bighas* 7 *cottas* 11 *dhurs* or that Sunder Sahay recognised the transfer of the rights.

It is next necessary to consider whether by the deed dated the 23rd July 1890 (Exhibit 12) Nathu Lal conveyed to Mr. Henry William Hudson any occupancy rights held by him in connection with the lands in the village of Etwarpur Jainti. Now it is quite plain that the deed was intended to convey and did convey the Pirakpur Indigo Concern and the schedules to the deed contained a list of all the villages and lands held by the Concern either in proprietary or *ticcadari* right, but there is no entry in the schedules of occupancy right in the 36 *bighas* now in dispute. The deed states that the vendors "have contracted with the purchaser for the sale to him of the Pirakpur Indigo Concern together with all the Taluks, Manzas, villages, lands, hereditaments and premises of which the particulars are set forth in the schedule," and proceeds to "grant, convey, transfer, assign, assure and confirm unto the purchaser, his heirs, executors administrators and assigns all and every, the said Taluks, Manzas and lands or parts or shares therein of which the particulars are contained in the said schedule hereto and also all other, if any, the hereditaments and property belonging to or forming part of or held with the said Taluks, Manzas and lands.....and all manner of rights, liberties, easements, privileges, profits, commodities, emoluments, advantages and appurtenances whatsoever to the said Taluks, Manzas, land, Indigo Concern and hereditaments belonging to or in any wise appertaining or therewith usually held used occupied possessed or enjoyed." Now even if it be held that the words from "and all manner of rights" onwards refer to incorporeal hereditaments and a right of occupancy is a corporeal hereditament, still the right of occupancy is a hereditament of the Indigo Concern held with or belonging to the Manza or lands mentioned in the schedule. As I have said, it is clear that the words of the deed show that the intention was to convey the Indigo Concern and every interest it possessed in the lands mentioned in the schedule, and I am of opinion that any right of occupancy possessed by the Concern in the scheduled lands passed to the purchasers under the deed. But, as found above, there is no reliable evidence that at most anything more than about 8 *bighas* would pass, for though Nathu Lal may have claimed tenancy over 36 *bighas*, the evidence to show that his tenancy had been ever recognised is untrustworthy.

It may be that Nathu Lal gave Mr. Henry William Hudson to understand that 36 *bighas* odd were held in tenancy right, and Mr. Hudson may well have believed that he had that right in the said area but until 1897 there is no good evidence of any recognition of the right by the landlord and in fact when the Settlement operations were going on, no claim was put forward by the Factory to be recorded as occupancy *raiyat* of the 36 *bighas*. The Settlement Record was finally published on the 22nd June 1896 and shows the 36 *bighas* to be "*bakasht* of the Factory but not *zerait*." The rent-receipts, Exhibits N and N-1, purporting to have been granted in 1891 and 1892 and to show acceptance of rent in respect of a tenancy of the 36 *bighas* bear such evident signs of their having been tampered with that it would be unsafe to rely on them.

In 1895 the lease under which the Indigo Concern held the lands expired. Matuk Lal was then the proprietor of the estate and was negotiating for its sale to the plaintiff. Mr. Richardson, who seems to have been

looking after the affairs of the Indigo Concern, seems to have sought for a renewal of the lease but Matuk Lal proposed that 2 *bighas* of the *zerait* land should be excluded from the new *patta*: in his letter of the 19th June 1895 (Exhibit 3) Mr. Richardson protested that if the two *bighas* were excluded he would be a great loser. It is significant that Mr. Richardson did not resist the exclusion on the ground that the Factory held the lands in occupancy right, this he would surely have done if he had been conscious of the existence of any such right.

The plaintiff purchased the estate from Matuk Lal on the 13th of July 1895 and obtained title by virtue of the purchase but, as he did not pay the purchase-money till the 29th August 1896, he did not get possession till then. Meanwhile, Mr. Hudson was still in possession of the leasehold property though the lease had expired. During this period Rs. 138 was received by Matuk Lal in respect of rent of the property which was held by the Factory, and it appears that Matuk Lal, in agreement with the plaintiff, appropriated this in part payment of the consideration for the purchase by the plaintiff with interest. The plaintiff's case, as shown in his own evidence, is that Matuk Lal himself collected the sum of Rs. 138 from the tenants, and that the Factory was, during the period from 1895 to 1897, holding under an oral lease from him. That the plaintiff's evidence is unreliable there can be no doubt for he has contradicated himself gravely. I can find no reason for distrusting the defendants' case that in order to find out how much rent was due from tenants of the lands covered by the expired lease, Mr. Hudson called the tenants together and in their presence and that of the *gomasta* of Matuk Lal drew up a *wasilbaki* account on the 5th April 1897. This account (Exhibit K) showed that the total rents due for the years 1303 and 1304 amounted to Rs. 1,150. The Pirakpur Factory was in that account shown to be a cultivating tenant of 36 *bighas* 7 *cottas* 11 *dhurs* at a rent of Rs. 197 a year or Rs. 395-12-0 for the two years out of which Rs. 138 had been paid. On the back of the document Mr. Hudson on 8th April 1897 endorsed the fact that the total account amounted to Rs. 1,150 and that Rs. 1,012 was payable making allowance for the Rs. 138 already paid. The rent-receipt (Exhibit 1) signed by Khub Lal Patwari shows that Rs. 138 were paid on the 18th Baisak 1303. I can see no reason to doubt the genuineness of Exhibit K and the receipt Exhibit 1. In Exhibit K, Mr. Hudson claimed to be a *raiyat* in respect to the 36 *bighas*.

On the 19th April 1897 the plaintiff granted Mr. Hudson a lease "of the whole and entire 8-annas of the Collectorate partition *patti* including 36 *bighas* 7 *cottas* 11 *dhurs* of *zerait* land." In the *Kabuliyat* (Exhibit 1) the passage,

"There was Rs. 1,150 on account of rent for 1303 and 1304 F. S. due by the tenants, out of this Rs. 138 had already been received by the former proprietors, and the remaining sum of Rs. 1,012 was found justly payable to the landlord by the tenants and by me the *ticcadar* which I, the *ticcadar*, have paid to them in cash and in one lump on getting receipts and the landlords have brought it to their possession, and appropriation, and I the *ticcadar* will get the same from the tenants and from my own Tahsil, and as regards the arrear due by the tenants and by me the *ticcadar* for 1304 F. S. which I have paid to the landlords I shall have no objection. If as regards the arrears of 1303 F. S. I, the *ticcadar*, suffer any loss then the landlords will be responsible therefor" is relied on by the defendants to show that the plaintiff was cognisant of Mr. Hudson's claim of *raiyati* right in the 36 *bighas* and recognised him as tenant. If this contention were to succeed, the plaintiff's case must fail. Stress is laid on the fact that the *kabuliyat* mentions that the sum of Rs. 1,150 is due by tenants, and the amount still owing after the deduction of Rs. 138 is to be obtained from the tenants and from Mr. Hudson's own *tahvil*.

A recognition by a landlord to be effective in favour of a tenant must be clear and certain, but in the present instance it is difficult to reconcile the last portion of the *kabuliyat* with a recognition of occupancy rights. Mr. Hudson agreed that if, during the period of the lease, he acquired any occupancy holding he would give it up on expiry of the lease and it would pass into the possession of the landlord as his *zerait*. The concluding passage of the lease runs, "I will cut down the indigo crops that may be standing on the *zeriat* lands on payment of 10-annas instalment

of rent and without waiting for any notice I will relinquish possession of the leasehold property and in that circumstance I shall have no right to interfere in the leasehold property nor shall I have any right of occupancy in the *zerait* lands, etc."

On the face of it, this concluding portion of the *kabuliyat* would seem to negative any recognition of an occupancy right, but the undertaking is one which is commonly entered in *kabuliyat* and which, where occupancy rights exist, has no binding force under the law. At the same time if Mr. Hudson has been cognisant of any such right and was claiming it we would have expected express exception of the occupancy right he claimed. It might well be that the *zerait* lands on which he was to be allowed to cut the indigo in Assar 1302 were understood by him to mean occupancy holding which he might acquire during the term of the lease and which were to revert to the landlord as *zerait* on its expiry, but it has to be remembered that the 36 *bighas* 7 *cottas* 11 *dhurs* had been described at the beginning of the *kabuliyat* as *zerait*. The general tenor of the document seems to be that all the leased lands were to be returned to the landlord and no occupancy right was to be retained or claimed. How then can the passage relating to the Rs. 1,150 due by the tenants which I have cited above be explained, for it seems to show that the *wasilbaki*, Exhibit K, in which tenancy right was claimed was known and recognised by the plaintiff? The explanation seems to be this—the arrangement as to ascertaining the amount due from the tenants would appear to have been made between Mr. Hudson and Matuk Lall, and it was the latter's *gomashta* who attended to watch the landlord's interest; the payment of the Rs. 138 had been made to Matuk Lal, and it was from Matuk Lal that the plaintiff came to know that the Rs. 138 had been paid by "tenants, etc.", the receipt (Exhibit 7) dated the 29th August 1896 shows this and it is signed by Matuk Lal. There is every probability that at the time of the lease the plaintiff merely inquired what sum had been found to be due from tenants and took Mr. Hudson's word for the Rs. 1,01½ stated to be still due. It might be that the plaintiff understood the passage in the *kabuliyat* describing Mr. Hudson as one of the tenants to refer only to the period after the expiry of the previous lease during which the Factory was cultivating the lands and paying direct to Matuk Lal. There is no witness to show that the plaintiff ever saw Exhibit K, and neither Mr. Hudson nor Gopal Lal who depose as to the drawing up of Exhibit K say that either the plainttiff or any agent of his was present when Exhibit K was drawn up. It might be argued that any businessman would have required fuller information as to what he was demising, but it has to be remembered that a reference to the Record of Rights, which the plaintiff would probably make would show him that Mr. Hudson was not recorded as having any occupancy holding in the leased property.

I am not satisfied, for the above reasons, that it can be held that it is proved that the plaintiff had notice of the contents of Exhibit K; or that, considering the rest of the document, a case of recognition by the plaintiff of Mr. Hudson's tenancy is made out.

Any recognition by Matuk Lal which may be inferred from the receipt of rent from Mr. Hudson and the attendance of his *gomashta* at the time when Exhibit K was prepared will be of no avail to the defendant for at that time Matuk Lal had sold the property and the title had passed from him. There is no suggestion or entry of any kind on Exhibit K to show that either the plaintiff or any one on his behalf had seen and examined the document. The omission of any entry in the Record of Rights finally published in 1896 showing that the Factory had any occupancy right in the 36 *bighas* odd is a most important feature of the case, showing that during the settlement operations Mr. Hudson was laying no claim to occupancy right. It is almost impossible to believe that if he had been aware of any such right he would have neglected to press his claim before the Settlement Authorities. It is urged that during the settlement operations Mr. Hudson was unable to look after his interests properly, but surely if the occupancy right was believed to exist some of the Factory *amla* would have brought the matter to the notice of the Settlement Officer or asked Mr. Hudson to press the claim.

I must hold, therefore, that the defendant has failed to prove that he holds coenpaney rights in the 36 *bighas* 7 *cottas* 11 *dhurs* or that he has been recognised as a *raiyat* by the landlord, the appeal should accordingly succeed.

z.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 76-B OF 1921.

March 1, 1922.

Present:—Mr. Prideaux, A. J. C.

TRIMBAK AND ANOTHER—APPLICANTS

versus

SHEORAM AND ANOTHER—NON-APPLICANTS.

Provincial Insolvency Act (III of 1907), s. 16—Insolvent's property, vesting of, in Court—Suit for recovery of debts barred—Permission of Court when to be obtained—Proceedings without permission, ultra vires, *and not* res judicata.

Under section 16 of the Provincial Insolvency Act of 1908 a Court making the order of adjudication is vested with the whole property of the insolvent and no creditor to whom the insolvent is indebted in respect of any debt, provable under the Insolvency Act, has any remedy against the property of the insolvent in respect of the debt, nor can he commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose. [p. 942, col. 1.]

The permission of a Court to sue an insolvent under section 16 of the Provincial Insolvency Act, 1907, is contingent to the suit being brought and cannot be given afterwards and the proceedings started without such permission are *ultra vires* and do not constitute *res judicata*. [p. 942, col. 1.]

Application for revision of the order of the District Judge, Akola, dated the 14th of February 1921, in Miscellaneous Appeal No. 14 of 1920.

Mr. *A. V. Khare*, for the Applicants.

Mr. *V. Bose*, for the Non-Applicants.

JUDGMENT.—This is a revision arising out of insolvency proceedings. On 16th June 1917 Sheoram Laxman applied to the Insolvency Court for being made an insolvent. Before that, on 29th May 1917, he and his brother Jairam had transferred a half share in Survey No. 37 of *Mouza* Bramhi to one *Musammat* Moti Begum; the remaining half of the field is said to be owned by Sheoram's cousin one Purnaji. Sheoram was adjudged an insolvent on 10th November 1917. The present applicants held a Small Cause Court decree dated 19th April 1917 against Sheoram and on 30th May 1917 in execution of the decree attached the field. Objections were raised to that attachment by *Musammat* Moti Begum because she bought half the field, and Purnaji because he said that a half belonged to him. Those objections were allowed and the field was released from attachment. Applicants then sued making Sheoram, his brother Jairam and Purnaji and Moti Begum parties, for a declaration that the field was liable to be attached and sold in execution of their Small Cause Court decree against Sheoram. The suit was dismissed on 7th October 1919 and the dismissal was confirmed in appeal and the case was fixed for disposal to-day as Second Appeal No. 182-B of 1920.

It has been held in that litigation that the decree obtained by applicants against Sheoram was not binding on Jairam, or Purnaji, or on their shares in the field and the sale to Moti Begum by Sheoram and Jairam was a *bona fide* transaction. On 14th August 1919 the applicants applied to the Insolvency Court for the same relief which they claimed in the litigation. They had proved their debt in that Court: the Insolvency Court has held that the decision in the regular suit works as *res judicata* and, therefore, the matter could not be gone into in insolvency proceedings. An appeal against that decision having failed the

present application for revision has been filed.

Now it seems to me that under section 16 of the Provincial Insolvency Act then in force the Court making the order of adjudication is vested with the whole property of the insolvent and no creditor to whom the insolvent is indebted in respect of any debt provable under the Insolvency Act has any remedy against the property of the insolvent person in respect of that debt nor can he commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose.

The adjudication dates back to and has effect from the 16th June 1917 while the date of the plaint in declaratory suit was 28th September 1918, therefore, the present applicants could not bring that suit except with the leave of the Insolvency Court and that permission is contingent to the suit being brought and cannot be given afterwards. That being so, those proceedings seem to me *ultra vires*.

The case discloses a curious position. Once an objection has been allowed it is final unless a suit is brought within a year under Order XXI, rule 63. The lower Court must decide whether the order in the objection case is good law: was it passed before or after the date the adjudication goes back to? If passed afterwards the effect of the vesting order is clear; the attaching creditor has no priority over the Official Assignee and the latter is entitled to claim the attached property for the benefit of the attaching and other creditors of the insolvent. If in the present case the order in the objection case is good then any suit plaintiff could bring with the permission of the Insolvency Court to challenge it is long time-barred. If the order is bad the question arises how far had execution got when Sheoram was made bankrupt and what steps are now necessary. The suit brought by the plaintiff could not have been brought except with the permission of the Insolvency Court and the proceedings are void and do not constitute *res judicata*. I have to-day in second appeal disposed of civil suit. I now set aside the order of the Courts below and direct that Insolvency Court re take on its file the application of 14th August 1919 and dispose of it afresh. The costs here will abide the result. I fix Pleader's fees at Rs. 15.

G. E. D. *Application allowed.*

MADRAS HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEALS NOS. 267 AND 268 OF 1918.

January 27, 922.

Present:—Sir Walter Salis Schwabe, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Phillips, Mr. Justice Devadoss and Mr. Justice Venkatasubba Rao.

P. AYYAKKUTTI *alias* VENKATACHALAM PATTAR—PLAINTIFF No. 2—APPELLANT

versus

P S. KRISHNA PATTER AND OTHERS—DEFENDANTS NOS 1, 3, 4 AND LEGAL REPRESENTATIVE OF DEFENDANTS NOS 2 AND 5 AND LEGAL REPRESENTATIVE OF RESPONDENT NO 6—RESPONDENTS.

Malabar Law—Santhathi Brahmaswom tenures, inalienability of—Alienation—Landlord, right of, to re-enter.

Under the Malabar Law in case of Santhathi Brahmaswom tenures a landlord is not entitled to re-enter on alienation by tenants without a special clause for re-entry in the deed of lease or a custom to that effect. [p. 48, col. 1; p. 950, col .]

Quære:—Whether a grant of land as a Santhathi Brahmaswom to be held by the grantee "for all time without power of surrendering and without being dispossessed" is inalienable. [p. 948, col. 1; p. 950, col. 1.]

Second appeals against the revised decrees of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suits Nos. 770 and 771 of 1913 respectively, preferred against the decrees of the Court of the District Munsif, Alatur, in Original Suits Nos. 172 and 171 of 1912 respectively.

These second appeals coming on for hearing on 3rd March 1920, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of Messrs. *C. Madhavan Nair*, and *K. P. Ramakrishna Iyer*, for the Appellant in both the second appeals and of Mr. *T. R. Ramachandra Iyer* for Mr. *C.*

V. Ananthakrishna Iyer and Mr. *P. V. Parameswara Iyer*, for the 5th Respondent in Second Appeal No 267 of 1918; Mr. *P. V. Parameswara Iyer*, for the 3rd Respondent in Second Appeal No. 268 of 1918, Mr. *S. Ranganatha Iyer*, for the Respondents Nos. 3 to 5 in Second Appeal No. 267 of 1918, Mr. *A. V. K. Krishna Menon*, for the 7th Respondent in Second Appeal No. 267 of 1918 and for the 5th respondent in Second Appeal No. 268 of 1918 and of Mr. *N. P. Narasimha Iyer*, for the 2nd Respondent in both the second appeals and the 1st respondent in both the second appeals not appearing in person or by Pleader the Court (Oldfield and Seshagiri Iyer, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

As appears from the language used by the learned Judges, the decision in *Zamorin Raja Avergal of Calicut* v. *Unikat Karnavan Samu Nair* (1) (Second Appeal No. 1079 of 1917) is in conflict with that in *Achutha Menon* v. *Sankaran Nair* (2). In those cases the tenure in question was Karamkari and nothing depended on any obligation in connection with it to perform service. In the present cases the tenure is Santhathi Brahmaswom, but it is admitted by Mr. Madhavan Nair that in them also there is no question of service and that the incidents of the Karamkari tenure will be applicable. In these circumstances, we think it necessary to have the conflict between the two decisions above referred to resolved; and we, therefore, refer to a Full Bench the question whether land held on the Karamkari or Santhathi Brahmaswom tenure is liable to forfeiture on alienation.

These second appeals coming on for hearing in pursuance of the above Order of Reference to a Full Bench before Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim, Mr. Justice Oldfield, Mr. Justice Coutts-Trotter and Mr Justice Seshagiri Iyer on 8th November 1920, and before Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim, Mr. Justice Oldfield, Mr. Justice Sadasiva Iyer and Mr. Justice Coutts-Trotter on 15th November 1920, and the second appeals having stood over for consideration till 18th January 1921, the Court (Sir John Wallis, C. J., Oldfield, Sadasiva Iyer and Coutts-Trotter, JJ.,) delivered the following

JUDGMENT.

WALLIS, C. J.—Speaking for myself, I do not as at present advised, differ from the judgment prepared by Sadasiva Iyer, J., but in view of the importance of this question, the conflict between *Achutha Menon* v. *Sankaran Nair* (2) and *Zamorin Raja Avergal of Calicut* v. *Unikat Karnavan Samu Nair* (1) and the fact that the members of the Bench are not in agreement on all points, I think that it will be better before disposing finally of the reference to call for a finding from the Subordinate Court as to whether in 1859 and 1867, the dates mentioned in the revised judgment of the Subordinate Judge, lands granted on the tenures known as Santhathi Brahmaswom and Adimayavana were inalienable as between the grantor and the grantee; and, if so, whether on alienation by the grantee, the grantor was entitled to resume the lands and re-enter. Fresh evidence may be taken. The finding will be submitted by the Subordinate Judge of Ottappalam within 6 months, and 10 days will be allowed for filing objections.

Mr. Justice Abdur Rahim who has left the Court concurred in these questions.

OLDFIELD, J.—I agree with the terms of the reference proposed and reserve further observations.

COUTTS TROTTER, J.—I agree and, like Oldfield, J., wish to reserve any expression of opinion at present.

SADASIVA IYER, J.—The question before the Full Bench is, whether land held on the Karamkari or the Santhathi Brahmaswom tenure is liable to forfeiture and resumption on alienation by the tenant.

The referring order shows that Mr. Madhavan Nair for the appellant admitted (and properly admitted) that a lessee holding lands either under the Karamkari tenure or under the Santhathi Brahmaswom tenure is under no obligation to perform any service to his landlord.

To avoid confusion, I would here remark that the question before us has very little to do with the incidents of service tenures,

(1) 55 Ind. Cas 380; 38 M. L. J. 275; 27 M. L. T. 111; 15 L W 61

(2) 12 Ind Cas. 1077; 36 M. 389; 22 M. L. J. 118; 10 M. L. T. 521; (1911) 2 M. W. N. 529.

Service tenures, (that is, involving performance of future service) connected with enjoyment of lands are usually of two kinds: (1) where the income of the land enjoyed is intended to be the emolument of the service and the land is enjoyed by the servant merely in order that the income thereof might be received by him as emoluments; (2) where the lands themselves have been granted to be owned by the tenant, the tenant being merely obliged to perform some service by himself or by a deputy, the income being enjoyed by the grantee in his status as owner thereof. The decisions dealing with the question of the distinction between these two classes of service tenures are, in my opinion, irrelevant for the decision of this case. The decision in 29 Travencore Law Reports 25, quoted by Mr. Ananthakrishna Iyer, related to a permanent tenure burdened with an obligation of *velam* service in a temple once a month, that service being one for the performance of which proper and adequate provision could be made through a deputy. That case and similar cases which held that lands held on service tenure of that kind are alienable the alienee being merely bound to make provision for the performance of the service, are not helpful for the decision of the question before us. The case in *Durgadut Singh* v. *Rameshwar Singh*(3), quoted for the respondent, has also no relevancy as it related to the alienability of land granted for the maintenance (on Babuana grant) of a junior male member and his descendants in a Raj family, *the lands having been granted with the incidents of an impartible tenure and there being no incident of inalienability attached to impartible tenures except by statute law in some provinces.*

I have had the advantage of studying the valuable opinion prepared in this case by Mr. Justice Seshagiri Iyer and I might at once state that I respectfully agree throughout with that opinion. As the question, however, is of far reaching importance. I might be permitted to add some thing in my own language, though I understand that that opinion might be attached to the report of this case.

The historical tradition is that the Nambudri Brahmins had the Jenm or birth-right in the ownership of the soil of the whole of the Malabar lands, the tradition being that the country itself was created for the Brahmins. The land revenue given to the Ruler was considered merely as remuneration given by the Jenm (or birth-right) owners of the land for the protection afforded by him; it was a "Kavali" or "protection" tax. The Rajahs of Malabar, (the Zamorin having been at one time their chief) and members of royal families (many of them being Stanees) had Jenmam rights in what are called "Cherikal" lands. The Devastanams were granted Jenmam rights in Dewswom lands. The Rajahkkanmar (Ruling Princes) had the right to require military assistance and contributions for military necessities from the two other classes of Jenmies, *viz.*, Namburies and Dewaswoms. We might take it that these three above mentioned persons and institutions were the only three classes of landlords who were for a long time considered to be entitled to be Jenmies or owners in fee simple of lands in Malabar. Ordinary Nair families were attached to one or other members of the three classes of Jenmies and looked upon them as their Feudal Liege Lords. A Jenmi even when in distress would not part with the entire ownership in any of his Jenmam lands and he always resorted to Kanom and other expedients and desperately clung to the last shadow of his Jenmam rights.

Putting aside, then, the tenure of a person who had been granted lands out of a portion of whose income provision could be properly made for the performance of periodical services (especially temple services) through deputies, the incident of inalienability and the right of the landlord to forfeit and to resume on alienation were attached to the other permanent tenures in Malabar created by Jenmies on favourable rents (usually very favourable rents) according to the opinion of all the authorities who have considered the matter. The Sadar Court came to that conclusion after two years' enquiry in 1856 and the Cochin and Travancore Manuals state the same. Mr. Justice Benson and Mr. Justice Sundara Aiyar whose knowledge of Malabar tenures was profound were

(3) 4 Ind. Cas. 2; 36 C. 943; 13 C. W. N. 1013; 6 M. L. T. 68; 19 M. L. J. 567; 10 C. L. J. 233; 6 A. L. J. 847; 11 Bom. L. R. 901; 36 I. A. 176 (P. C.).

of the same opinion in *Achutha Menon* v. *Sankaran Nair* (2). The laboured attempt of Mr. Anantakrishna Aiyar to argue that the decision in *Achutha Menon* v. *Sankaran Nair* (2) was based on the express terms of the particular document of lease failed in my opinion, the terms prohibiting alienation relied upon being merely the statement by way of excessive caution of what was already involved in the name and nature of the created tenure. The incident of inalienability and liability to forfeiture on alienation with the right of re-entry in the landlord are attached to these tenures, not by usage (which implies the gradual growth as the result of convenience or practice in mercantile and similar transactions, the growth being spread over a long period of time, or being confined to particular trades or localities or families or institutions) but by the immemorial law of Malabar, a law more analogous to the immemorial Marumakkathayam Law prevailing in the west coast, in the matter of inheritance and succession, than to mercantile and other usages or to ordinary customary law. Such law may, of course, be also called custom or customory law. It may be that the word "usage" is also not wholly inappropriate but I should like the latter word to be confined to practices which the parties in certain particular places or engaged in particular trades or business are presumed to have in view when entering into certain classes of contracts and with reference to which the terms of such classes of contracts have to be ascertained and to the usages governing the succession to the trusteeship of particular local temples or local Mutts or governing particular families and so on, and not to fairly widespread rules governing tenures and legal rights with reference to which well-known and defined nomenclatures have been immemorially employed. To all perpetual leases of the lands now under consideration, namely, Anubhavam, Adimayavana, Santhathi Brahmasam and Karankari were attached these conditions against alienation, the dignity and status of the grantee and his family or the dignity and status of the grantor and his family (or both) having been considered to be closely wound up with such conditions. Section 10 of the Transfer of Property Act allows a landlord who has leased his property, even for a term of years, to insert a condition for the benefit of the landlord restraining the lessee from alienating the lease-right on pain of forfeiture and resumption. I do not, therefore, see anything against public policy or anything unreasonable in the condition attached to these ancient tenures granted permanently as a matter of favour by the landlord (who was usually the manager of an Illom, a Kovilagam or a Devasvam with limited powers of alienation) the condition, namely, that no alienation should be made by the lessee on penalty of forfeiture and reversion to the landlord. These grants, though against the pecuniary interests of the grantor, whether Stanam or Devasvam or Karnavan and Illom, have been recognised by Courts, [See *Mana Vikraman, Rajah of Calicut* v. *Sundaran Pattar* (4)] because they were customary and they added to the dignity of the family or Devaswom or Stanam, and also because there was this right reserved of resumption on alienation or on failure of heirs in the grantee's family, and hence there was a chance of revision to the grantor's Illom or Devasvam or Kovilagam The Courts have, therefore, allowed such onerous tenures of a permanent character to be created by Illoms, Sthanis and by Devasvams so as to be binding upon succeeding Karnavans, Urallers and Stanees. To hold that the above ancient law governing these tenures prohibiting alienation on pain of forfeiture and reversion has been abrogated by custom or usage would require, in my opinion, proof of an almost conclusive character extending over several decades and accepted as law by the landlord and I am very doubtful whether such a custom, even if, could be proved, involving as it does injury to the rights of religious trusts like Devasvams, would be legally valid. The law applicable to these ancient tenures can, of course, be changed by Statute. If it could be changed by the growth and establishment of a contrary custom, the establishment of that custom should not be treated as proved except on very conclusive evidence, Courts usually holding that evidence to establish an alleged new custom contrary to what has been recognised as an old established custom should be much more cogent than even the

(4) 4 M. 148; 6 Ind. Jur. 183; 1 Ind. Dec. (N. S.) 988.

proof considered usually necessary to establish a custom contrary to general law. That there is no Statute changing the law of of these tenures is admitted. As regards the creation of a subsequent contrary customary law, there is nothing except the opinion of the Bench which decided *Zamorin Raja Avergal of Calicut* v. *Unikat Kornavan Samu Nair* (1) and the evidence adduced in that case. But in that case the learned Judges held, not that the old law attaching well known incidents to these tenures had been changed by subsequent custom, but that there never was any law or custom attaching such incidents to these tenures. In expressing that opinion, they (if I may say so with great respect) not only went against the law till then settled, but even against the opinion of the Judge of the lower Court (in that case) who held that till 1896 the custom (or what I would rather call the law) attaching the incident of inalienability was clearly established and did prevail. As regards cases of alienation after 1896, the lower Appellete Court in that case said that subsequent to that year, in a particular area called Manhalur Cherkakal there have been a number of instances of alienations "evidences the growth of a usage which has effected a breach in the wall of custom and that, so far as this Cherakkal is concerned, one of the prime requisities of custom, its continuity and concordance, is not established in this case by the plaintiff." In fact, the Subordinate Judge's view was that there was a custom but it had "fallen into desuetude" after 1896 and that there have been inroads into that custom so as to shake its continuity and uniformity and that the process is going on."

The learned Judges who decided *Zamorin Raja Avergal of Calicut* v. *Unikat Kornavan Samu Nair* (1) threw the onus of proving the custom of inalienability even before 1896 on the landlord and, in my opinion, with the greatest respect, they were in error in doing so. So far as "usage" after 1896 is concerned, the fact that many lands held on such tenures have been alienated after that date and that in some cases the landlord accepted rents from the alienees (it may have been on payment of a consideration for such recognition) cannot be accepted as proving a valid custom superseding the ancient law without further and cogent proof that the landlords had notice of the alienations and accepted the position that such alienation did not give them the legal right to resume the lands. Without proving such a consciousness on the part of the landlords that the immemorial law had been superseded by a newly established custom mere evidence of alienations by tenants is of very little value. I find, on going through the printed papers in that case, that two important witnesses therein, namely, one Mr. T. V. Venkateswara Aiyar, a practising Vakil of 40 years standing, and one Mr. Kalu Eradi, also possessing very great experience, gave evidence that in their opinion the old immemorial law of inalienability persisted up to the date of their giving evidence. That the Jenmi landlord's rights have been attempted to be encroached upon during two or three decades past by all kinds of tenure-holders under them is well known, but such attempts cannot be said to have established a new custom changing the old law as regards the tenures in question. The rather sustained attempt on the part of all kinds of tenants during 20 or 25 years past may have been partly the natural result of the oppressive conduct of many Malabar Jenmies in the matter of the grant of Melcharths over the heads of tenants of long standing, and it was probably also due to the change of general attitude on the part of tenants towards Jenmies, an attitude which was formerly (even in the case of Kanam tenants) that of a social inferior to an acknowledged social superior, but is no longer so in most cases, a fairly large proportion of Kanamdars and other tenure-holders and assignees from such tenure-holders being in recent times recruited from influential legal practitioners, Government servants and business men who of course cannot look upon themselves as holding a position of undue dependence on their landlords in the matter of dealings with the land held by them.

In a recent Privy Council case *Rao Kishore Singh* v. *Musammat Gahenabai* (5) the Judicial Commissioner's Court had held, as regards an old family custom of inheritance varying from the ordinary Hindu Law (which custom stands on a distinctly inferior position to the custom of inalienability of the tenures under consideration) that that family custom

(5) 53 Ind. Cas 630; 12 L. W. 730; 15 N. L. R. 176; 37 M. L. J. 562; 17 A. L. J. 1077; 26 M. L. T. 494; 1 U. P. L. R. (P. C.) 94; (1919) M. W. N. 82 24 C. W. N. 601; 22 Bom. L. R. 507 (P. C.).

though once existing and operative had ceased to be so, "either because the primitive condition out of which it sprang had ceased to exist and, therefore *cessat ratio cessat lex*," or "because owing to the improvement in education and the spread of socialistic opinion consequent thereon, the custom has been so gradually but steadily and persistently encroached upon that it has, as it were, been eaten away and has ceased to be observed or applied....." But their Lordships of the Privy Council observe (page 740*) that "where a custom has up to quite recent times outlived 'the condition of things which gave it birth' the principle embodied in the expression. *cessat ratio cessat lex* does not apply." The Judicial Commissioner's Court had further observed that "the advance of socialism in the family due to education and the evanescence of all real authority in the head" and the assertion of a right on the part of a younger member of the family to what used to be granted to him "as a favour" might change the family custom of inheritance long prevailing. There Lordships say, as regards the above reasoning,—"It is unnecessary for their Lordships to determine whether this *reasoning would be sound as applied to any case*," thus indicating grave doubts as to the soundness of such reasoning. The family custom in that case was a matter of a few centuries whereas the law of the tenures in this case is one which had prevailed for at least ten centuries before the date (1896) referred to in the judgment in *Zamorin Raja Avergal of Calicut* v. *Unikat Karnavan Samu Nair* (1). Their Lordships of the Privy Council, while indicating the trend of their opinion, decided on the facts of that case that the old family custom had not been changed notwithstanding that in January 1865 the members of the family including the head of the family had acted in a manner which contravened the family custom and that the junior members in the family for several generations had enjoyed properties and other allowances independently of the head of the family to which they respectively belonged and notwithstanding that the Government had made settlements in 1865 with the head of the family and a junior member which purported to create rights which cannot be claimed according to the family custom. If the transaction, dating about 60 years before the suit was filed, contravening the family custom could not be held to destroy that custom. I think it follows *a fortiori* that a general territorial custom which remained in force for several centuries could not have been abrogated on the date this suit was brought. The defendant's written statements in the present suit do not admit the existence of the custom at any time and its abrogation by a contrary custom which has invariably prevailed afterwards but deny vaguely that the tenures are inalienable I would, therefore, answer the reference (following Mr. Justice Sadasiva Aiyar's opinion) that lands held under the Karankari or Santhathi Brahmaswam tenure are liable to be forfeited on alienation if no valid contract to the contrary binding on the grantor or his successors is established, and that the lands held thereunder can be resumed by the grantor or his successors and re entered upon the alienation by the tenant without the landlords' consent.

In compliance with the order contained in the above judgment the Subordinate Judge of Ottapalam submitted the following

FINDING.—These appeals have been remitted to this Court by their Lordships of the Full Bench for a finding on the following issue :—

"Whether in 1859 and 1867, the dates mentioned in the revised judgment of the Subordinate Judge (in revised Appeal Suits Nos. 770 and 771 of 1913 on the file of the Court of the Temporary Subordinate Judge of Palghat at Calicut), lands granted on the tenures known as 'Santhathi Brahmaswom and Adimayavana' were inalienable as between the grantor and the grantee, and, if so, whether on alienation by the grantee the grantor was entitled to resume the lands and re-enter ?"

* * * * * * *

30. I would return an affirmative finding on both parts of the issue.

These Second Appeals came on for hearing on the 25th and 26th January 1922 :

Mr. *K. Srinivasa Iyengar*, (with him Messrs. *A. Krishnaswamy Iyer*, *T. S. Narayana Iyer* and *K. P. Ramakrishna Iyer*), for the Appellants.

*Page of 12 L. W.— *Ed.*]

AIYAKKUTTI v. KRISHNA PATTER.

Mr. *C. V. Ananthakrishna Iyer*, (with him Messrs. *S. Rangadhiyar*, *N. P. Narasimhaiyer*, *A. V. K. Krishna Menon*, *A. Vasudeva Menon*, *N. R. Sesha Aiyar*), for the Respondents.

OPINION.

SCHWABE, C. J.—This is a case of importance and of some difficulty. It has been very fully and ably argued before us and, I think, we are in a position to give our judgment without reserving it further.

The matter has been referred to the Full Bench by reason of a difference of opinion among the Judges who had to consider the same matter before. In the case in *Achutha Menon* v. *Sankaran Nair* (2) Benson and Sundara Iyer, JJ., took the view that in holdings of the nature in question in this case there was no right of alienation and that on alienation the landlord had a right to re-enter. The wording of the document in that case differs from the wording in this case in that it expressly forbids alienation, but the judgment does not go on that ground alone but also on the ground that alienation necessarily involves a right on the part of the landlord to re-enter. The other case is *Zamorin Raja Avergal of Calicut* v. *Unikat Karnavan Samu Nair* (1). That matter came before Ayling and Krishnan, JJ., and was sent back by them for further enquiry as to the alleged custom. After further enquiry it was held by them that such grants did not involve forfeiture on alienation. In that case the grant was of a somewhat different character and of a more recent date.

The question to be decided in this case is, whether a grant of land as a Santhathi Brahmasam to be held by the grantee "for all time without power of surrendering and without being dispossessed", or possibly "without vacating" instead of "without power of surrendering" is inalienable, and if inalienable, whether there is a right of re-entry in the landlord on alienation. The question whether such a grant is alienable or not is one which it is unnecessary for us to decide, if we come to the conclusion that on alienation the landlord has not the remedy of re-entry because in this case the question is, whether the tenant having made the alienation the landlord can re-enter. I am not prepared myself to say on the materials at present before us whether alienation is or is not forbidden by the grant or by custom. The question whether it is forbidden by the grant turns on the translation of words which might mean "without power of surrendering" and might also mean "without vacating." Whether there is a custom in regard to such grants against alienation is a difficult question and there is undoubtedly evidence before the Court that such a custom exists. Whether that evidence is sufficient is a different matter on which I do not desire to express an opinion. It has also been pressed upon us that, if there is such a custom, it is a custom which has become part of the common law of Malabar and as such is fixed and cannot be altered by any means except Statute. I am not prepared to assent to that proposition and I think that it is a matter which would require very careful consideration. But in the view that I take of this case it is not necessary to express a definite opinion on that point.

This matter came before this Court and was referred back to the Subordinate Judge to ascertain whether this alleged custom against alienability and in favour of forfeiture on alienation existed or not and we have his report before us. He has found that at the date of this grant, *i. e.*, 1866, there was a custom against alienation and a custom in favour of the landlord's power of re entry upon alienation. This is a question of mixed law and fact. As far as the facts are concerned, I think we are bound by his finding of fact provided, of course, there was some evidence to support that finding; but whether, taking those facts as found by him, they amount to sufficient evidence of custom is a question of law,—a question on which it is open to us to review his decision and to express our own views. The facts as found by him are very fully set out in his findings and report and his decision is based on two lines of evidence: first, the written evidence from books in the nature of text books, reports and so on; the other, the oral testimony given before him. Taking first the text-books and other documentary evidence on which it is clear he mainly bases his view, these books on

examination do not in my view show that at any time it was part of the common law of Malabar that a landlord was entitled to forfeiture of such a grant as this on alienation by the tenant. Reliance was mainly placed on the reports of proceedings of the Sudder Court which are added as an Appendix to the notes on the draft of the Bill relating to Malabar Land Tenures by Sir Charles Turner, Chief Justice of this Court, published in 1885. The report of the proceedings of the Sudder Court referring to tenures of this description states that they are inalienable. It is not stated in very clear language and as regards one particular kind the statement is only contained as a side note, but the Sudder Court Proceedings do not state that there was any right of re entry on alienation. Sir Charles Turner himself in his report in dealing with the particular tenure here in dispute does not even set out the law against alienation though it would look on an examination of his report that this is only a case of his having omitted to mention it, but there is not one word in his report as regards any right of re-entry. The next document we are referred to, and which is earlier in date, is Mr. Graeme's Glossary which on examination clearly shows nothing of that kind. We are then referred to the works of Mr. Wigram and Mr. Moore. These gentlemen were both Judges in Malabar and had ample opportunity of knowing what the custom was and what the practice was in Malabar at about the same time as Sir Charles Turner was making his report, and it is a very remarkable thing, if the custom alleged in this case really did exist, that neither of these gentlemen seems to have heard of it, for both state that this kind of tenure is inalienable, and both suggest that if the matter came before the Court it would very possibly refuse to hold that the grant was resumble. I refer particularly to a passage at page 143 of Mr. Wigram's book. He says:—"There is a singular absence of judicial authority in respect of these grants, and it is doubtful how far in the present day the Courts would recognise the grantor's power of resumption" That seems to be dealing with the power of resumption on failure of heirs in the grantee's family which he had mentioned above and does not seem to refer to a supposed power of re entry on breach of the condition against alienation. It is remarkable, in my view, that these two writers should have been silent on a matter so important if it was so certain as to become a part of the law of Malabar. Next, there is a statement in the Cochin Manual which is a more recent publication, that in Cochin, where we are told that the tenure is the same as in Malabar, there is a custom against alienation and for forfeiture on alienation. We do not think that this is a statement which we can act upon in arriving at a conclusion whether such an alleged custom exists in Malabar. The result is that, in my view, the documentary evidence of the kind I have indicated, far from supporting the alleged custom, contains nothing which can be regarded as any evidence of its existence.

Passing to the verbal evidence and accepting the view of the Subordinate Judge of the accuracy of the testimony of the two learned Vakils who appeared as witnesses before him, in my judgment that testimony does not provide nearly sufficient facts on which to say that there is a definite settled custom to the effect contended for. They only gave their opinions, and for purposes of opinion we have apparently before us as much material as they had except such recollection as they had of cases which they had been connected with. Their opinions are quite clearly based for the most part on the same documentry evidence as we have just been considering and which, in my view, does not contain the statements as to the custom which the witnesses thought it contained. The rest of their evidence is their recollection of cases in which they had been engaged. I cannot think that the Subordinate Judge attached great importance to this part of their evidence because they were dealing with cases which would be on record and which the proper way to prove would be by production of the records and not by mere statements of the Vakil engaged in the case to the effect that he remembered a case in which he had been engaged in which there was such and such a thing decided. A search has been made and no one has been able to produce any record of a case which has decided this point. We are unable to say, for we have not before us the records of

those cases, whether the facts of those cases were the same as the facts in this case; we do not know what evidence was given of custom in those cases and what the grounds of decision in those cases were; and if those cases did decide any thing of the kind that in itself would not be such evidence of custom as would be enough to establish a definite custom within the meaning of recognised rules.

Therefore, I have come to the conclusion that neither in the written evidence nor in the oral evidence was there enough to establish a custom in favour of a right of re-entry of a landlord of such tenure on alienation by the tenant.

OLDFIELD, J.—I agree.

PHILLIPS, J.—I agree and add that I am not now expressing any opinion on the other question which was referred to the Subordinate Judge, viz., the question as to alienability.

DEVADOSS, J.—I agree.

VENKATASUBBA RAO, J.—I agree.

M. C. P. J. P. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 134 OF 1920.

September 13, 1920.

Present:—Mr. Lindsay, J. C.

RAM CHHATTAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

RAM LAL—PLAINTIFF—RESPONDENT

Hindu Law—Alienation by father—Son's pious obligation—Alienation invalid—Sons, whether bound—Mortgage by father—Legal necessity, proof of, to bind sons—Simple obligation against sons—Limitation, starting point of.

A transfer by a Hindu father which is admittedly invalid in its inception, cannot become valid on the death of the father and be enforced against the sons merely on the ground of their pious duty under the Hindu law to discharge their father's debt [p. 951, col. 1]

In the case of a mortgage made by a Hindu father, the son is not liable for the debt on the death of the father in the absence of proof of necessity. The remedy of the creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security. [p. 951, col. 2]

A suit against the sons on the simple obligation created by a bond executed by their father must be brought within six years from the date of the bond and limitation against the sons does not begin to run from the date of the father's death. [p. 952, col. 1]

Muhammad Baqar Ali Khan v *Hazari Lal*, 52 Ind. Cas. 103; 6 O. L. J. 297 at p. 306, dissented from

Chandradeo Singh v *Mata Prasad*, 1 Ind. Cas. 489; 31 A. 376; 6 A. L. J. 252, followed

The pious obligation resting upon the sons to discharge their father's debt does not extend to the payment of time-barred debts. [p. 952, col. 1.]

Appeal against a decree of the Subordinate Judge, Gonda, dated the 25th February 1920, confirming that of the Munsif, Utraula, dated the 17th December 1919.

Mr. *Bisheshwar Nath Srivastava*, for the Appellants.

Mr. *Aditya Prasad*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit to enforce a mortgage, which was executed on the 14th of May 1907, by one Jokhan, who is now dead and is represented by his sons, Ram Chhattar and Bholai, who are the appellants in this case. The term of the mortgage was two years and the debt became payable on the 14th of May 1909. The plaintiff in whose favour the mortgage was made asked for a decree for sale of the mortgaged property.

It is admitted that the plaintiff had not pleaded in this case that there was any legal necessity for the mortgage. It is also an admitted fact that the sons who contested the suit, did not put forward any plea to the effect that the debts have been incurred for unlawful or immoral purposes.

Both the Courts below have decreed the claim and directed the mortgaged property to be sold. They relied upon a proposition which is laid down in a Bench ruling of this Court reported in 6 Oudh Law Journal p. 297 [*Mohammad Baqar Ali Khan* v. *Hazari Lal* (1).] There can be

(1) 52 Ind. Cas. 103; 6 O. L. J. 297 at p. 306.

no doubt that the dictum upon which both the Courts below have relied justified the passing of the decree; but it has been argued before me that as a matter of law the proposition laid down by the Bench is erroneous.

If this statement of the law as laid down by the Bench were not, as I find it to be, *obiter dictum*, I should have been obliged to refer this case for consideration to a Bench. But a reference to the report shows that, for the purposes of deciding the case which was before the Bench, there was no necessity for the learned Judges to lay down the proposition. I am, therefore, free to disregard it if I disagree with them as I do. The judgment in question purports to contain an exposition of the judgment of their Lordships of the Privy Council in the well known case of *Sahu Ram Chandri* v. *Bhup Singh* (2).

The particular proposition upon which the lower Courts have relied is to be found at page 306 of the report in Volume 6 of the Oudh Law Journal and is stated as follows:—

"2. A transfer by a father although originally invalid under the principles stated in paragraph 1 is given effect to against the sons on the death of the father provided that the transfer was to discharge or secure a debt not for immoral purposes, owing to the pious obligation of the sons to discharge such a debt of their father."

It seems that the learned Judges held that this is a proposition which can legitimately be derived from the judgment of the Privy Council, in the case just referred to. With this I am unable to agree. There is nothing in the judgment of their Lordships which either directly or indirectly supports this proposition. On the contrary it appears to me that their Lordships were of opinion that such a mortgage could not be enforced against the sons merely on the ground of their pious duty under the Hindu Law to discharge their father's debts. It is not necessary to refer at length to the report of the judgment of their Lordships. It is, I think, sufficient to point out one passage to be found at page 444* of the report where it is said that "in short, responsibility to meet the father's debts is one thing and the validity of the mortgage over the joint estate is quite another thing."

I am unable to see on what principle a transfer by a father, which admittedly is in its inception invalid, can become a valid transfer merely by the accident of the father's death. Moreover, the proposition which is laid down by the learned Judges of this Court is in direct conflict with the Full Bench ruling of the Allahabad Court in *Chandradeo Singh* v. *Mata Prasad* (3). That case was cited with approval in the judgment of their Lordships in the case of *Sahu Ram Chandra* v. *Bhup Singh* (2). As was pointed out in the Allahabad case, the remedy of the creditor on the basis of the sons' pious duty is not co-extensive with his remedy on foot of a binding security. The case which the Allahabad Court had to deal with was similar to the case now before us; and there, in the absence of proof of legal necessity, they refused to enforce as against the sons a mortgage which had been executed by their father. The decision of both the Courts below on this point, therefore, must be set aside.

There remains another question. The sons undoubtedly being under a pious obligation to discharge the debts of their father were liable to have a simple money, decree passed against them. It is urged, however, that in the present case any claim for a simple money decree is barred by limitation. The lower Appellate Court seems to have thought that the claim was not barred because, in its view, limitation against the sons began to run from the date of the father's death. This, in my opinion, is an erroneous statement of the law.

The suit is for the recovery of a debt which was owing from the father of the defendants and as the period of mortgage was two years it necessarily follows that limitation for the simple money claim began to run from the 14th of May 1909. The period of limitation is six years, the docu-

(2) 39 Ind Cas. 260; 39 A. 437; 21 O. W. N. 638; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 499; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 218; 44 I. A. 128 (P. C.).

(3) 1 Ind Cas. 479; 31 A. 176, 6 A. L. J. 263.

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ment being a registered document and, therefore, limitation expired in May 1915, whereas the present suit was not brought till July 1919. A suit against the sons on the simple obligation created by the bond executed by their father must be brought within six years from the date of the bond. It follows, therefore, that any claim for a simple money-decree in the present case was barred by limitation. I may add that, in my opinion, the pious obligation resting upon the sons does not extend to the payment of time barred debts.

The only other matter which is raised before me is a dispute regarding the rate of interest. I should not be disposed to interfere in this matter; but in any case the point is immaterial in view of the findings which I have already come to. The suit must be dismissed.

I allow the appeal, set aside the decree of the Court below and direct that the suit of the plaintiff be remanded to the Court of first instance for trial with reference to the allegations made about the payment of the antecedent debt in paragraph 4 of the plaint in the manner required by law. The Trial Court should re frame the issue so as to cover that point and allow the parties to produce evidence relevant thereto. The costs here and hitherto will abide the result.

J. P.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 215 OF 1921.

February 21, 1922.

Present :—Mr. Hallifax, A. J. C.

RAMCHANDRA BALKRISHNA—DEFENDANT—APPELLANT

versus

RAMCHANDRA JAIRAM AND ANOTHER—PLAINTIFFS—RESPONDENTS

C. P. Tenancy Act (XI of 1898), s. 89—Gift of absolute occupancy holding by tenant—Consent of landlord, effect of—Surrender—Alienation—Widow, powers of—Landlord, power of, to confer status of absolute occupancy tenant—Hindu Law—Gift by widow with dying wish of husband—Reversioners, whether bound.

The transfer by a tenant of an absolute occupancy holding by gift with the consent of the *malguzar*, even though it is a subsequent consent, is equivalent to a surrender to him by the tenant and a fresh grant by him to the donee. [p. 953, col. 2.]

In respect of surrenders an absolute occupancy right is a tenancy and not a proprietary right. [p. 953, col 2.]

A surrender by a widow of her tenancy rights to the *malguzar* is binding on the reversioners inasmuch as the limitations of her interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation. [p. 953, col. 2.]

In a suit for possession the plaintiffs having no title cannot succeed on the weakness of the defendant's title when he is in possession. [p. 954, col. 1.]

A landlord is entitled to lease a parcel of land with the condition that the lessee is to have all the rights and liabilities that an absolute tenant has and though such a lessee may not be called an absolute occupancy tenant as defined in section 59 of Act XI of 1898 or section 4 of Act I of 1920 yet his rights and liabilities and legal status would be the same whatever he is called. [p. 954, col. 1.]

Obiter dicta.—A gift made by a widow in accordance with the expressed dying wishes of her husband, especially one entailing the many spiritually beneficial acts to be performed, is binding on the reversioners [p. 954, col. 1.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 5th of January 1921.

Mr. *D. T. Mangalmurti*, for the Appellant.

Messrs. *A. O. Hoy*, *M. R. Indurkar* and *B. G. Pandit*, for the Respondents.

JUDGMENT.—The first two defendants are brothers with identical interests in this case. The second never appeared in the suit and it will be convenient to speak of them both as one person. The third defendant was a transferee from the first two, and went out of the case at an early stage on a compromise. The facts with which we are now concerned are as follows. In addition to owning other property, one Govind Bhat was the absolute occupancy tenant of certain land. Shortly before his death, in 1915, he made an oral Will leaving all his property, including the tenancy, to the defendant-appellant subject to certain conditions in regard to the maintenance of

his widow and the building of a temple and a well and the performance of other acts of piety, all of which have been carried out. After his death disputes arose between Kaveri Bai, his widow, and the defendant, and eventually she executed a deed of gift of all the property in his favour on 16th June 1900. This was by way of compliance with the wishes of her deceased husband and of carrying out the terms of his oral Will. The *malguzar* consented to the transfer and has accepted the defendant as the absolute occupancy tenant of the land. Kaveri Bai died in 1918 and thereupon the plaintiffs who are the next reversionary heirs of Govinda Bhat filed this suit for the recovery of all his property. In respect of the absolute occupancy tenancy it has been held in the lower Appellate Court that the defendant could not acquire any title to it under the Will as was laid down in *Anandi Bai* v. *Harlal Brahman* (1), and that the widow's deed of gift ceased to be operative after her death. Against this decision the defendant has come here in second appeal.

2. As respondents in this Court the plaintiffs filed a cross objection in which they impeached the finding of the lower Appellate Court as to the validity of Govinda Bhat's Will. This was most carelessly worded. What they meant to attack was the finding of fact that the Will was actually made, not its validity as that is unquestionable if it was ever made. Their attack on this finding is based solely on the allegation that in arriving at it the learned Additional District Judge left out of consideration the very important fact that in the year following that in which Govind Bhat died his widow executed a deed of gift of the property in favour of the alleged legatee, which she never would have done if he had made a Will. It is clear that this fact was prominently before the mind of the learned Judge all through his discussion of the evidence as to the making of the Will. He considered that Kaveri Bai executed the deed of gift in compliance with the expressed wishes of her husband as practical execution of this Will and to settle once for all the disputes between herself and the defendant. The cross-objection must be dismissed, and all the costs connected with it will be paid by the respondents.

3. I can see no difficulty in regarding the transfer by gift with the consent of the landlord, even though it was a subsequent consent, as a surrender to him by the widow and a fresh grant by him to the defendant. In respect of surrenders the absolute occupancy right is a tenancy and not a proprietary right. On page 70 of Woodfall's Law of Landlord and Tenant the ruling in *Doe d Hull* v. *Wood* (2) is stated to have been this "Where two persons being tenants from year to year of two closes under different lessors agreed verbally to exchange them which they did and then the arrangement was mentioned to a person who was steward of both the lessors and who expressed his assent to it, it was held that this was evidence of new demises and of surrender by operation of law of the previous interests of the tenant." The same view of a transfer of an occupancy holding was taken by Ismay, J. C., in *Piare* v. *Gopal Jhira* (3) and in *Sunder* v. *Sitaram* (4) Batten, A. J. C., said that, in his opinion, an arrangement whereby an occupancy tenant gives up a definite portion of his holding to the landlord who agrees to the payment of a certain rent for the remainder which the tenant retains "is not to be distinguished from surrender of the entire holding with a fresh lease of some of the fields comprised in it."

4. The gift by the widow to the defendant was then to begin with a surrender to the landlord and such a surrender was held by Drake-Brockman, J. C., in *Dajiba* v. *Raghunath* (5) to be binding on the reversioners. The learned Pleader for the respondents cited *Bhura* v. *Ramrao* (6) as authority for the proposition that a Hindu widow's interest in an absolute occupancy tenancy which has devolved on her at her husband's death is the same in all respects as the estate of a Hindu widow in land inherited from her husband. The judgment, however, makes the important exception that the

(1) 15 C. P. L. R. 1.

(2) (1844) 14 M. & W. 682; 15 L. J. Ex. 41; 9 Jur. 1064; 153 E. R. 649; 64 R. R. 781.
(3) 15 C. P. L. R. 37.
(4) 10 Ind. Cas. 892; 7 N. L. R. 8.
(5) 20 Ind. Cas. 920; 9 N. L. R. 126.
(6) 17 Ind. Cas. 366; 8 N. L. R. 134.

limitations of her interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation. The learned Pleader further argued that, even if the gift can be regarded as a surrender, and a fresh grant and the surrender is binding on the reversioners, still the defendant can have no title, as the landlord cannot create an absolute occupancy tenancy; that was done for the first and last time by the Government in 1865. That is, of course, a matter between the defendant and the *malguzar* and the plaintiffs having no title cannot succeed on the weakness of the defendant's title when he is in possession.

5. But I can see no reason for thinking that a landlord cannot create an absolute occupancy tenancy. If he leases a parcel of land with the condition that the lessee is to have all the rights and liabilities that an absolute occupancy tenant has, which he is undoubtedly entitled to do, it may be said that the lessee cannot be called an absolute occupancy tenant as defined in section 39 of Act XI of 1898 or section * of Act I of 1920. But his rights and liabilities and legal status are the same whatever he is called. If it is really necessary to preserve the distinction he might be given the cumbrous description of "a person having all the rights and liabilities but not the same of an absolute occupancy tenant." That, however, would make no difference to anybody in the world except the Patwari, who would get a little extra work.

6. I am conscious of a distinct inclination to the view that, on a careful examination of the principles of the Hindu Law, it would be found that a gift made by a widow in accordance with the expressed dying wishes of her husband, especially one entailing the many spiritually beneficial acts that were performed in this case would be binding on the reversioners. I also venture, with all respect, to express a doubt as to the soundness of the ruling in *Anandi Bai* v. *Harlal Brahman* (1) on which the learned Judge of the lower Appellate Court relied in view of the later ruling in *Ragho* v. *Sadoo* (7) and the words of section 5 of the present Tenancy Act (I of 1920). These matters do not, however, need discussion, as the dispute between the parties is decided by what I have already said. The decree of the lower Appellate Court is set aside. In lieu thereof a decree will issue dismissing the plaintiffs' suit against the first two defendants, and the plaintiffs must pay all the costs incurred by the first defendant in all three Courts.

J. P. & G. R. D.

Appeal allowed.

(7) 5 Ind. Cas. 428; 6 N. L. R. 6.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

October 28, 1921.

Present :—Lord Buckmaster, Lord Carson, Sir John Edge and Sir Lawrence Jenkins.

PANDURANG KRISHNAJI—APPELLANT

versus

MARKANDEYA TUKARAM AND OTHERS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Attestation—Knowledge of contents—Estoppel—Settlement—Registration.

Attestation of a deed by itself does not estop a person attesting the deed from denying anything except that he has witnessed the execution of the deed. Knowledge of the contents of the deed ought not to be inferred from the mere fact of the attestation, though an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the deed. [p. 957, col. 2.]

The appellant and his two uncles were co-sharers in certain villages, of which the appellant was the registered proprietor. A deed of settlement signed by the appellant and addressed to his two uncles provided that the appellant was to manage the villages taking a salary and paying the expenses, that, if there was a loss, the uncles should make good the amount in respect of their shares on demand and that, in case of default, the uncles should lose their shares in the villages. This deed was presented for registration by one of the uncles and duly registered. In the years

following, there was loss in respect of one of the villages On a demand by the appellant, the uncles wrote a letter to him that he was liable for the profit or loss accrued or accruing, that they were not to take shares and pay the loss and that he might manage as he liked. Subsequently, the uncles transferred their shares in the village in question by a deed which the appellant attested as a witness:

Held, (1) that, although the deed of settlement was only signed by the appellant, the arrangement made under it was a perfectly valid one, as it was accepted by the uncles and acted upon by the appellant: [p. 957, col 1.]

(2) that the subsequent letter did not require registration as it was not an instrument of transfer but was only a piece of evidence showing that the uncles accepted the terms in the earlier deed of settlement and admitted that the condition upon which the first agreement was to operate had in fact arisen; and [p 957, col. 1.]

(3) that the appellant was not estopped from denying that he was a party to the subsequent transfer by the uncles as there was no proof of his knowledge of the contents of the document he attested [p. 958, col. 1.]

Appeal from a decree and a judgment of the Court of the Judicial Commissioner, Central Provinces, reversing a decree of the Second Additional District Judge, Amraoti.

FACTS.—The suit was instituted by the first respondent against the appellant and others for partition and possession of a 8 anna share in a village. The facts are sufficiently set out in their Lordships' judgment.

The District Judge dismissed the suit but on appeal the Judicial Commissioner passed a decree directing partition and possession. Hence the present appeal.

Mr *Dube*, for the Appellant.—The Judicial Commissioner was wrong in thinking that the appellant was estopped.

Nanda Lal [Banga Chandra] Dhur Biswas v. *Jugat Kishore Acharjya Chowdhury* (1). The letter of April 11, 1910 did not affect title to the property the appellant's title was established by the earlier deed of settlement. The letter is admissible in evidence to show that the uncles accepted the terms of the settlement and admitted that the event referred to therein had occurred. (Section 49 of the Indian Registration Act).

The appellant and his uncles acted upon the terms of the settlement and the letter for a long time and effect must be given to it apart from technicalities.

Mahomed Musa v. *Aghore Kumar Ganguli* (2).

The appellant's attestation of the deed does not estop him from denying that he knew its contents or consented to them.

Messrs. *DeGruyther*, *K. C.*, and *Parikh*, for the Respondents.—There is evidence that the appellant attested the deed knowing its contents and his attestation led the transferee to believe that he consented to the transaction. The transferee was a *bona fide* purchaser. The attestation amounts to a representation by which the appellant was estopped.

Sarat Chunder Dey v. *Gopal Chunder Laha* (3).

Apart from the letter of 1910, there was nothing to show that the uncles had relinquished their shares. The letter is useless in the absence of registration, for purposes of evidence. It is not admissible without registration. The deed of transfer provided for transfer of all the villages.

Mr. *Dube* replied.

JUDGMENT.

LORD BUCKMASTER.—The plaintiff in the suit out of which this appeal has arisen is the first respondent. His plaint asked that a joint estate in certain property known as Mauza Khandal should be partitioned, and that it might be declared that he was entitled to an 8 anna share in the property. The suit was dismissed by the District Judge of East Berar, but was granted in the Court of the Judicial Commissioner. The respondent's title rested on two deeds, the first, dated the 2nd February, 1914, by which two grantors, Kanhoba and Vishwanath, the sons of Raghu, purported to convey the property in question to one Hari Govind Damle for Rs. 9,100, and the second, dated the 26th June 1914, by which Hari Govind Damle conveyed the same parcels to the said

(1) 36 Ind Cas 420; 43 I A 240; 20 M L. T. 335 31 M. L. J. 564; 1916 2 M W. N. 330; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L J. 487; 1 P. L. W. 1; 2. C. W. N. 225; 44 C. 183; 10 Bur. L. T. 177 (P. C.).

(2) 28 Ind. Cas. 930; 42 I. A. 1; 17 Bom. L. R. 420, 21 C. L. J. 231; 25 M L. J. 543; 19 C. W. N. 260; 13 A. L. J. 229; 17 M. L. T. 141; 2 L. W. 258; 42 C. 501; (1915, M. W. N. 621 P. C.).

(3) 19 I. A. 203; 20 C. 296; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201 (P. C.).

respondent for Rs. 15,000. So far as the documentary title is concerned, it is complete, and if in fact Vishwanath and Kanhoba had the right to convey the two shares covered by the deed of the 2nd February 1914, there could be no answer to the respondents' claim The first question that arose in the suit and remains for decision upon this appeal is, whether those two signatories possessed that right or no, and the second, whether, if no such right existed, the appellant was estopped from setting up the defect. The dispute arises in these circumstances. The village in question was originally part of the joint estate of a joint Hindu family, which had separated before 1906, leaving this village undivided. The joint family had been constituted by the four sons of Raghu. The eldest of these, Krishna, died before the separation. The appellant Pandurang was one of the sons of Krishna, and so also were the second and third respondents. The other respondents, with the exception of No. 8, were descendants of two of the dead sons of Krishna, and respondent No. 8, *Musammat* Sakhubai, represented Laxman, the second son of Raghu, who was also dead. The two other sons of Raghu were, as has already been stated, Kanhoba and Vishwanath, who were each entitled to a one fourth share.

Pandurang was the registered holder of the land. In 1906 disputes, with the exact nature of which their Lordships are unacquainted, had arisen between him and the other joint members. Accordingly, on the 8th September 1906, a document was executed which has given rise to the question that has now to be determined. It was stated to be a deed of settlement by Pandurang in favour of Kanhoba and Vishwanath and Sakhubai, the widow of Laxman, and it took the form of a statement made by Pandurang to his two uncles. It sets out their relationship to him, that a partition has been effected between them and him in respect of the ancestral property, and that only certain ancestral *izra* villages remain, of which Mauza Khandal is one. It continues by referring to the fact that disputes had often arisen and tended to arise between them and himself, and it then proceeds to put forward the terms of the settlement. The effective part of those terms is this, that he, Pandurang, will manage in future all the village affairs and take Rs. 180 per annum as his salary and remuneration for doing it; that he will pay the necessary expenses, and that if the village profits were not sufficient to meet the expenses and there might be a loss, his two uncles should pay on account of the loss in proportion to their shares. It then concludes in this way: "If you raise contentions in future in respect of the loss, they shall not be heard, and you shall be held to have lost, under this Vyavastha patra (deed of settlement), your shares in the villages. The shares shall, however, be lost if the losses are demanded and not paid in the presence of the *panch*." It finally refers to a suit pending between himself and his uncles in respect of the villages, and states that it has been compromised under the settlement. That document was signed by Pandurang alone, but it was presented for registration by Vishwanath, one of the two uncles of Pandurang, and registered accordingly. Nothing appears to have been contained in the document affecting Sakhubai, and her only defence to the suit is a statement that Pandurang is estopped from disputing the sale-deed of the 2nd February 1914. Pursuant to the arrangements made in that agreement, Pandurang continued to manage the estate and to make the payments. It must also be assumed that the civil suit was compromised. It appears that in the course of management there was a loss in respect of this particular village, Mauza Khandal. The other villages, although the exact accounts have not been produced, apparently roughly balanced, but as to Mauza Khandal, there was, in 1910, a loss for the four years of a total of Rs. 1,069. The fact that this loss had been incurred was mentioned to the two uncles of Pandurang, and a letter to him in the handwriting of Vishwanath was drawn up on the 11th April 1910, and signed by both of them in these terms. "You have demanded from us Rs. 533 1 3 (rupees five hundred and thirty three, one anna and three pies) found due on account of loss in Khandal *izara* for four years from 1907. But we cannot pay the same. You are, therefore, liable for the profit or loss which accrued

up till now and may accrue in future. We are not to take a share and pay the loss. You may make a management as you like."

It was not registered. The arrangements evidenced by those two documents would be sufficient for the purpose of conveying the shares of Kanhoba and Vishwanath to Pandurang, but the real argument that has been brought before this Board against that effect being given to these transactions is that the first document was not formally signed by Vishwanath and Kanhoba and that the second document was not registered and, therefore, could not be given in evidence. Their Lordships think that both these contentions fail. With regard to the first, the arrangement was a perfectly good one according to Hindu Law, if accepted by Vishwanath and Kanhoba and acted upon by Pandurang, even although the document was not in fact signed by the persons to whom it was addressed. That Pandurang did act upon it is beyond dispute. The only question that follows is, whether the subsequent letter was an effective instrument necessary for the purpose of transferring the property, or whether it was only a piece of evidence not constituting acceptance of the earlier proposal but showing that it had been accepted and that Vishwanath and Kanhoba, admitted that the condition upon which the first agreement was to operate had in fact arisen. Their Lordships think that the latter is the true interpretation. The document itself contains no statement of conveyance or release. It repeats that Vishwanath and Kanhoba are not to take a share and pay the losses because they are unable to do so, and read, as it must be read, as a sequel to the earlier document which had been drawn upon in 1906, it is a recognition that the share will pass as that document provides. There was consequently no need for its registration.

It is then urged that in point of fact the original document dealt with the share in all the villages as one, and the evidence goes to show that the only village with regard to which the accounts were placed before Vishwanath and Kanhoba was the village of Mauza Khandal, to which alone the letter relates. Their Lordships think that there is no weight in this contention. There would be no reason, even on the original agreement, to prevent the parties dealing with the one village instead of the three. The terms are clumsily expressed, and the letter merely shows that all parties accept the interpretation of the earlier document as permitting each share to be dealt with individually instead of all being necessarily grouped together. It is, therefore, not surprising that this contention does not appear to have been raised at any time prior to the actual hearing before their Lordships.

There remains the matter which, so far as can be gathered from the judgments in the Courts from which this appeal has proceeded has been the real controversy, and that is that whatever be the true effect of the transaction Pandurang is estopped from setting it up against the respondent. The first estoppel that is put forward, which was undoubtedly the estoppel upon which the real issue was taken, was said to arise by virtue of the fact that Pandurang had himself attested the first deed which had been executed on the 2nd February 1914 conveying the property to Damle. The issue is framed in these words: "Is defendant No. 1 (*i.e.*, Pandurang) estopped from questioning the right, title and interest of defendants Nos. 9 and 10 (*i.e.*, Vishwanath and Kanhoba) in the property transferred under the sale-deed dated the 2nd February 1914 on account of the fact that he attested that deed." And then a further issue is raised as to whether he attested with knowledge and consented to the transfer. Before their Lordships consider the circumstances in which that attestation took place, they think it is desirable to emphasize once more that attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, possible, as was pointed out by their Lordships in the case of *Nanda Lal* [*Bangi Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1), that an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the document, but no such knowledge ought to be inferred from the mere fact of the attestation. Their Lord-

ships think that a mistake has arisen in this case, not for the first time, from assuming that attestation carries some greater weight. In the present instance the learned District Judge says in his judgment at page 47:—

"My impression is that Pandurang did not understand the nature of the consequences that may accrue from his conduct and what interpretations would be put upon the fact of his signing the deed as an attesting witness. I, therefore, hold that the defendant Pandurang is not estopped from raising the question that he was not bound by his mere signature to show that he consented to the result that he was not entitled to them."

That is the wrong way of approaching the question. Pandurang is not estopped by his mere signature unless it can be established by independent evidence that to the signature was attached the express condition that it was intended to convey something more than a mere witnessing of the execution, and was meant as involving consent to the transaction. The statements made by the learned Judicial Commissioners at page 61 of the record are even more startling, and they appear to show that the error as to the effect of attestation must be very widespread. They state there: "The mere attestation of a sale-deed does not work an estoppel unless it is pleaded and proved that such attestation has induced a belief followed by action." Estoppel does not arise from any such circumstance. As already stated, attestation itself does not effect it, nor does the belief of other parties as to the meaning of attestation affect the man who has placed his signature as a witness, unless it can be established that he knew that that belief would arise, and signed with that intent. A similar statement is to be found later on in the judgment, where the learned Judges say:—

"We think that attestation by a person who has or claims any interest in the property covered by the document must be treated, in the absence of any evidence to show that he was tricked into making the signature, *prima facie* as a representation by him that the title recited in the document is true and will not be disputed by him as against the obligee under the document."

Their Lordships are bound to point out that that is an entire misapprehension of the law of estoppel, and that if that misapprehension be not corrected, much mischief may be done in the administration of justice in India. They think it well to recall the precise words in which estoppel is defined in the Indian Evidence Act of 1872, section 115, which is in these terms:—

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

If the clear rule there laid down had been observed, the difficulties which have embarrassed this case would not have arisen. It is then said that attestation in this particular case had greater weight because of the circumstances associated with the execution of the deed. Those circumstances, when they are carefully examined, amount to this: That it is alleged that Pandurang knew of the deed's contents; that he was warned against signing it: that he said he did not mind signing it because he had no objection and that there were circumstances from which it is possible to infer that he in fact consented to the sale. No one of these suggestions was put to Pandurang himself and their Lordships are unable to draw that inference from the other evidence. There can be no doubt that in 1910 Pandurang had obtained a formal acknowledgment of the fact that the condition under which his title to these two shares arose had in fact taken place. He must be assumed to have known that his right was then established, subject to whatever argument might be raised as to the question of registration, which obviously was not in the mind of either of the parties. He thought that the property was worth some Rs. 4,000, it was to be sold for Rs. 9,100, and the whole of the right and interest that arose to him by virtue of the fact that the Rs. 533 that were owing to him had not been paid was to disappear; he was to get nothing whatever out of it, and he was to relinquish the right to which the non-payment of the monies had given rise. It seems to their Lordships impossible to think that, in such circumstances, a man could have attested a deed for the purpose

of relinquishing for no consideration whatever a right which, upon the face of the document, would have been one of great value. Their Lordships do not think that the evidence that Pandurang knew of the contents of this deed and attested for the purpose of evidencing his consent can be accepted, and the burden of establishing that contention lay upon the plaintiff. If in fact there be a practice, as is suggested from the evidence, that when the consent of parties to transactions is required, it can be obtained by inducing them by one means or another, to attest a signature of the executing parties, the sooner that practice is discontinued the better it will be for the straightforward dealing essential in all business matters.

Their Lordships, therefore, think that this estoppel has not been made out, and for the reasons already given they think that this appeal ought to be allowed. The judgment in the Court of the Judicial Commissioner should be reversed and the suit dismissed with costs, the appellant to have his costs of this appeal and in the Courts below, and they will humbly advise His Majesty to this effect.

K. V. L. N. *Appeal allowed.*

Solicitors for the Appellant.—Messrs. *Barrow, Rogers & Nevill.*

Solicitor for the Respondents.—Mr. *E. Dalgado.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 370 OF 1920.

January 17, 1922.

Present :—Mr. Hallifax, J. C.

RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SIDAKALLI AND OTHERS—PLAINTIFFS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s. 4—"*Pre-emption*"—*Landlord's right—Intended sale not taking place—Suit for pre-emption, maintainability of—Limitation Act (IX of 1908), Sch. I, Arts.* 10, 120, *distinction between.*

A landlord is entitled to claim pre-emption under section 4 of the C. P. Tenancy Act irrespective of the fact whether the intended sale has taken place or not. [p. 960, col 2.]

Article 10, Schedule I of the Limitation Act applies to a pre-emption suit when the sale has actually taken place. [p. 960, col 2.]

Article 120 of the Act applies to suits for pre-emption where the sale has not taken place. [p. 961, col. 1.]

Appeal against a decree of the District Judge, Bhandara, dated the 30th of June 1920, in Civil Appeal No. 234 of 1919.

Mr. *V. N. Bapat*, for the Appellants.

Mr. *P. A. Pandit*, for the Respondents.

JUDGMENT.—It will clear the ground if we take first the question of a document which the appellants contend ought to have been admitted in evidence in the lower Appellate Court and tender in evidence now. At or shortly after the partition in 1879 between Shriram's father, Jairam, and Jairam's brother, Tanba, the absolute occupancy holding in suit passed into the possession of Jairam. Jairam died on the 17th of June 1915 and Shriram on the 7th of June 1918. The defendants, other than Shriram's widow Rai, are the heirs of Tanba and alleged that the holding fell to the share of Tanba at the partition but Jairam was allowed by Tanba to hold and cultivate it during his lifetime. It is admitted that they signally failed to prove this allegation in the First Court. After filing their appeal in the Court of the District Judge they applied to the First Court for a review on the ground that they had discovered new and important evidence. This was a document purporting to be a letter dated Phag Sudi 10, Sambat 1956 (10th March 1900) from Jairam to Tanba in which Jairam admitted the land was Tanba's and he was entitled to hold it only till he died. This document was stated to have been found after the date of the decree in the First Court among the defendants' own paper in a "*daftar*", that is a place where it would naturally be, but in a village belonging to them other than that in which the land in dispute is situated. The application for a review of judgment was rejected in the First Court on the ground that the Appellate Court was already seised of the case in appeal. The document was then tendered in evidence in the Court of the District Judge and was rejected as tendered too

late. I do not consider that any reason beyond a statement of these facts need be given for holding that the document was rightly rejected in the Court of the District Judge and must be rejected here.

The only other matter for considera- is the question of limitation. The facts and dates which are relevant in this connection are as follows. On the 22nd of December 1915 the absolute occupancy tenant, Shriram, gave the landlord notice of his intention to sell the land for Rs. 800, as he was bound to do under section 41 of the C. P. Tenancy Act then in force, Act XI of 1898. Within ten days the landlord replied stating that he proposed to exercise his right of pre-emption. On the 6th of January 1916 he applied to the Collector to fix the price, and it was eventually decided to be Rs 700 on the 13th of January 1917. On the 26th of January 1918 the heirs of Tanba filed a suit against Shriram claiming possession of the land as the rightful tenants, on the ground that Jairam was only the holder for life and neither he nor Shriram was the tenant at all. Shriram admitted their claim and delivered possession to them, or at least purported to do so, on the 9th of February 1918 but, apparently *pro majore cautela*, suffered a decree to be passed against him on the 7th of March 1918. On the 7th of June 1918 Shriram died. Then, in February 1919, the heirs of Jairam made a statement to the Settlement Officer that they were the tenants of the land and in possession of it, on which they were apparently so recorded and given a "*parcha*". The landlord filed this suit on the 6th of March 1919.

The learned District Judge has held that the suit is within time though the reasons he gives are by no means clear. In *Dadu* v. *Chamru* (1) Skinner, A. J. C., seemed to incline to the view that there could not be a suit for pre emption unless the sale originally intended had been carried out. This view was not definitely stated, as my learned predecessor was only concerned to show that the claim in the case before him, which was of the same character as that in the present suit, was not for specific performance of a contract but for the enforcement of a statutory right. I cannot, however, see what that statutory right, under section 41 of the C. P. Tenancy Act (XI of 1898), could be if it was not the right of pre-emption Quoting the words of Ismay, J. C., in *Bharat Singh* v. *Dhansingh* (2) that, "if the holding has been already sold the suit would be a suit to enforce a right of pre emption", the learned Additional Judicial Commissioner added: "But if it has not been sold, it must be a claim against the original tenant to enforce the landlord's claim to purchase." Unless the word "pre-emption" refers only to the right to purchase property *in preference* to another who has actually done so, this involves a contradiction in terms. The word appears to me to mean at least equally a purchase of property before another person, who was intending or had contracted to purchase it, had completed his purchase. Article 10 of the Schedule of the Limitation Act speaks of suits for pre-emption generally but does not provide any starting point for a case in which the sale has not taken place. It cannot, however, be argued from this that, because no starting point for limitation is provided for pre-emption suits of any other kind, therefore, the word "pre emption" is used in the first column in that limited sense. Even if this were so, it could still less be said that, therefore, the word must be used in the same limited sense in all other legislation. In section 41 of Act XI of 1898 the expression "right of pre-emption" in sub-section (5) and clause (*a*) of sub-section (3) read together must refer to the right which the landlord has during the month in which the tenant is forbidden by sub section (2) to proceed with the transfer.

All this, however, is little more than an academic discussion of the meaning of the word "pre emption." Article 10 of the Schedule of the Limitation Act refers in the first column to all suits for pre-emption including, as it seems to me, those in which the originally intended sale has not yet taken place. But it does not purport or attempt to provide any period of limitation for suits of that

(1) 8 Ind. Cas. 1186; 6 N. L. R. 190.

(2) 14 C. P. L. R. 162 at p. 165.

particular class, as it omits to mention in the third column any starting point from which that period could be reckoned. We are compelled, therefore, to have recourse to the omnibus Article No. 120. That allows a period of six years from the time "when the right to sue accrues." That right accrued when the landlord first became aware that the tenant did not intend to sell the land to him. When exactly this happened we need not enquire in this case, as it could not possibly be earlier than the 13th of January 1917, when the price to be paid by the landlord was fixed by the Collector, and the suit was filed less than two years and two months after that date.

(5) The view that Article 120 applies to this case is not in any way in conflict with the ruling of Ismay, J. C., in *Sectaram* v. *Ramdayal Marwari* (3) or the earlier rulings in this Court in *Fatechand* v. *Dinanath* (4) and *Ramji* v. *Dewani* (5) there cited that Article 10 applies to a suit for pre-emption under section 41 of Act XI of 1898, as in all those cases a sale had already taken place before the suit was filed. Till the rival purchaser takes possession of the property or his sale-deed is registered, Article 10 does not provide any period of limitation and Article 120, therefore, applies. When either of these events hapens, the suit is no longer one for which no period of limitation is provided elsewhere than in Article 120. That Article, therefore, ceases to be applicable and Article 10 begins to apply. The appeal is dismissed and the appellants must pay all the costs of the respondents.

J. P. & G. R. D.

Appeal dismissed.

(3) 1 N. L. R. 6.
(4) 4 C. P. L. R. 72.
(5) 6 C. P. L. R. 67.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2057 OF 1918.

February 21, 1921.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Oldfield.

T. KUTTI THEVAN—DEFENDANT No. 8—APPELLANT

versus

RAYAPPA GOUNDAN AND OTHERS—DEFENDANTS Nos. 1, 2, 3 AND 4, PLAINTIFF, DEFENDANTS Nos. 5, 6 AND 7 AND LEGAL REPRESENTATIVES OF THE DECEASED DEFENDANT No 7—RESPONDENTS.

Mortgage—Two mortgages of same property of same date—Execution, order of, uncertain—Priority.

Where two mortgages of the same property are executed on the same day, and it is impossible to decide which mortgage was executed first, it is not open to either of the mortgagees to claim priority over the other: they must rank *pari passu* as if the mortgages had been executed at the same time. [p. 952, col. 1.]

Ram Ratan Sahu v. *Mohant Sahu*, 6 C. L. J. 74 at p. 82; 11 C. W. N. 732, followed.

Second appeal against a decree of the District Court, Coimbatore, in Appeal Suit No. 246 of 1917, presented against a decree of the Court of the Subordinate Judge, Coimbatore, in Original Suit No. 90 of 1916.

This second appeal and the memorandum of cross-objections put in by the 5th respondent coming on for hearing on 20th October 1920, the Court (Oldfield and Hughes, JJ.,) delivered the following

JUDGMENT.—The lower Appellate Court has given no distinct finding on the additional Issue No. 11. We must, therefore, call on it to find clearly on that question, in what order were the mortgages of plaintiff and 8th defendant executed.

Finding is to be given on the evidence on record and returned in six weeks. Seven days are allowed for objections.

In compliance with the order contained in the above judgment the District Judge of Coimbatore submitted the following

FINDING.—I am asked to find clearly in what order the mortgages of plaintiff and 8th defendant were executed. The Sub-Judge originally found that 8th defendant who took a mortgage of Item No. 3 did so

with a knowledge of the execution of the suit-bond in favour of plaintiff and that he admitted this. Consequently, he has no right of priority. In his judgment Mr. Waller stated that this was certainly not the effect of 8th defendant's evidence as he understood it and sent down the matter for a special finding on this point. Then the Sub-Judge found, in the absence of any more evidence than what he quoted, that the document in favour of 8th defendant was executed first and then the one in favour of plaintiff. On this point Mr. Waller disagreed with him and found that there was no priority for 8th defendant's mortgage.

2. The evidence is very meagre and will be re stated. Plaintiff's first witness, an attestator of both documents, states in cross-examination that Exhibit I was "written" before Exhibit A was written. What is meant by written is not clear, whether engrossing on the document, or executing it. As the word written is used it presumably means simply that the document was written out first. Eigth defendant examined as defendant's witness No. 1 says that Exhibit I was executed to him first, and it was presented for registration first. In cross examination he said he was aware of the hypothecation bond Exhibit I executed to plaintiff which the Sub Judge seems to have interpreted as meaning that, at the time of Exhibit I, he was aware of Exhibit A, thus indicating that his deed was not prior. The words, however, are not clear. In the next sentence, to the Court, he said that Exhibits A and I were executed at the same time. We are left, therefore, with indefinite and meagre materials to go upon. It cannot be clearly said that 8th defendant has proved that his document was the prior one; and I can only agree with Mr. Waller that he is not entitled to any priority. My answer to the issue sent down is that it is not clear from the evidence on record in what order the documents were executed, and that 8th defendant has not satisfied me as to the priority of his mortgage.

This appeal came on for final hearing on the 28th January 1921 before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Oldfield.

Mr. *V. C. Seshachariar*, for the Appellant.

Messrs. *V. T. Srinivasagopalachariar* and *L A. Govindaragava Iyer*, for the Respondents.

JUDGMENT.—The District Judge has found that it is impossible to say whether the mortgage, Exhibit A, relied on by the plaintiff or the mortgage, Exhibit I, relied on by the 8th defendant was executed first. The 8th defendant on 6th June 1911 purchased the equity of redemption in a portion of the mortgaged property, Item No. 3 consisting of 3/10ths of the whole, in part satisfaction of his mortgage debt, the balance of which was otherwise discharged with interest on 30th October 1915.

If the 8th defendant's mortgage was executed first, he must, on the facts found, be regarded as having intended to keep alive his mortgage rights when he purchased the equity of redemption in Item No. 3.

As the District Judge has found it impossible to decide which of the two mortgages was executed first, it is not open to either of the mortgagees to claim priority over the other and they must rank *pari passu* as if both mortgages had been executed at the same time. A similar view was taken in *Ram Ratan Sahu* v. *Mohant Sahu* (1).

We must, therefore, set aside the decree and remand the appeal suit to the District Court for disposal according to law in the light of the above observations. Costs will abide. Stamp will be refunded.

M. C. P.

Appeal allowed;
Case remanded.

(1) 6 C. L. J. 74 at p. 82; 11 C. W. N. 732,

BHAGWANSA V. AMIN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 22 OF 1921.

February 23, 1924.

Present:—Mr. Batten, J. C.

BHAGWANSA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

AMIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Instalment-bond—Principal and interest consolidated—Default, whole sum to be due on—Enhanced rate of interest on default—Penalty—Court, power of, to award reasonable compensation

Under section 74 of the Contract Act if in an instrument principal and interest have been consolidated the total amount is payable by instalments, and there is a default clause that on the failure to pay an instalment the whole sum will become at once due, such a provision is a penalty. [p. 96, col. 2]

A Court has power under section 74 of the Contract Act, as amended, even when no interest is payable until default but interest at an exorbitant rate becomes payable on default, to treat the stipulation as to the exorbitant rate payable on default as a penalty and to award reasonable compensation in lieu of such extortionate interest. [p. 96, col. 2; p. 964, col. 1]

Avathani Muthukrishnier v. *Sankaralingam Pillai*, 18 Ind Cas. 7; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135, followed.

A Court is competent to grant relief whenever the rate of interest appears to the Court to be penal [p. 964, col. 1]

Khagaram Das v. *Ram Sankar Das*, 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775; followed.

Appeal against a decree of the Subordinate Judge, Khandwa, dated the 29th October 1920, in Civil Suit No. 2 of 1920.

Mr. *V. R. Pandit*, R. B., for the Appellants.

Mr. *K. V. Deoskar*, for the Respondents.

JUDGMENT.—In this case the appellant-mortgagee complains that he has not been awarded sufficient interest. The bond is dated 1906 and the debt due to the mortgagee then, which appears to have been made up of an old cash debt secured by something of the nature of *zar i peshgi* lease and of an old grain debt purporting to be secured by an unregistered mortgage, was valued in the mortgage-deed at Rs. 475. In lieu of this amount the mortgagor was to pay 3 *manis* and 4 *maunds* of cotton and 5 *manis* of Juari in 5 instalments spread over 3 years. Any defaulted instalment had to bear compound interest at 25 per cent. On 4 instalments being defaulted the whole amount was to become payable with interest at 25 per cent. At the date of the suit, *viz.*, at the end of the year 1919, nothing had been paid. On that date the plaintiff calculated the amount due to him to be over 94 *manis* of cotton and nearly 58 *manis* of Juari, being about 152 *manis* of cotton and grain as against 13 *manis* and 4 maunds originally stipulated for. The money value of these 152 *manis* was stated at Rs. 26,626. Thus, while the grain and cotton had swollen by about 12 times owing to interest, its money value which the plaintiff claims to be due to him had increased by more than 50 times owing to the exorbitant rate of interest, in addition to the rise in price of grain and cotton.

The lower Court has held that the stipulations as regards interest were penal, though it has not given very clear grounds for so doing. It has relieved against the penalty and has given the plaintiff interest at the rate of 24 per cent. simple interest which cannot be called too low interest provided the lower Court was justified in relieving against the penalty. It appears perfectly clear to me that the 8⅓ *manis* of cotton and 5 *manis* of Juari payable in instalments was not the present value at the date of the bond for Rs 475, but included future interest up to the date of the last instalment. Under section 74 of the Contract Act if in an instrument in which the principal and interest have been consolidated and the total amount is payable by instalments, there is a default clause that on failure to pay an instalment, the whole sum will become at once due, such a provision is a penalty. These factors are present in this case and the stipulations as to interest undoubtedly amounted to a penalty. As I have said, I have no doubt that the 13 *manis* and 4 maunds did include future interest. But even if they did not, the lower Court was right in holding that the provisions regarding interest were penal. The Madras High Court has in a recent Full Bench case decided that the Court has power under section 74 of the Contract Act, as amended, even when no interest is payable until default, but interest at an exorbitant rate becomes payable on default

to treat the stipulation as to the exorbitant rate payable on default as a penalty and to award reasonable compensation in lieu of such extortionate interest: *vide Avathani Muthukrishnier* v. *Sankaralingam Pillai* (1). In a recent Calcutta case, *Khagaram Das* v. *Ram Sonkar Das* (2), Sir Asutosh Mookerji, J., has held that the Court is competent to grant relief whenever the rate of interest appears to the Court to be penal.

I have no doubt that the lower Court was right in holding that the stipulations as to interest in this case were penal and in giving a reasonable rate of interest,

The appeal is dismissed with costs. The time for payment is extended from the 29th April 1921 to the 29th April 1922. interest to run on the amount decreed at 6 per cent. per annum from the 29th April 1921.

G. R. D.

Appeal dismissed.

(1) 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135.

(2) 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775.

MADRAS HIGH COURT.

CIVIL APPEAL No. 276 OF 1919.

December 5, 1921.

Present:—Mr. Justice Spencer and Mr. Justice Ramesam.

NALLAKA VENKATASWAMI AND OTHERS —DEFENDANTS—APPELLANTS

versus

RUGUM VIRANNA AND ANOTHER— PLAINTIFFS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 31, scope of—Sanction to sell minor's property—Necessity, recital of—Suit by minor to set aside alienation—Burden of proof—Fraud—Procedure.

An order of a District Judge giving sanction to a guardian of a minor to sell the minor's property must recite the necessity for the sale as required by section 31 (2) of the Guardians and Wards Act. [p. 965, col. 2.]

An order of sanction by a District Judge authorising the guardian of a minor to sell his property does not cure inherent defects that may exist in the sale. Sanction is *prima facie* evidence that the transaction is a good one but the minor may at any future time show that it was fraudulent or improper. [p 965, col. 2]

Where in a suit to set aside an alienation made by a guardian of a minor the evidence on both sides is before the Court, there is nothing to prevent the Court from coming to the conclusion that the sale is an improper one and not for the benefit of the minor, though the burden of proof in the first instance lies upon the person seeking to set aside the alienation. [p. 965, col. 2.]

Per *Ramesam, J.*—The effect of sanction under section 31 of the Guardians and Wards Act is that the burden of proof is shifted to the plaintiff and it is not necessary that fraud has to be made out on the part of the purchaser to impeach the transaction. [p. 966, col. 2.]

Appeal against a decree of the Court of the Third Temporary Subordinate Judge, Guntur, in Original Suit No. 6 of 1918.

FACTS appear from the judgment.

Mr. *C. Sambasiva Rao*, for the Appellants.—The Subordinate Judge is in error in going into the question of the necessity for the sale. The sale was sanctioned by the District Court under the Guardians and Wards Act and the order of Court protected the purchaser and passed a good title to him by his purchase.

Mr. *P. Narayanamurthi*, for the Respondents.—The sanction of the District Court does not bar the minor's right to question the sale. The effect of the sanction was only to throw on the plaintiffs the onus of proving that the sale was fraudulent or improper. And if the Court could find materials for setting it aside it can do so. *Sikher Chund* v. *Dulputty Singh* (1), *Jugul Kishori Chowdhurani* v. *Ananda Lal Chowdhuri* (2).

The District Court's order does not also recite the purpose of the sale.

JUDGMENT.

SPENCER, J.—This suit was brought by the plaintiffs to set aside alienations made during their minority by their guardian and the appeal relates to Item No. 10 of Schedule A. This property was mortgaged under Exhibit IX B in 1901 by the plaintiff's mother after the death of their father in 1899. In 1908 the plaintiffs'

(1) 5 C. 363; 5 Ind. Jur. 260; 5 C. L. R. 374; 2 Ind. Dec. (N. S.) 842.

(2) 22 C. 545 at p. 550; 11 Ind. Dec. (N. S.) 862.

maternal uncle, Panakalu, who had been appointed as guardian of the minors under the Guardians and Wards Act, applied to the District Court for permission to sell a portion of the property to discharge the mortgage and obtained sanction on the 24th February 1908. The mortgage, according to the recital in the mortgage document, was for the purpose of borrowing Rs. 600 for the marriage of the plaintiffs. These boys were then aged three and six years respectively. One of them was married 15 years later and the other is still unmarried. As pointed out by the Subordinate Judge, the recital as to the purpose for which the money was borrowed was obviously false. The sale deed, Exhibit IX, in favour of the 39th defendant of 9 acres for Rs. 1,500 was dated 1st April 1908. The purchaser took a transfer of the mortgage on the 28th March and five days after his sale he sold the same property under Exhibit IX A to the 41st defendant for Rs 1,800 having previously received an advance on the 29th March before he got the transfer in his own name. The 39th defendant was a Gumasta to the plaintiff's guardian, Panakalu. The above circumstances are enough to cast a great deal of suspicion on the transaction and to suggest the existence of a conspiracy between the guardian and his Gumasta and the purchaser from that Gumasta to defraud the minors. There are no reasons to treat 41st defendant as a *bona fide* purchaser having no knowledge of the defects of the previous sale. But in appeal it has been urged that the sanction of the Court under the Guardians and Wards Act will give a good title to the purchaser. The Court's sanction, however, was not given according to the requirements of the law and it is in itself not free from suspicion. The affidavit presented by the guardian to the District Court, Exhibit IX (c), contains an incorrect statement that the mortgage bore interest at Re. 1-9-0 compound interest, whereas the truth was that interest was due at the rate of Re 1 5 0 and in default interest was to be calculated upon interest at the same rate. D. W. No. 10 deposes that the land sold under Exhibit IX was not worth more than the price for which it was sold, but this witness is evidently interested as he admits that he is related to the 39th defendant and was living in his house during his education period.

Now as to the effect of the sanction of the District Court given to the guardian to sell the minor's property, it has to be noted, in the first place, that the District Judge's order has not complied with section 31 (2) as it did not recite the necessity for the sale but simply ran thus:—"in the circumstances the sale of 9 acres in full satisfaction of the mortgage debt is sanctioned."

In my opinion the District Judge's sanction will not cure inherent defects that may exist in a sale by a guardian. The effect of the sanction accorded by Courts in such cases has been considered in *Sikher Chund* v. *Dalputty Singh* (1) and in *Jugal Kishori Chowdhurani* v. *Anundi Lal Chowdhuri* (2). The learned Judges of the Calcutta High Court held that sanction was *prima facie* evidence, that the transaction was a good one, but that the minor may at any future time show that it was fraudulent or improper. Where the evidence on both sides is before us, there is nothing to prevent the Court from coming to the conclusion that the sale was an improper one and not for the benefit of the minor, though the burden of proof in the first instance lies upon the person seeking to set aside the alienation. There is ample evidence for concluding that the sale in this case was not for purposes binding upon the minors. The plaintiffs are entitled to have it set aside in the suit and the Subordinate Judge's finding that it does not bind them must be upheld and the appeal dismissed with costs.

RAMESAM, J.—I agree with my learned brother and the Subordinate Judge with reference to the conclusion on the facts.

On the question of law argued by the learned Counsel for the appellants, I wish to add a few words. I think that the true rule as to the effect of the sanction of the District Court authorising an alienation by the guardian of the minor is stated in the decision in *Sikher Chund* v. *Dulputty Singh* (1). At page 370* Prinsep, J., says: "The fact that the District Judge, on the application and representation of a guardian under section 18, Act XL of 1858, may have sanctioned an alienation, cannot, in my opinion, affect the

*Page of 6 C.—[*Ed.*]

present cases, except in so far as it may rightly be considered as a general rule to throw the onus on the plaintiff to show that the alienations were improperly made contrary to the usual rule requiring the purchaser to establish the validity of the alienations, or that he acted with due care and caution after making such enquiry as an honest and prudent man would make." At page 381* Garth, C. J., says: "If the Court upon the materials and information brought before it by the guardian, makes an order for sale, I think that a purchaser who buys in good faith under that order, acquires a good title to the property sold, unless the minor or those claiming under him can show at some future time that the sale was fraudulent or improper." Again, at page 388* Garth, C. J., adds: "But then I also consider, that as the sales took place under the order of the Civil Court, the onus lies on the plaintiff to make out a *prima facie* case, such as she has alleged in her plaint, of fraud or illegality, and to show, that the debt or sum of money, which formed the consideration for the sale in each case was one for which the minor was not responsible." These observations are quoted with approval and followed in *Jugul Krishori Chowdhurani* v. *Anunda Lal Chowdhuri* (2).

It is contended before us that the decision in *Akhil Chandra Saha* v. *Girish Chandra Saha* (3) lays down a different rule, namely, that it is necessary to bring fraud home to the purchaser in order to impeach the transaction. I do not understand the case in *Akhil Chandra Saha* v. *Girish Chandra Saha* (3) as laying down a general rule that fraud should be made out. It may be observed that the decision in *Akhil Chandra Saha* v. *Girish Chandra Saha* (3) and the decision in *Gangapershad Sahu* v. *Maharani Bibi* (4) relate to sanction of the Court for the raising of loans by mortgage whereas the present case and the case in *Sikher Chund* v. *Dulputty Singh* (1) relate to sales. To give effect to the policy of the Legislature in section 31 of the Guardians and Wards Act I think it is enough to hold, as in *Sikhar Chand* v. *Dulputty Singh* (1), that the burden of proof is shifted to the plaintiff, and that it is not necessary to say that fraud has to be made out on the part of the purchaser to impeach the transaction.

I agree that the appeal should be dismissed with costs.

M. C. P.

J. P. *Appeal dismissed.*

(3) 41 Ind. Cas. 302; 21 C. W. N. 864.

(4) 11 C. 379; 12 I. A. 47; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec. (N. S.) 1012 (P. C.).

*Pages of 5 C.—[*Ed.*].

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE No. 193-B OF 1921.

February 22, 1922.

Present:—Mr. Kotval, A. J. C.

NATHU—PLAINTIFF

versus

SONASA DEFENDANT

Provincial Small Cause Courts Act (IX of 1887), Sch II, Art. 8—Suit for recovery of shop rent, whether triable by Small Cause Court.

The term "house rent," as used in Article 8 of the Provincial Small Cause Courts Act, includes "shop rent". Therefore, a suit for the recovery of the rent of a shop is cognizable by a Small Cause Court.

Reference by the Judge, Small Cause Court, Amraoti, dated the 15th of November 1921, in connection with Civil Suit No. 1071 of 1921.

Mr. *K. K. Gandhe*, for the Plaintiff.

ORDER.—The plaintiff sued in the Small Cause Court for the rent of a shop situated in the town of Amraoti. The defendant contended that the suit being one for the rent of a shop and not of a house was excepted from the cognizance of Small Cause Courts. The question referred by the Small Cause Court is:

"Whether the term 'house rent,' as used in the Article 8 of the Provincial Small Cause Courts Act, includes 'shop rent.'"

The defendant has not, in spite of notice, appeared in this Court to support his contention. It may be urged that, ordinarily,

"house" signifies a structure for dwelling in, and "shop" one for storing and selling goods in. In India, however, the same structure or part of a structure is, according to the habits of the majority of its people, not unsuited for use and is often used for both these purposes at the same or different times. In other words, what is ordinarily a shop is also a house. Again, the reasons for not excepting from the jurisdiction of a Small Cause Court a suit for rent of a house would apply equally to a suit for the rent of a shop. I can see no reason for distinguishing between shop rent and house rent in this connection. Probably it never occurred to the Indian Legislature that such a distinction was likely to be urged. In my opinion the suit is cognizable by the Small Cause Court.

G. E. D. *Order accordingly.*

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 21 OF 1921.
February 15, 1922.
Present :—Justice Sir P. C. Banerji, KT.
HIRA LAL—DEFENDANT—APPLICANT
versus
JHUNNI LAL—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLIII, r. 1 (d)—Ex parte *decree by Munsif having Small Cause Court powers—Application to set aside* ex parte *decree rejected by Munsif having no powers—Appeal.*

Where a suit in the nature of a Small Cause Court suit was decreed *ex parte* by a Munsif exercising jurisdiction as a Small Cause Court Judge but an application to set aside the *ex parte* decree under Order IX, rule 13 of the Civil Procedure Code, was made to, and rejected by, his successor who was not invested with Small Cause Court powers:

Held, that as the decree, being that of a Small Cause Court, was final and not open to appeal, no appeal lay from the order passed by the Munsif under Order IX, rule 13 of the Civil Procedure Code.

Civil revision from an order of the District Judge, Mainpuri.

Mr. *Baleshwari Prasad*, for the Applicant.

Mr. *Indu Bhushan Banerji*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the District Judge refusing to entertain an appeal on the ground that no appeal lay to him. It appears that the suit in this case was instituted in the Court of a Munsif who exercised Small Cause Court powers. He decided the suit and made an *ex parte* decree which was final. He was subsequently transferred, and his successor was an officer who was not invested with the jurisdiction of a Court of Small Causes An application was made to him to have the *ex parte* decree set aside under Order IX, rule 13. This application was refused by the Munsif upon grounds to which it is not necessary to refer. An appeal from the order of the Munsif was preferred to the District Judge and he held that no appeal lay. I think the view of the learned Judge was right. An appeal from an order passed under Order IX, rule 13 is maintainable under Order XLIII, rule 1 (*d*) in a case "open to appeal." This was not a case "open to appeal" inasmuch as the decree was passed by an officer exercising Small Cause Court jurisdiction, whose decree was final. Therefore, this was not a case open to appeal and, consequently, no appeal lay from the order passed by the present Munsif under Order IX, rule 13. This is not one of those cases in which execution proceedings taken in a Court the presiding officer of which had ceased to have Small Cause Court jurisdiction were held to be appealable. The application is dismissed with costs.

J. P. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.
FIRST CIVIL APPEAL No. 6 OF 1921.
May 30, 1921.
Present:—Mr. Dalal, A. J. C.
GAJADHAR BAKHSH SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
BAIJNATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Father, alienation by Sons, position of—Pious obligation, how far enforceable Legal necessity—Antecedent debt—Consideration, major portion

GAJADHAR BAKHSH SINGH v. BAIJNATH.

of, borrowed for legal necessity, effect of—Transfer, whether void.

A Hindu son is not bound to pay the amount of a mortgage executed by his deceased father, which was not borrowed for any valid necessity or for the payment of an antecedent debt simply on the ground of a pious duty to pay the debt of a deceased father. [p. 969, col 1.]

Muhammad Baqar Ali Khan v. *Hazari Lal*, 52 Ind. Cas 108; 6 O. L. J. 297 at p. 306, dissented from.

Ram Saran v. *Bhaya Mangal Singh*, 60 Ind. Cas. 219; 8 O L. J. 87; 2 U. P. L. R. (J. C.) 191; 23 O. C. 327, considered

Where a large portion of the consideration amount is borrowed for legal necessity the transfer by the manager of a joint Hindu family is not void. [p 969, col. .]

Gajodhar Bakhsh v *Gauri Shankar*, 61 Ind. Cas. 295; 8 O. L. J. 81, distinguished.

Appeal from a decree of the Subordinate Judge, Biswan, dated 13th September 1920.

Mr. *A. P. Sen*, for the Appellant.

Mr. *Chhail Behari Lal*, for Respondents Nos. 1 and 2.

JUDGMENT.—The plaintiffs-mortgagees sued in the Court of the Subordinate Judge of Sitapur for mortgagee's possession of the property in suit on foot of a mortgage bond executed on the 6th of August 1903 by one Anant Singh, father of two of the defendants and grandfather of the third defendant. The plaintiffs desired to enforce the condition in the mortgage entitling the mortgagees to take possession of the mortgaged property on non-payment of the mortgage amount within a certain time.

The defence was that the mortgage was not made for the payment of antecedent debt or for valid necessity so as to bind the defendants who were no parties to the mortgage. Anant Singh was dead prior to the institution of the suit.

The learned Subordinate Judge held that out of a consideration of Rs. 2,700, Rs. 1,603 was borrowed for the payment of antecedent debt, that there was no proof of valid necessity as regards the balance of the consideration and that the mortgage was not void because the major portion of the consideration was such as would be binding on the members of the joint family other than the mortgagor. On these grounds the suit was decreed and the defendants have appealed to this Court.

It is necessary, first, to examine the plea raised on behalf of the respondents in this Court that the father being dead the sons and grandson are under a pious duty to pay the balance of the consideration of Rs. 1,097 and that, therefore, the entire amount of the mortgage consideration was binding on the defendants. This plea is based on a pronouncement of a Bench of this Court in the case of *Muhammad Baqar Ali Khan* v. *Hazari Lal* (1) that "a transfer by a father, although originally invalid.....is given effect to against the sons on the death of the father provided that the transfer was to discharge or secure a debt not for immoral purposes, owing to the pious obligation of the sons to discharge such a debt of their father." This opinion of the Bench was not necessary for the decision of the case before it, but has been so often quoted in this Court that I first had the intention of referring the matter to a Bench. This opinion, however, has been definitely dissented from in an unreported judgment* of the Judicial Commissioner, Mr. Lindsay, in Second Appeal No. 134 of 1920 decided on the 13th of September 1920 [*Ram Chhattar* v. *Ram Lal* (2)] and a contrary pronouncement has been made by another Bench of this Court in *Gur Sahai* v. *Girdhar Lal* (3). So it is not necessary to refer the matter to a Bench. The Judges who decided the case reported in *Muhammad Faqir Ali Khan* v. *Hazari Lal* (1) appear to have derived the proposition set out above from the judgment of the Privy Council in Sahu Ramchandra's case. The Privy Council case, however, does not justify that proposition of law. Their Lordships of the Privy Council in the case of Sahu Ram Chandra quoted with approval the Full Bench ruling in the case of Chandra Deo Singh of the Allahabad High Court [*Chandradeo Singh* v. *Mata Prasad* (4)]. The Allahabad case was similar to the case before this Court and there, in the absence of proof of legal necessity, the Court refused to enforce as against the sons a mortgage which had been executed by the father though the father had died prior to the institution of the suit. This

(1) 52 Ind. Cas. 108; 6 O. L. J. 297 at p. 306.

* (2) Since reported as 65 Ind. Cas. 950; 24 O. C. 395.

(3) 52 Ind. Cas. 75; 6 O. L. J. 411 at p. 416; 22 O. C. 81; 1 U. P. L R. (J. C.) 54.

(4) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

view of the law is further emphasized by the judgment delivered by Viscount Haldane in the Privy Council case of *Jagi Das* v. *Ganga Ram* (5). It was stated in that judgment that the mere circumstance of a pious obligation to pay a father's debt does not validate a mortgage which is invalid for want of legal necessity or of the necessity for the payment of antecedent debt. To quote the words of Mr. Lindsay in the unreported judgment referred to above: "I am unable to see on what principle a transfer by a father which, admittedly, is in its inception invalid can become a valid transfer merely by the accident of the father's death." On behalf of the respondents a Bench ruling in the case of *Ram Saran* v. *Bhaya Mangal Singh* (6) was quoted, but the reference to the principle of the pious duty of a son at page 92 of the report is very slight and one of the Judges who delivered the judgment in that case formed the Bench with another Judge in *Gur Sahai's case* (3), quoted above.

It is certain, therefore, that the defendants are not bound to pay the amount of Rs. 1,097 which was not borrowed by the mortgagor for any valid necessity or for the payment of an antecedent debt simply on the ground of a pious duty to pay the debt of a deceased father.

The next question is, whether the mortgage in suit is enforcible or not having regard to the finding of the lower Court regarding the validity or otherwise of portions of the consideration in suit which finding is not challenged in appeal. It was argued by the appellants' learned Counsel that the mortgage was at its inception void and, therefore, not enforcible. This argument would have been sound if the entire mortgage consideration or considerably a larger portion thereof had been proved to have been borrowed without legal necessity. I was referred to the ruling of a Bench of this Court reported as *Gajodhar Bakhsh* v. *Gauri Shankar* (7), in which case also, curiously enough, the mortgagor was the same person as the mortgagor in this case and the defendants the same, as in the present case. In that case, however, Anant Singh had no right whatever to mortgage the property and the mortgage was rightly held to be void and ineffectual from its very inception. The other case of a Single Judge referred to by the learned Counsel for the appellants was that of *Bunyad Husain* v. *Mata Din Singh* (8), but that case favours the contention of the mortgagees in this case. In that case legal necessity was found to have been proved with respect to a consideration of Rs. 3,782 out of Rs. 4,000 and the Court held that the alienation was effective. Where a large portion of the consideration amount is borrowed for legal necessity the transfer by the manager of a joint Hindu family cannot be said to be void. The question is one of equity and if the defendants had come forward to pay the sum of Rs. 1,603 with interest up to date it might have been found possible to order the plaintiffs to accept that amount and to dismiss the plaintiffs' suit In this case, however, though the suggestion was thrown out by the Court, no desire was expressed on behalf of the defendants to pay the valid portion of the consideration of the mortgage in suit. Under the circumstances, the only equitable course open to the Court is to direct that the plaintiffs may be put in possession in lieu of the principal amount of Rs. 1,603.

In the result, I dismiss the appeal but having regard to the invalid plea raised by the respondents' learned Counsel I direct that parties shall bear their own costs here.

J. P. —

Appeal dismissed.

(5) 42 Ind. Cas. 791; 21 C. W. N. 957; (1917) M. W. N. 739 (P. C.).

(6) 60 Ind. Cas. 219; 8 O. L. J. 87; 2 U. P. L. R. (J. C.) 191; 26 O. C. 327.

(7) 61 Ind. Cas, 205; 8 O. L. J. 81.

(8) 33 Ind. Cas 57; 19 O. C. 122; 3 O. L. J. 313.

ONKARLAL v. SHALIGRAMLALA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 62 OF 1921.

December 22, 1921.

Present :—Mr. Hallifax, A. J. C., and Mr. Dhobley, A. J. C.

ONKARLAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHALIGRAMLALA—PLAINTIFF—RESPONDENT

Limitation Act (IX of 1908), Sch. I, Arts. 14, 120—*Settlement entries, suit for amendment of—C. P. Land Revenue Act (XVIII of* 1881), *s.* 83—*Limitation.*

A suit under section 83 of the C. P. Land Revenue Act of 1881 for amendment of Settlement entries is in the matter of limitation governed by Article 14 and not by Article 120 of the First Schedule to the Limitation Act and must be filed within one year of the date on which the Record of Rights is duly made and attested and the assessment is offered to the proprietor. [p. 971, cols. 1 & 2.]

Appeal against a decree in Civil Suit No. 3 of 1918, of the Court of the Additional District Judge, Nagpur, dated the 6th April 1920.

Messrs. *V. B. Pandit*, B. B., and *W. R. Puranik*, for the Appellants.

Dr. *H. S. Gour* and Mr. *M. V. Kinkhede*, for the Respondent.

JUDGMENT.—The defendants repeat in their appeal the plea taken in the lower Court that the plaintiff's claim under section 83 of Act XVIII of 1881 (C. P. Land Revenue), for an amendment of the entries made at Settlement in respect of the proprietorship of Kharsoli Koparwadi and Rohna and the *sir* land of Rohna was barred by time. It will be convenient to settle this question first. At the Settlements of 1865 and 1893 the plaintiff's father was recorded as one of the proprietors of the village shares in dispute and the land he held was recorded as *sir*. At the recent Settlement orders were passed on the 18th and 19th of May 1914 by the Settlement Officer that the name of the plaintiff should be omitted from the *khewat* or list of proprietors of each village and that the land held by him in Rohna should no longer be recorded as *sir*, etc., but as his occupancy holding. This Settlement came into force on the 1st of July 1915. The date of the signature of the Malguzar on the Record of Rights for Rohna is 2nd January 1916 and on that for Kharsoli-Koparwadi is 10th January 1915, as we have ascertained by an examination of the Settlement Misl for each village. The signature of the Assistant Settlement Officer is undated in both cases. The Settlement was announced and the rent certificates were distributed on the 31st of December 1915. It may be mentioned that the learned Additional District Judge is apparently unaware of what the announcement of a Settlement is. He has taken it to be the communication to the plaintiff of the Settlement Officer's orders of the 18th and 19th May 1914. This suit was filed on the 15th of May 1916.

2. The claim for the amendment of the entries regarding the land which the Settlement Officer refused to record as *sir* is now admitted to be within time. Section 69 (4) of the Land Revenue Act lays down that such a suit must be filed within one year after the Settlement comes into force and this suit was filed a month and a half before the end of that year. It is in regard to the suit for the correction of the lists of proprietors that a question of limitation arises. The learned Additional District Judge has held that the period of limitation for a suit under section 83 of Act XVIII of 1881 is that prescribed by Article 120 of the First Schedule of the Limitation Act, that is, six years from the time when the right to sue accrues and not the one year from the date of the Act or order of a Government Officer sought to be set aside which is allowed by Article 14. In this he followed the view taken by the Calcutta High Court in 1915 in *Nabaghan Sadhai* v. *Raghu Nath Babu* (1) a case from Sambalpur, which was filed in 1912. We are, with all respect, unable to accept that view. The reasoning of the learned Judges is as follows. Section 152 (*b*) of the Land Revenue Act deprives the Civil Court of jurisdiction over a number of matters in which are included "correction of entries or revisions of records under sections 120, 121 and 122" of the Act. Section 120 empowers the Deputy Commissioner alone to make any correction in an entry in a Record of Rights

(1) 30 Ind. Cas. 61; 19 C. W. N. 1303; 21 C. L. J. 646.

and limits the grounds on which such a correction can be made to four, of which one is that the entry has been declared to be erroneous by a decree in a suit brought under section 83. Though section 83 itself "speaks of a suit under it as a suit to have an entry cancelled or amended the Civil Court can only declare that the entry is erroneous and how it should be amended, but cannot execute its decree by bringing the Record of Rights into Court and altering it." The decree in such a suit is, therefore, "a decree which is merely declaratory of the plaintiff's right and a mere basis for further proceedings before some Revenue or other Officer." It is not "a decree which positively sets aside and nullifies something which an officer of Government has done."

3. It appears to us that the same reasoning would make a mortgage-decree no more than a declaratory decree if it ordered the sale of "any interest in land used for agricultural purposes or held on a tenure which was recognized at the time of the Settlement of such land, or of houses or of other immoveable property connected with such land or interest and used for agricultural purposes," because under section 70 (2) of the Civil Procedure Code the Civil Court cannot itself execute such a decree, which is "a mere basis for further proceedings before a Revenue Officer." Following the reasoning of the learned Judges still further, we would be forced to the conclusion that a suit for the sale of such land on mortgage was a suit for the declaration of a right only and was governed in the matter of limitation by Article 120. Section 83 itself authorises the filing of a suit to have a decision set aside or an entry cancelled or amended, and we can find no reason for treating a suit filed expressly under that authority as anything but what the section says it is. Least of all can we find any reason for doing so in the mere fact that the law prescribes a particular procedure for the execution of the decree, and does not leave it to be executed under the ordinary rules. We hold that, in the matter of limitation, a suit under section 83 of Act XVIII of 1881 (C. P. Land Revenue) is governed by Article 14 of the First Schedule of the Limitation Act. This view derives some slight additional support from the fact that lays down that a suit of this nature is to be filed "within one year of the date on which the assessment is offered to the proprietors."

4. For the defendants it was strongly urged in this Court that the one year allowed for the institution of the suit must begin on the date of the Settlement Officer's order. This is based on a failure to notice that both section 83 of the Land Revenue Act and Article 14 of the Limitation Act speak of two kinds of suits though they use slightly different terms in describing them, those in the latter being naturally wider. One is a suit to set aside what is called a "decision of a Chief Settlement Officer" in the Land Revenue Act and an "order of an Officer of Government" in the Limitation Act. The other is called a suit to have an entry in the Record of Rights cancelled or amended by the Land Revenue Act and one to set aside an act of an Officer of Government by the Limitation Act. The distinction between an act and an order was not observed in the Calcutta case already discussed, where the learned Judges speak of a contention "that an entry in a Record of Rights is an 'act' or 'order' of a Government Officer." As the 'order' that the entry should be made and the 'act' of making it would naturally not be far apart in time, this matter may have been immaterial for the purposes of that case, if both order and act were within six years but not within one year of the institution of the suit, or the order and the act may have been contemporaneous. Here, however, they are not contemporaneous and the date of the act only is within one year of the institution of the suit. In terms and in essence, however, the suit is for the amendment of the entries, that is, for the setting aside of the act of the Settlement Officer in making them. The date of that act can only be taken to be that on which the Record of Rights was, in the words of section 82 of the Land Revenue Act, 'duly made and attested" by the last of the necessary signatures being affixed to it, because till the moment the record was merely a draft and these or any other entries could have been altered. The dates of the completion of the Record of Rights were not earlier than 2nd January 1916 for one village and 16th January 1916 for the other, as has already

been stated, and the suit was filed on the 15th May of the same year. It is, therefore, well within time.

5. It was, however, pleaded by the defendants that the suit was barred by time in another way, which is that the plaintiff had been kept out of possession of the shares in both villages by them for more than twelve years. In the lower Court this plea has prevailed in regard to Kharsoli Koparwadi but not in regard to Rohna. We will take the case of Rohna first. The plaintiff and his father have all along been in possession of the land in Rohna which he claims is *sir* land. Up to 1914 at least he or his father was recorded as a co proprietor of the village share and the land was recorded as his *sir*. They were, however, apparently excluded from participation in every other form of proprietary profits. These other profits seem to amount to little or nothing, and the plaintiff or his father may have paid the amount of the assumed rent of the land they held every year to the defendants as a contribution to the revenue, though neither of these matters is quite clear. Now, from 1894 till 1914 the land was undoubtedly *sir* and the plaintiff and his father held it as such, and they conceived themselves and held themselves out to be co-sharers in the village. We are unable to understand how this can possibly be said to be anything but possession of a share in the village. The share may be measured by the extent of the *sir* land they held and may be incapable of expression in annas and pies for a fraction, but of that share they were undoubtedly in possession. The plaintiff's title to it is not disputed except on the ground of the adverse possession of the defendants for more than twelve years That plea having failed, the plaintiff is entitled to a decree declaring that he is a co-owner in Rohna and that the land he holds is his *sir* land.

6. For this village, however, the decree of the lower Court is clearly wrong in its definition of the share held by the plaintiff. It declares that he is the owner of a one fifth share in the half village that originally belonged to the family and also that all the plots with an area of 58·68 acres which he has been holding are his *sir*. All the *sir* land and also one-fifth of the other proprietary profits may be the extent of what he or his father held originally, but that state of things ended many years ago. For much more than twelve years before the institution of the suit the proprietary interest in the *sir* land is the only part of the whole proprietary interest that he has held. That must then be the extent of the share now belonging to him. The declaration in the decree of the lower Court in regard to Mouza Rohna must, therefore, be modified into a declaration that the present entries in the Record of Rights of that village are erroneous and that the correct entries are that the plaintiff is one of the owners of that village in that he is the sole proprietor of the four plots numbered 22, 39, 92 and 160 and measuring 58·63 acres and that these plots are *sir* land, and not occupancy land.

7. As to Kharsoli-Koparwadi, it is not denied that, since 1901 at the latest, the plaintiff has had no actual possession and has received no share whatever in the profits. His contention is that his name remained on the record as co-proprietor all the time and the defendants were managing the share on his behalf, under an arrangement by which he held some other part of what had once been the joint estate and appropriated the profits, so that there was never any necessity for the actual passing of any money in the payment of profits. He has not explained what other part of property was held in this way except by suggestions put forward by the mouth of his witnesses only, that it was Rohna. But as the learned Additional District Judge points out, this suggestion "falls to the ground the moment one considers that the plaintiff's father never made collections from the tenants of Rohna." It is beyond all possibility of doubt that the defendants have all along been holding the share in Kharsoli Koparwadi adversely to the plaintiff in very strenuous denial of his title. In these circumstances, the mere fact that the plaintiff's name remained on the record is of no help to him. In regard to this village the decree of the lower Court appears to us to be quite correct.

8. In the defendants' appeal, it is contended that the decree of the lower Court in regard to costs is not in accordance with the judgment, which orders "that the plaintiff shall get costs from the defendants in proportion to his success and that the plaintiff shall pay costs to the defendants in proportion to his failure

The proportions are certainly not correctly worked out. The plaintiff succeeded in respect of Rs. 20,000 and failed in respect of Rs. 3,000. The plaintiff has, therefore, to pay Rs 138, not Rs. 159 8 0, to the defendants, and the defendants have to pay Rs. 326 8 0 to the plaintiff, and the decree must be corrected accordingly.

9. In this Court both parties have succeeded to a very slight extent and the nearest possible approximation to what is fair in the matter of costs appears to be that each side pay its own in both appeals. The decree of the lower Court will, therefore, be modified as set out in paragraphs 6 and 8 of this judgment, and there will be no order for costs in either appeal.

G. R. D.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2041 OF 1920.

December 14, 1921.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

A. VEDA MURTHI MUDALIAR—

DEFENDANT—APPELLANT

versus

JWALAPURAM RAGHAVACHARLU

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 92, 93, 94—Contract of sale in favour of one named person and others—"Others", who are—Evidence, admissibility of.

Where a vendor agrees to sell land to several named persons and in drawing up the agreement of sale the name of one person is mentioned and, without naming the rest, the word "others" is used, evidence can be let in in a suit for specific performance of the contract as to the persons in whose favour the conveyance is to be executed.

Second appeal against a decree of the District Court, Anantapur, in Appeal Suit No. 18 of 1920, preferred against that of the Court of the District Munsif, Penukonda, in Original Suit No. 1011 of 1917.

Mr. *A. Krishnaswamy Aiyar*, for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—We are unable to accept the finding of the District Judge that the first plaintiff is the only person interested in the contract. The agreement to sell, Exhibit A, expressly states that the contract is in favour of the first plaintiff and others. The case for the first plaintiff is that the others referred to in the document are the second and third plaintiffs. The case for the contesting defendant is that by others were intended the other plaintiffs, the sixth defendant and 20 other villagers. The only evidence is that of first plaintiff and first defendant. The first plaintiff says that the others means second and third plaintiffs, and the first defendant in his evidence says that 'others' means second and third plaintiffs, sixth defendant and 20 others. The sixth defendant in his written statement also says so. Having regard to the terms of the document, the written statement and the evidence in this case, we find it difficult to see how the Court can find that the first plaintiff was solely interested in the contract or how a decree can be passed in favour of the first plaintiff alone.

It is argued by the appellant's Vakil that evidence is not admissible to show who are meant by the term "others" and that the contract is, therefore, unenforcible. Where a vendor agrees to sell land to several named persons and in drawing up agreement of sale the name of one person is mentioned and, without naming the rest, the the word "others" is used, we can find nothing in the Evidence Act to prevent evidence from being let in as to the persons in whose favour the conveyance is to be executed. We do not think that any of the provisions of section 91 or 92 are contravened nor does the case fall within sections 93 to 97 of the Evidence Act.

As there is no dispute that the three plaintiffs are interested, and as the only point in issue between parties is whether the sixth defendant and 20 others are also interested, the lower Court was wrong in passing a decree in favour of the first plaintiff alone.

We reverse the decree and remand the appeal for disposal in the light of the above observations. Costs will abide the result. The Court-fee will be refunded.

E. C. F.

Appeal allowed.

BHAIDAS SHIVDAS v. BAI GULAB.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

October 25, 1921.

Present:—Lord Buckmaster, Lord Atkinson, Lord Carson and Sir John Edge.

BHAIDAS SHIVDAS—APPELLANT

versus

BAI GULAB AND ANOTHER—RESPONDENTS.

Hindu Law - Will, construction of—Widow, rights of—Absolute owner—"Malik"—Trust—Uncertainty of subject-matter.

If words are used in a Will executed by a Hindu husband in favour of his wife conferring absolute ownership upon the wife, the wife enjoys the rights of ownership without their being conferred by express and additional terms unless the circumstances or the context are sufficient to show that such absolute ownership was not intended [p. 76, col. 1]

The word "*malik*" is not a "term of art" and does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be. [p 976, col. 1]

A Hindu, governed by Mayukha Law, executed a Will by which he constituted his wife as owner (*malik*) and directed that whatever property remains after her death, the wife shall leave the said property to his two daughters in such manner as she may like:

Held, that the use of the word "*malik*" taken with the context of the Will indicated a clear intention to pass an absolute estate. [p 976, col 2; p. 977, col. 1.]

Surajmani v. *Rabi Nath Ojha*, 35 I. A. 17; 12 C. W.N. 231 P. C.); 5 A. L. J. 67; 18 M. L. J. 7; 10 Bom. L. R 59; 7 C. L. J. 131; 3 M. L. T. 144; 30 A. 84, followed.

Held, also, that there was no trust created in favour of the daughters as the subject-matter on which the trust was to operate was too uncertain to enable the Court to give it administration [p 977, col. 1.]

Appeal from a judgment and decree of the High Court at Bombay, affirming a decree of the same Court in its Original Civil Jurisdiction.

FACTS.—Nathu Moolji, a Guzerati Hindu, who died on the 8th December 1894, left a Will, the material terms of which appear from the judgment of the Judicial Committee. The appeal relates to the construction of the terms of the said Will.

Nathu Moolji left a widow and two daughters, Jamnabai and Diwali. Diwali died in 1906 leaving the appellant (her (husband) as her heir. The widow died in 1911 and the other daughter Jamnabai died sometime afterwards. The respondents claim the properties as heirs of Jamnabai.

The suit was instituted by the appellant as heir of Diwali who died in 1906.

The Trial Judge (Macleod, J.,) dismissed the suit. On appeal, Scot, C. J., and Heaton, J. disagreed upon the construction of the Will.

Scott, C. J., was of opinion that the widow took only a life estate and that there was a trust in remainder in favour of the daughters as tenants-in-common in equal shares. Heaton, J., held that no obligation was imposed on the widow to make any disposition in favour of the daughters.

The question upon which they disagreed was referred under section 98, sub-section (2) of the Code of Civil Procedure, and was heard by Bachelor and Shah, JJ., who agreed with Heaton, J., and dismissed the appeal.

An appeal to the Judicial Committee was preferred but the only question argued before the Committee then was with regard to the irregularity in procedure. The Judicial Committee allowed the appeal [*Bhaidas Shivdas* v. *Bai Gulab* (1)] holding that the procedure followed by the High Court was wrong and expressed their readiness to hear the appeal on its merits. The appeal was subsequently restored to the list by consent and was heard upon its merits.

Mr. *DeGruyther*, K. C., and Mr. *Parikh*, for the Appellant.—On a proper construction of the Will, the widow took only a widow's estate with a special obligation to appoint between the two daughters. The use of the word "Malik" is not conclusive as to the absolute estate taken by the widow as the subsequent clauses 18 and 23 show a contrary intention.

Powers of appointment in Hindu Wills are valid.

Bai Motivahu v. *Bai Manubai* (2).

Section 79 of the Indian Succession Act was not made applicable to Hindu Wills by Act XXI of 1870, section 2, because it was thought at the time that a power of appointment could not be given under a

(1) 60 Ind. Cas. 822; 48 I. A. 181; 40 M. L. J. 519; 25 C. W. N. 605; 33 C. L. J. 488; 19 A. L. J. 409; 23 Bom. L. R. 623; 3 U. P. L. R. (P. C.) 22; 14 L. W. 7; (1921) M. W. N. 403; 29 M. L. T. 350; 45 B 718; 30 M. L. T. 149.

(2) 24 I. A. 93; 21 B. 709; 1 C. W. N. 336; 7 Sar. P. C. J. 140 (P. C.); 11 Ind. Dec. (N. s.) 477.

Hindu Will. But the rule embodied in section 79 is, however, a rule of construction and should receive effect as a rule of justice, equity and good conscience. The Appellate Court relied upon a translation of the words used in the Will which is different from the official translation accepted by the parties. If two constructions are possible, effect shall be given to the one which excludes an intestacy.

Section 6 of the Indian Trusts Act (II of 1882) was extended to the Bombay Presidency in 1891.

Sir *George Lowndes*, *K. C.*, and Mr. *Raikes*, for the Respondents.—The word "Malik" imports full proprietary rights, unless there is something in the context to qualify it.

Surajmani v. *Babi Nath Ojha* (3). There is no trust created in favour of the daughters. The words relied upon are insufficient to create a trust. They are merely indicatory that the widow may transmit property to the daughters.

The Appellate Court composed of Judges knowing the language in which the Will was written, was entitled to give effect to the true translation of the words in the Will.

Ramanudan Chettiar v. *Vava Levvai Marakayar* (4).

The subject matter of the alleged trust was too uncertain for a trust to arise.

[Lord Buckmaster referred to *Horwood* v. *West* (5) and *Parnall* v *Parnall* (6).]

Mr. *De Gruyther*, *K. C.* in reply referred to *Le Merchant* v. *Le Merchant* (7).

JUDGMENT.

LORD BUCKMASTER.—This is an appeal against a decree dated the 23rd March 1917 of the High Court of Judicature at Bombay (Appellate Civil Jurisdiction), affirming a decree, dated the 8th September 1916, of the High Court in its Ordinary Original Civil Jurisdiction.

The question raised for determination arises on the construction of the Will, dated the 6th August 1894, of one Nathoo Moolji who died on the 8th December 1894.

The appellant is the husband of one of the two daughters of the testator, who predeceased her mother, the testator's widow. The respondents claim under the other daughter who survived her mother

At the date of the Will there were living the testator's widow, his two daughters, and the widow of a predeceased son. The two daughters were named Jamnabai and Diwali. Diwali died on the 13th May 1906 and the testator's widow on the 15th August 1911.

In these circumstances, the appellant claims as the husband of Diwali that, according to the true construction of the Will, the two daughters took a vested interest in the testator's residuary estate, which was not divested by reason of the death of one of the daughters before the death of the widow. The history of the suit has been fully dealt with by their Lordships when this appeal was formerly before them, and need not be repeated.

The Will was made in the Gujarati language, and in the translation is divided into clauses. By clause 2 the testator appoints his wife as his sole executrix. In the next clause, after stating that as he has no son he appoints his wife to be his heir; and the clause continues in these words:—

"And I constitute her the owner. And as to whatever property there may remain after her death my wife shall leave the said property to my two daughters in such manner as she may like (either) by making a 'Will' or by making (some) other instrument. Of my two daughters one named Bai Jamnabai was married to Shah Haridas Hemchand, but as he subsequently died she has now become a widow. To her and to (my) other daughter Bai Diwali who has been married to Shah Bhaidas Shivdas (*i. e.*) to both of them my wife shall give (my) property in such manner as (she) may like."

By later clauses of the Will the testator referred to powers that he desired his wife to enjoy; for example, by clause 6 he expressly states that he gives his wife authority to do what she thinks right with the profits and the ready moneys of a shop

(3) 35 I. A. 17; 12 C. W. N. 231; 5 A. L. J. 67; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 30 A 84 (P. C.).

(4) 39 Ind Cas. 235; 44 I. A. 21; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 2 5; 21 C. W. N. 521; 40 M. 116; 1 P. L. W. 294; 19 Bom. L. R. 401 (P. C.).

(5) (1823) 1 Sim. & S. 387; 1 L. J. (o. s.) Ch. 201; 24 W. R. 199; 57 E R. 155; 24 R. R. 199.

(6) (1878) 9 Ch. D. 96; 26 W. R. 851.

(7) (1874) 18 Eq. 414; 22 W. R. 839.

where he carried on business, and further to continue in partnership with the partners if she so desired. By clause 18 he provides that, after there have been defrayed out of the rents of certain specific immoveable property, the expenses in connection with a religious object, for which he had made provision, the wife should apply the surplus for her maintenance and use and for the maintenance and use of her daughters if they were living with her, and if the surplus were insufficient she should deal with the moveable and immoveable properties in such manner as she thought fit. By clause 20, again, he gave express power to his wife to mortgage, lease sell and use the properties. Finally, by clause 23 he provided that after the death of his wife his daughters should be named executrixes, and he gave them authority to deal with or manage the whole of his property and effects. There is no dispute that the word that was used in clause 3 as the original word of gift was the word "Malik" which could be appropriately used to constitute the wife absolute owner. It is not that the word is a "term of art," it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be; and in the context of the present Will their Lordships think the estate was absolute. At the time when the Will was executed it may well have been that whoever drew the Will was aware that at that time words of absolute gift in favour of a Hindu widow might not be supposed capable of conferring upon her a power of alienation, for, in the case of *Surajmani* v. *Rabi Nath Oha* (3), which ultimately came before this Board, we find that the High Court had ruled :—

"that under the Hindu Law, as interpreted up to the present in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate, unless the power of alienation is conferred upon her in express terms."

The decision in *Surajmani* v. *Rabi Nath Oha* (3) showed that that provision was no longer sound and that if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended. If clause 3 stood by itself it would, their Lordships think, be difficult to dispute that whatever the testator desired with regard to the disposition of his property after the death of his wife he had not expressed his wishes in such a manner that they bound the property. The words under which the appellant claims are words which only attach to whatever property there may remain after the death of the wife. Without for the moment considering whether the desire expressed by the testator is expressed in a form that makes her disposition of it mandatory or no, it is sufficient to say that if that clause stood alone the principle stated in the case of *Horwood* v. *West* (5), would be applicable to this Will as it would to a Will in England. The Vice Chancellor says at page 389*:—

"It is essential to the execution of a trust that the subject should be certain; and if this testator intended that his wife should, at her pleasure, during her life, dispose of the property which he left to her and that his recommendation should extend only to what, if anything happened to remain of his property at her death undisposed of by her, then there is no trust to be administered by this Court."

But the appellant points out with considerable force that clause 3 does not stand by itself; but that the clauses referred to, and most notably clauses 18 and 23, are in their terms inconsistent with the view that the provisions of clause 3 constituted the wife the absolute owner. Their Lordships are very far from saying that there is not force in this argument; but so far as clause 18 is concerned, it should be remembered that even then there is a provision that the surplus, after the property has been used for maintenance in the manner suggested, is to remain with the wife for her maintenance and use, and power is given to her to deal with the immoveable or moveable property as she may think fit. Again, with regard to clause 23, the appointment of the daughters as executrixes of the property, if in fact there had been a gift to them after the widow's death would be quite unnecessary. The only purpose for creating them executrixes would on either hypothesis be to see that the religious purpose

*Page of (1823) 1 Sim & Sim.—[*Ed.*]

to which part of the property had been devoted and a certain beneficial trust given to the widow of the son should be carried out. If and so far as they were absolute owners it had little value.

Their Lordships, therefore, think that these subsequent clauses in the Will are not sufficient to displace the language of clause 3, fortified by the powers given in clause 20, and by that language there is no trust created in favour of the two daughters of the testator. In forming this conclusion their Lordships have not considered the serious difficulty that is placed in the way of the appellant by the judgments of the Court from which this appeal has proceeded. In the Court of Appeal one at least of the Judges was thoroughly acquainted with the language in which this Will is drawn, and he took the view that the actual words used in clause 3 suggesting how the property should be left after the death of the testator's widow were in themselves inadequate to do anything more than to express a wish and did not create an obligation. Their Lordships have not dealt with that part of the case, because in their opinion the matter is better decided upon the principle to which reference has already been made, *viz.*, even assuming it was intended to create a trust and the words were sufficient for that purpose the subject-matter on which the trust is to operate is by the terms of this Will too uncertain to enable the Court to give it administration.

For these reasons, their Lordships are of opinion that this appeal must fail and ought to be dismissed with costs; the costs incurred in the Court below from the 13th March 1917, and of the appeal on the preliminary point that was argued before this hearing on the merits was reached, which were reserved, in their Lordships' opinion should be costs in the appeal; and they will humbly advise His Majesty accordingly.

J. P.

Appeal dismissed.

Solicitor for the Appellants:—Mr. *E. Dalgado.*

Solicitors for the Respondents:—Messrs. *Hughes & Sons.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 816 OF 1919.

January 16, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Ross.

Babu ASHURFI SINGH—PLAINTIFF—APPELLANT

versus

Babu BISESWAR PRATAP NARAIN SAHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of—Principle of construction—Court, duty of—"Malik," meaning of—Gift by husband in favour of wife—Absolute or limited estate.

It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in another case [p. 978, col. 2.]

Kollany Kooer v. *Luchmee Pershad*, 24 W. R. 345, *Saraj Mani* v. *Rabi Nath Ojha*, 39 A. 84; 5 A. L. J. 67; 2 C. W. N. 241; 18 M. L. J. 7; 10 Bom. L. R. 59, 7 C. L. J. 131; 3 M. L. T. 141; 35 I. A. 7 (P. C.), followed.

In construing a Will a Court must look to all the clauses of the Will and give effect to all the clauses, ignoring none as redundant or contradictory. [p. 979, col. 1.]

Shib Lakshan v. *Srimati Tarangini Dasi*, 8 C. L. J. 20, *Kundarpi Nath Ghose* v. *Jogendra Nath Bose*, 6 Ind. Cas. 64; 12 C. L. J. 33, followed.

The word "*malik*" is not a term of art, that is to say, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be. Absolute ownership imports at least the right to exclusive and free enjoyment of the property and free power of disposition. [p. 979, col. 1.]

Bindu Sheikh v. *Bai Gulab*, 61 Ind. Cas. 974; 25 C. W. N. 124; (1921) A. I. R. 12, 21 A. L. J. 289; 42 M. L. J. 345 (P. C.), followed.

A deed of gift, executed by a husband in favour of his wife referred in the preamble to the deed to the whole collection of rights and by the first clause the properties were granted to the wife as "*malik*," by the second clause she was given the power of alienation for charitable purposes of a portion of the property to one of the relations of the husband and to no one else; by the third clause she was given power to execute a Will in favour of one of the aforesaid relations, by the fourth clause provision was made for disposal of property at the donee's death, and by the fifth clause provision was made for any unmarried daughter or son's daughter of the donee, and by the last clause provision was made that if the donee died before the donor the properties undisposed of by the donee will revert to the donor. A *mokarrari* lease having been granted by the donee a question arose whether she had the power to grant the lease (

ASHURFI SINGH v. BISESWAR PRATAP NARAIN.

Held, that no absolute estate was granted to the donee and that the intention of the donor was to provide for the donee and also for the ultimate devolution of his property and that the grant in effect was the grant of an ordinary Hindu woman's estate with power to sell, or to appoint by deed or Will, to certain specified persons and that she was not empowered to grant a *mokarrari* lease. [p. 979 col. 2.]

Appeal.

Messrs. *Manuk*, *S. C. Mitter* and *J. P. Singh* for Mr. *G. D. Singh*, for the Appellant.

Mr. *Kulwant Sahay*, for the Respondents.

JUDGMENT.

Ross, J.—This is an appeal by the plaintiff. He alleges that *Musammat* Mulukrani Kuer was the absolute owner of the properties specified in the plaint and that he obtained an *istamrari mukarari patta* from *Musammat* Mulukrani Kuer on the 7th of August 1896. A dispute having arisen between himself and the reversioners of Babu Har Pragas Narayan Singh, the husband of *Musammat* Mulukrani Kuer, the properties were attached by the order of the Magistrate and this suit was brought for a declaration of the plaintiff's title to, and for recovery of, possession of the properties together with the surplus amount of profits in the hands of the Receiver. There were six parties who were defendants to the suit but we are concerned now only with the third party who are two minors under the protection of the Court of Wards. Their defence was that *Musammat* Mulukrani Kuer had only a limited interest in the properties for the term of her life and that, consequently, the plaintiff was not entitled to succeed. The Subordinate Judge held that *Musammat* Mulukrani Kuer had an absolute right to the property and consequently gave a decree to the plaintiff. This decision was reversed on appeal and the question now is as to the nature of the estate taken by *Musammat* Mulukrani Kuer under a deed of gift executed in her favour by her husband on the 23rd June 1859.

The contention on behalf of the appellant is that the preamble to the deed refers to the whole collection of rights to their uttermost limit in these properties, and that by the first clause the properties are granted to the grantor's wife "as *malik*" and that, consequently, she became full owner, her interest being limited only so far as it is specifically limited in the succeeding clauses. The second clause deals with the power of alienation and there is no restriction therein on the granting of a *mokarari* lease. Consequently, *Musammat* Mulukrani Kuer had power to grant a *mokarari* lease and the lease granted by her is valid.

Reference was made to the decisions in *Kollany Koer* v. *Luchmee Pershad* (1), *Suramani* v. *Rabi Nath Ojha* (2), *Bhaidas Shivdas* v. *Bai Gulab* (3) and the unreported decision of the Privy Council in *Musammat Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*. It was argued that the effect of these cases is to show, as observed in the last mentioned case, that the term '*malik*,' when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred;" and, further, that the fact that the donee is the wife or widow of a Hindu is not in itself a circumstance qualifying the meaning of the word "*malik*".

Now, as was pointed out in the case of *Musammat Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*, it is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will which was adopted by a Court in another case. The case upon which the learned Counsel for the appellant most strongly relies is *Bhaidas Shivdas* v *Bai Gulab* (3), but the terms of the Will in that case were materially different from those under consideration now. The rule of construction is given in *Shib Lakshan* v. *Srimati Tarangini Dasi* (4) where it was laid down

(1) 24 W. R. 395.

(2) 30 A. 84 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 44; 35 I. A. 17 P. C.).

(3) 65 Ind Cas. 974; 46 C. W. N. 139 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; (P. C.).

(4) 8 C. L. J. 20.

that the Court must, in construing a Will, look to all the clauses of the Will and give effect to all the clauses, ignoring none as redundant or contradictory—see also *Kandarpa Nath Ghose* v. *Jogendra Nath Bose* (5). This deed, therefore, cannot be construed by reference only to the preamble and the first two clauses, but must be read as a whole. The second clause lays down the limits within which the donee can alienate the property; any alienation made during the lifetime of the donor is to be by his permission. After his death she can transfer up to a limit of 50 *bighas* for charitable purposes; she can also transfer by sale or gift to any son of the donor and the donee or the son of that son or any other son or daughter of the donor or any male descendant of his elder brother, but except to these persons she is to have no power to sell, or make a gift of, or mortgage, more than 50 *bighas*. The third clause gives the donee power to execute a Will in favour of any of the aforesaid persons. The fourth clause deals with the property, undisposed of at the donee's death by any such Will and in that case it is declared that her son will get the property, or his male descendants, and if there is no son of the donee or male descendant of such son then in existence, then any other son of the donor or his son and in default of such persons, the donor's elder brother or his son will get the property, but no daughter of the donee or any of her paternal or maternal relations. The fifth clause provides for any unmarried daughter or son's daughter of the donee, and the last clause declares that if the donee dies before the donor, the properties undisposed of by the donee will revert to him.

Now, as was pointed out in the case of *Bhaidas Shivdas* v. *Bai Gulab* (3), the word "*malik*" is not a term of art, that is to say, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be. Absolute ownership imports at least the right to exclusive and free enjoyment of the property and free power of disposition. It is impossible to hold, on the terms of this deed, that an absolute estate was granted to *Musammat* Mulukrani Kuer; the limitations are inconsistent with free and full ownership. Reading the deed as a whole, it seems to me clear that the intention of the donor was to provide for the donee and also for the ultimate devolution of his property. The grant in effect is the grant of an ordinary Hindu woman's estate with powers to sell, or to appoint by deed or Will, to certain specified persons, and if these powers are not exercised by the donee they are exercised by the donor by this deed in favour of those persons. It follows that the absence of any clause restraining the donee from granting a *mokarrari* lease does not lead to the conclusion that she is empowered to grant it; her powers must be gathered from the total effect of the conveyance and from the nature of the estate thereby granted. The argument of the appellant involves isolating a portion of the deed from the rest and then inferring that, because this power is not expressly taken away, it is granted. The argument infringes the rule of construction above referred to. In my opinion, therefore, this appeal must fail and be dismissed with costs.

COURTS, J.—I agree.

J. P. *Appeal dismissed.*

(5) 6 Ind. Cas. 141; 12 C. L. J. 391.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1142 OF 1920.

April 28, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

ANAKKARAN PUTHIYAVALLAPAL MUSSAN HAJI—PLAINTIFF—APPELLANT

versus

THIYAN THAVARA KORAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Suit against landlord—Tenancy under lease prior to suit—Decision in suit, whether binding on tenant.

A lessee under a lease granted before the institution of a suit against the lessor is not bound by the decision against the lessor in that suit to which he (the lessee) was not a party.

SRIPAL SINGH v. JAGDISH NARAYAN.

Seshappaya v. *Venkatramana Upadya*, 5 Ind Cas. 732; 33 M. 459; 20 M. L. J. 752; (1910) M. W. N. 26, explained.

Appeal against a decree of the District Court, North Malabar, in Appeal Suit No. 595 of 1916, preferred against the decree of the District Munsif, Taliparamba, in Original Suit No. 456 of 1910.

Mr. *B. Focker*, for the Appellant.

Messrs. *C. Madhavan Nair*, and *V. P Karunakaran Nambiar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The lower Appellate Court has so far decided the case against the plaintiff-appellant, because it answered in the affirmative the question whether the person holding under a lease granted before a suit is bound by the decision against his lessor in that suit, although he is not a party to it. We cannot follow the lower Appellate Court in this; and in fact the only support adduced for its opinion is the quotation from an American author in *Seshappaya* v. *Venkatramana Upadya* (1). But the portion of that quotation at present material was not so for the purpose of the issue in that case and the learned Judges, in fact, after observing that it was inconsistent with the principle of English, Irish and Indian cases, declined to decide as to its correctness. On the other hand, although no case of tenancy has been shown to us, the principle applied to other cases of transfer in *Sita Ram* v. *Amir Begum* (2), *Joy Chandra Banerjee* v. *Sreenath Chatterjee* (3), *Abdul Ali* v. *Mukhan Abdul Hussein* (4) and *Ramchandra Dhondo Kulkarni* v. *Malopa Narsapa* (5) is in accordance with plaintiff's contention. Adopting that principle, we must set aside the lower Appellate Court's decree and remand the appeal to it for further hearing on its merits. Costs to date here and in the lower Appellate Court will be provided for in the decree to be passed. Stamp value will be refunded on application.

(1) 5 Ind. Cas 782; 33 M. 459; 20 M. L. J. 752; (1910) M. W. N 26.

(2) 8 A. 344; A. W. N. (1886) 101; 5 Ind. Dec. (N. S.) 105.

(3) 42 C 357; 1 C. L. J. 23.

(4) 10 Ind Cas. 860; 35 B. 97; 13 Bom. L. R. 268.

(5) 66 Ind. Cas. 443; 40 B. 677; 18 Bom. L. R. 757.

RICHEY, J.—I will only add that an illustration of the principle of privity by subordination Bigelow gives is the Common Law case of feoffor and feoffee. This, he says, is Coke's illustration. Then he mentions the case of landlord and tenant, for which no authority is cited. On the other hand, Black on Judgments, Volume II, section 549, states the law in the other way, citing *Satterlee* v. *Bless* (6), so that, even in America, it is doubtful whether the law as to landlord and tenant is as stated by Mr. Bigelow. All other authority is against it. I agree in the order of my learned brother,

M. C. P.

Apreal allowed;
Case remanded.

(6) 36 California 489.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 27 OF 1921.

August 5, 1921.

Present :—Mr. Daniels, J. C.

SRIPAL SINGH—PLAINTIFF—APPELLANT

versus

JAGDISH NARAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 iv (c)—Suit for declaration—Consequential relief—Court-fee payable.

In order to determine the amount of Court-fee payable in a suit for a declaration that a particular property is or is not liable to a mortgage or charge it is the substance of the prayer which must be looked to and not merely the form of plaint, and the plaint or memorandum of appeal must be stamped *ad valorem* according to the value of the charge with which the plaintiff or the appellant seeks to burden the property or of which he seeks to relieve it. [p. 681, col. 2.]

A suit praying that certain foreclosure decrees are void and ineffectual against the rights of the plaintiff and that the mortgage still subsists and is redeemable, is one involving consequential relief and an *ad valorem* Court-fee is payable under section 7 (iv) (c) of the Court Fees Act. [p. 683, col. 2.]

SRIPAL SINGH v. JAGDISH NARAYAN SINGH.

Appeal against a decree of the Subordinate Judge, Lucknow, dated the 24th February 1921.

Messrs *Bisheshwar Nath Srivastava* and *Rajeshwari Prasad* for the Appellant.

Messrs. *K. N Chak* and *Wasi Hasan*, for Respondents Nos. 1 and 2.

Mr. *Ali Mohammad*, holding brief of Mr. *Gokaran Nath Misra*, for Respondents Nos. 7 to 11.

JUDGMENT.—This case raises a question of Court fees which must be decided before the appeal can be heard on the merits. The question is, whether the suit is "to obtain a declaratory decree or order where consequential relief is prayed" and liable to an *ad valorem* Court-fee under section 7 (*iv*) (*c*) of the Court Fees Act, or whether it is a purely declaratory suit sufficiently stamped with a Court fee of Rs. 10 under Article 17 (*iii*) of the Second Schedule to that Act. The alternative suggestion of the appellant that the suit is one the value of which it is not possible to estimate in money under Article 17 (*vi*) of the same Schedule, though a Calcutta case is cited in support of it, need not be seriously considered. The value of the relief is clearly capable of being estimated. The plaintiff valued it for purposes of jurisdiction at Rs. 5,967 11 0, the amount of the foreclosure decree which has been obtained against him, and under section 8 of the Suits Valuation Act the valuation for Court fees in the case of a suit falling under section 7 (*iv*) (*c*) is the same as the valuation for jurisdiction. This section occurs in Part II of the Act, which extends to the whole of British India. This section also disposes of the suggestion made by the appellant that, even if an *ad valorem* fee is payable, he is at liberty to put on it a different valuation for Court fees from that which he has placed on it for purposes of jurisdiction.

A final foreclosure decree in respect of the property in suit has been passed against the plaintiff-appellant. The preliminary decree which was afterwards made final was obtained on the basis of a compromise sanctioned by the Court. The appellant seeks to set aside both the preliminary and the final decrees on two grounds; first, that they were obtained by fraud, and, secondly, that he was a minor and was not properly represented in the foreclosure suit. (He was represented but he alleges that the guardian was not regularly appointed).

The relief asked for is in these terms: "That a declaratory decree be passed to the effect that the foreclosure decrees, dated 12th October 1911 and 2nd May 1912, are void and ineffectual against the rights of the plaintiff and the plaintiff is not bound by them. The mortgage does still subsist and the plaintiff is still entitled to redeem the mortgage of 15th October 1900."

It was stated at the hearing before me on behalf of both sides that the parties were agreed that if this suit is successful the Court will be asked to restore the foreclosure suit and dispose of it on the merits. This position was accepted by the learned Subordinate Judge who says in an order of 10th September 1920 on the record: "If the decree is proved to have been obtained by exercise of fraud or collusion and the suit is decreed, it appears to me that the first suit will be revived and would stand in the condition in which it was filed on the date of institution."

The suit has been dismissed by the Court below so that the relief asked for in appeal is the same as that asked for in the trial Court.

The contention of the appellant's learned Advocate that the Court cannot look beyond the form of the plaint, and that, unless consequential relief is asked for in express terms, the suit is purely declaratory, is negatived by a long series of cases in which declarations have been asked for that a particular property was or was not liable to a mortgage or charge. In such cases the Courts have consistently held that it is the substance of the prayer which must be looked to, and that the plaint or memorandum of appeal must be stamped *ad valorem* according to the value of the charge with which the appellant seeks to burden the property or of which he seeks to relieve it. As instances of such suits I may refer to *Khichera* v. *Kharag Singh* (1), *Sukhnandan* v. *Lachhman Prasad* (2), *Jodhan Pershad Singh* v. *Nankku Pershad Singh* (3), *Premsukh Das* v. *Shah Gopi Saran* (4), *Moti*

(1) 7 Ind. Cas. 313; 33 A. 20; 7 A. L. J. 812.
(2) 24 Ind. Cas. 286; 17 O. C. 30.
(3) 46 Ind. Cas. 509; 3 P. L. J. 484; 5 P. L. W. 133.
(4) 51 Ind. Cas. 786; 4 P. L. J. 328.

Begam v. *Har Prasad* (5), *Sheoraja* v. *Debi Din* (6).

In this connection I may usefully refer to the remarks of Sir Lawrence Jenkins in *Deokali Koer* v. *Kedar Nath* (7). That case was very similar to the one now before me. The appellant sued for a declaration that a registered mortgage-deed and a decree obtained thereon had been obtained by fraud and were ineffectual, inoperative and invalid and that the mortgaged property could not be sold under that decree. Notwithstanding that the form of the suit was declaratory the Court held that the prayer in the plaint really involved consequential relief, and Sir Lawrence Jenkins in delivering the leading judgment says: "If the Courts were astute—as I think they should be—to see that the plaints presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases, would no longer arise."

In *Arunachalam Chetty* v. *Rangasawmy Pillai* (8) the question was referred to a Full Bench.

"Whether a suit for declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt is not binding on him, is a declaratory suit only;" and the Full Bench unanimously answered the question by saying that a suit of the nature indicated which merely asks for a declaration is nonetheless a suit for a declaratory decree with consequential relief within the meaning of section 7 (*iv*) (*c*). The appellant points out that in the actual case which gave rise to the reference the plaintiff asked for a declaration that a decree for sale on the basis of a mortgage was not binding on him and for an injunction restraining the decree-holder from executing that decree, and, therefore, the remarks regarding a purely declaratory suit were *obiter*, but a judgment which was delivered by the Full Bench for the purpose of finally setting at rest a question which had given rise to difference of opinion among the Judges ought not to be lightly brushed aside on this ground. The case emphasises the principle which has been laid down in many other cases, that it is the real nature of the relief which will result on a suit being decreed which determines the Court-fee payable. If a consequential relief is involved the plaintiff cannot evade payment of Court fees merely by casting his suit into a declaratory form. Here the result would be precisely the same whether an injunction were asked for or not. Even if no injunction were asked for, no Court would proceed to execute a decree which had been declared to be a nullity in a regular suit between the parties. The decisions in *Arunachalam Chetty* v. *Rangasawmy Pillai* (8) and *Deokali Koer* v. *Kedar Nath* (7) have superseded the earlier decisions of the same Courts on which the appellant seeks to rely.

Finally, it has been argued that even in substance no consequential relief is involved. It is urged that the defendants were in possession of the property as mortgagees before the foreclosure decree was passed and they will remain in possession if the present suit is successful. This argument is specious but unsound. In the ordinary case of a declaratory suit asking for a declaration that the plaintiff is owner and in possession of the disputed property, the position is that the plaintiff is proprietor at the time when the suit is brought. Something has happened to cast a cloud on his title and he seeks to have that title re-affirmed. Here the position is entirely different. So long as the foreclosure decree stands good, the plaintiff is not only not the owner but has no right whatever left in the property. The ownership rests in the decree-holders and the decree operates as *res judicata* between the parties. If this suit is successful the decree-holders will lose their title to the property and will be relegated to the position of mortgagees seeking to enforce their mortgage by a suit in the Courts. The preliminary and final decree will be wiped out and proceedings which have finally terminated will be restored to the file and decided afresh. If the decree which the plaintiff seeks to set aside had merely declared a charge on the property, the plaintiff would unquestionably have had to pay an *ad valorem* fee. Can he be in any better position when that decree goes further and extinguishes his proprietary right alto-

(5) 47 Ind. Cas. 311; 16 A. L. J. 81.
(6) 48 Ind. Cas. 535; 5 O. L. J. 663.
(7) 15 Ind. Cas 427; 39 C. 704; 16 C. W. N. 838.
(8) 28 Ind. Cas. 79; 38 M. 922; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 154.

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gether ? I hold, therefore, that the suit is one involving consequential relief and that an *ad valorem* fee is payable under section 7 (*iv*) (*c*) of the Court Fees Act.

It is needless to enter into any question of the value of the relief given by the plaintiff. He has himself valued it. In cases falling under section 7 (*iv*) it is for the plaintiff himself to state the value of the relief in the plaint or memorandum of appeal. In this case he has valued it at Rs. 5,967-11 0, the amount of the foreclosure decree, and, as has been already pointed out, in suits of this nature, the value for jurisdiction and the value for Court-fees are the same. The appellant must, therefore, pay the sum of Rs. 315 on this valuation both in this Court and in the Court below, failing which the appeal will be dismissed. I allow thirty days' time for the deficiency to be made good. The case will be put up on September 5th for orders.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 708 OF 1920.

September 23, 1921.

Present:—Mr. Justice Krishnan.

OBLA K. SUBBAYAR—PETITIONER

versus

THOPPAI MUTHAYAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Application to set aside sale—Deposit by one of several judgment-debtors, whether enures for benefit of co-judgment-debtors.

Where one of several judgment-debtors makes a deposit in Court of the amount stated in a sale proclamation and the 5 per cent. of the purchase-money, quite independently and not conjointly with the other judgment-debtors, it is not open to a co-judgment-debtor to take advantage of such deposit in support of an application under Order XXI, rule 89 of the Civil Procedure Code.

Petition under section 115 of Act V of 1908, praying to revise an order of the District Court, Madura, in Civil Miscellaneous Appeal No. 52 of 1919, preferred against the order of the Subordinate Judge, Madura, in Execution Appeal No. 202 of 1919.

JAGMOHAN DAS *v.* INDAR PRASAD.

Messrs. *K. S. Jayarama Aiyar*, and *P R. Narayana Aiyar*, for the Petitioner.

Mr. *K. V. Sesha Aiyangar*, for the Respondent.

JUDGMENT.—Following the ruling in *Karunkara Menon* v. *Krishna Menan* (1), which takes a strict view of Order XXI, rule 89 and holds that the terms of the rule should be "very strictly conformed to," I think this petition must be allowed. The first defendant did not deposit in Court the amount stated in the proclamation and the 5 per cent. himself. He is not entitled to take advantage of any deposit, made by his co-judgment-debtor or the defendant, which was not made conjointly with him but quite independently of him. Such a deposit in Court cannot be treated as money received by the decree-holder within the meaning of the rule so as to enable the respondent to take advantage of it; See *Trimbak Narayan* v. *Ramchandra Narsingrao* (2), followed in *Karunakara Menon* v. *Krishna Menon* (1), cited above.

In these circumstances, I must hold that the provisions of rule 89 have not been complied with by the respondent and the order setting aside the sale of Item No. 1 must be reversed. The order of the District Judge is set aside and that of the Subordinate Judge is restored with costs here and in the Courts below.

M. C. P.

W. C. P.

Petition allowed.

(1) 27 Ind. Cas. 952; 39 M. 429; 28 M. L. J. 262; 2 L. W. 196.

(2) 23 B. 723; 1 Bom L. R. 215.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 41 OF 1921.

August 29, 1921.

Present:—Mr. Daniels, J. C., and Mr. Dalal, A. J. C.

JAGMOHAN DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

INDAR PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Partition suit—Preliminary decree—Order directing

MUNICIPAL BOARD, AGRA *v.* ASHARFI LAL.

Commissioners to ascertain value and take possession of property—Interlocutory order—Appeal—Order, when can be questioned.

There can be only one preliminary decree in a suit.

Kamini Debi v. *Promotho Nath Mookerjee*, 27 Ind. Cas. 317; 20 C. L. J. 476; 19 C. W. N. 755 and *Bharatendu* v. *Yaqub Husain*, 18 Ind. Cas. 701; 35 A. 159; 11 A. L. J. 120, relied on.

An order in a partition case after the passing of a preliminary decree directing Commissioners appointed in the case to ascertain the value of certain property and to take possession of it, is an interlocutory order and is, consequently, not appealable but can be questioned in appeal from the final decree.

Appeal against a decree of the Subordinate Judge, Lucknow, dated the 6th May 1921.

Mr. *Parbhu Dayal Rastogi*, for the Appellant.

JUDGMENT.—This is an appeal from the order of the learned Subordinate Judge in a partition case directing Commissioners who had been appointed in the case to ascertain the value of certain property and to take possession of it. The appeal was filed as an appeal from a preliminary decree, but no copy of the decree was filed with it as it was said that no decree had been prepared. On enquiry from the learned Subordinate Judge it appears that a preliminary decree had previously been passed in the case and that this was merely an interlocutory order. It has been held, both by the Allahabad and Calcutta High Courts, that there can be only one preliminary decree in a suit. [*Vide Kamini Debi* v. *Promotho Nath Mookerjee* (1) and *Bharatendu* v. *Yaqub Husain* (2).] With these rulings we are in agreement. We, therefore, hold that this appeal is not maintainable, but should this suit result in a final decree unfavourable to the appellant, it will be open to him to attack the present order in appeal from the final decree.

J. P.

Appeal not maintainable.

(1) 27 Ind. Cas 317; 20 C. L. J. 476; 19 C. W. N. 755.

(2) 18 Ind. Cas. 701; 35 A. 159; 11 A. L. J. 120.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 41 OF 1921.

November 18, 1921.

Present: Mr. Justice Walsh and Mr. Justice Stuart.

THE MUNICIPAL BOARD, AGRA—DEFENDANT—APPELLANT

versus

ASHARFI LAL—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Municipal election—Wrong description of name in candidates' list—Suit for damages, maintainability of—Damages, liability for—Member as corporate body or individual—Principal and agent, principle of, applicability of—Discovery of documents—Civil Procedure Code (Act V of 1908), O. 11, r. 12—Affidavit, content of.

If any duly qualified citizen, or burgher, or person entitled to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote, and so as to give the Returning Officer an adequate ground for refusing him the right to vote on election day when the matter has to be decided summarily, and that refusal or omission from the roll, as the case may be turns out on investigation to be wrongful he has suffered a legal wrong: he has been deprived of a right recognised by law and he has against the person so depriving him a remedy by "an action on the case" for nominal damages for the right that he has lost, which may, at the discretion of the Court, be punitive or exemplary if the conduct is the result of some malicious and wicked intention and also for any pecuniary expenses to which he may have been reasonably put as a result of the wrong done, for example efforts to re-place his name on the roll. [p. 985, cols. 1 & 2]

A suit for damages for wrong done to the plaintiff by wrongful omission to record his name correctly on the candidate's list of the Municipal Electoral Roll is rightly brought against the Municipal Board itself and individual members including the Executive Officer, and if in such a case liability is eventually established for damages, that liability, in order to be placed upon the right shoulders, must be decided according to the ordinary general principles of principal and agent. No individual member of the Board can be made liable in his own pocket, separately and independently of the Board for an act in which he had no part or lot himself and which he did not in any way authorise. On the other hand, any individual member of the Board who either expressly or indirectly encouraged, incited, directed or approved of, in other words, aided and abetted the attempt to deprive the plaintiff of his right to be on the candidates' list would be liable in his own pocket, independently altogether of the question whether or not the Municipal Board would be liable as well. The Municipal Board as principal would only be liable for their corporate act, *i.e.*, an act done by themselves by way of resolution, or by a committee of authority appointed by them, or by one of their servants in the ordinary course of business [p. 986, col. 2.]

In such a case a plaintiff has a right under

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Order II, rule 12 of Civil Procedure Code, and any Court trying such a suit has the duty, to insist that all documents in existence or which had been in existence which throw light on that question must de produced. [p 9-7, col 1]

Where a Municipal Board is called upon to produce documents and is unable to produce them an affidavit must be made on behalf of the Municipal Board by the Chairman or the Executive Officer, who, making their affidavits jointly as such officers, must swear that they have made all necessary enquiries of all employees in the Board with reference to the documents which they swear to in their affidavits and if there is any document to which they make any objection, legal or otherwise, to produce although it is relevant to the question in point, they must take their objection in the affidavit and the Court must decide it before hearing the case. [p. 988, col. 1.]

First appeal from an order of the Additional Subordinate Judge, Agra.

Mr. *Uma Shankar Bajpai*, for the Appellant.

Messrs. *Nihal Chand*, *Abu Ali* and *Narain Prasad Asthana*, for the Respondents.

JUDGMENT.

WALSH, J.—This is an appeal from an order of remand which was clearly rightly made, although we think made on wrong grounds. The matter raises a question of such importance, possibly to the plaintiff himself but certainly to the general public, that it is desirable to make the law clear. It has not yet been tried and we refrain from expressing any opinion about the merits. We would merely say this by way of preface, that, in our opinion, the law in India upon the questions raised is the same as the law in England, and the Common Law of England provides that if any duly qualified citizen, or burgher, or person entitled to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote, and so as to give the Returning Officer an adequate ground for refusing him the right to vote on election day when the matter has to be decided summarily, and that refusal or omission from the roll, as the case may be, turns out on investigation to be wrongful, he has suffered a legal wrong; he has been deprived of a right recognised by law and he has against the person so depriving him a remedy by what has always been called "an action on the case" for nominal damages for the right that he has lost, which may at the discretion of the Court be punitive or exemplary if the conduct is the result of some malicious and wicked intention; and also for any pecuniary expenses to which he may have been reasonably put as a result of the wrong done, for example, efforts to replace his name on the roll. It has been suggested by the Municipal Board before us that the plaintiff either did not seriously assert, or abandoned, this precise form of claim when he came to Court. It is certainly contained in his plaint. It does appear to be absent from the judgments of the two Courts as a substantive matter in dispute, and it is not the ground on which the lower Appellate Court has remanded the suit. But we are not satisfied that the plaintiff ever intended to abandon it, and it is clearly a matter which ought to be disposed of either by a correct judicial decision or by the consent of the parties. All that we know about the plaintiff's attitude in the matter is that he asked for something very much more—one relief which he had already got, and another, namely, a declaration that the constitution of the Municipal Board was altogether invalid, which he was never likely to get,—and that he announced his intention of conferring such damages as he could recover upon some charitable institution.

In order that our view must be properly appreciated the allegation of the plaintiff should be stated. The suit is brought against the Municipal Board of Agra. The plaintiff who is a Pleader is a previous member of the Board, on which he says he sat from 1914 to 1916. Two lists are prepared by the officials of the Board under statutory authority, namely an electoral roll and a candidates' list. An election was approaching in the year 1919 and the plaintiff had been a severe critic of the Municipal Administration up to that time. He alleges, and on this matter he is the best Judge, that his criticism was such as to create hostility to himself personally among the members of the Board. He is a house-owner and an occupier at Agra and it is not denied that he is entitled to be on both the roll and the candidates' list; indeed he was on both, and the revising authority, consisting of three members of the Board, passed the roll and the list on the 31st of January 1919. Either as the result of what these persons did officially in the course of their business, or wrongly with intention in the course of their business, or as a result of the revengeful and malicious interference of

some individual, either a member of the Board or an employee in the office of the Board, after the statutory sitting of the revising authority the plaintiff's name on the list was so put and his description so fabricated as to represent him to be somebody other than the person he was known to be. For example, on the candidates' list (and if his description of himself is correct, it is as a candidate that he was most objectionable to the Board) he is described by his right name but with his wrong father, his wrong caste, and his wrong occupation, all three of which put against his name were those of the owner of the house and not of himself. This being so, the Nomination Officers who acted sometime between the 31st January and 8th of March had to reject his nomination, because the person who presented himself at the nomination was not the son of the father in the candidates' list. Thereupon, the plaintiff brought this suit asking for the correction of the list as a specific relief, claiming damages for the wrong done to him, and at some later stage of the suit adding the somewhat childish claim that, because the electoral list or the candidates' list had been tampered with, the whole constitution of the Board was invalid. Before the case came on for trial the District Magistrate had corrected the list. This, indeed, happened before the election took place and it is said that the plaintiff was an unsuccessful candidate. That is in no way a defence to the suit. We know nothing about the merits of Municipal controversies at Agra, but it might happen that a candidate whose nomination had been rejected and whose qualifications had obviously become a matter of public discussion would be seriously hampered in his efforts to obtain votes, and even although he succeeded in correcting the mistake and securing his proper nomination before the election it might be sufficient in certain cases to explain his defeat. But, apart from that, in the leading case on the subject, namely *Ashby* and *White* which was decided in the reign of Queen Anne in England, the plaintiff in that case, who had been deprived of his right to vote, intended to vote for the successful candidate; none the less he had been deprived of a lawful right for which he was held entitled to recover damages. Unfortunately, the defendants have done, up to this moment, little or nothing to clear the ground and to enable the Courts to see whether or not the plaintiff's grievance is well founded What the defence may ultimately be nobody knows, because the door has been closed upon the plaintiff before that stage was reached. It is impossible to discover it from the pleadings and one is bound to observe that one's suspicions are invariably aroused against defendants who shelter themselves behind pleas which disclose nothing on the facts or merits of the case. The defendants who have been sued, and presumably rightly sued, because the plaintiff cannot know,—no member of the public can know,—what goes on behind the doors of the Municipal body, are the Municipal Board itself and individual members, including the Executive Officer. If liability is eventually established for damages, that liability, in order to be placed upon the right shoulders, must be decided according to the ordinary general principles of principal and agent. No individual member of the Board can be made liable in his own pocket, separately and independently of the Board, for an act in which he had no part or lot himself and which he did not in any way authorise. On the other hand, any individual member of the Board who either expressly or indirectly encouraged, incited, directed, or approved of, in other words, aided and abetted the attempt which was undoubtedly made by somebody to deprive the plaintiff of his right to be on the candidates' list would be liable in his own pocket, independently altogether of the question whether or not the Municipal Board would be liable as well. The Municipal Board as principal would only be liable for the act, *i. e.*, the public funds of which the Municipality are custodians and out of which they will have to pay any damages for any corporate act committed by them, would only be liable for an act done by themselves informally, or formally by way of resolution, or by a committee of authority like the revising authority appointed by them, or by one of their servants doing what he did, although wrongfully, at a time and in a manner when and in which he is employed to do it by the Municipality, if he did it improperly, *i. e.*, if the act were done by a clerk whose duty it was to fill in the plaintiff's name correctly

and he filled it incorrectly in the ordinary course of business, the Municipality would be responsible for that.

It is perhaps desirable to say quite clearly, although it appears from what we have said already, that the ground on which the case was remanded, namely, the re consideration of the issue as to whether the Board should be declared to be altogether invalid and improperly constituted because one of the names on its election list is wrongly entered, is one which no Court ought to have entertained at all and which the lower Court should disregard and strike out of the issues altogether. In its place an issue must be put which we ourselves frame:—"What damages, if any, ought the plaintiff to recover, and from whom, in respect of the wrongful omission to record his name correctly on the candidates' list?"

This leads us to some further observations and further directions which, we think, under the special circumstances of this case and of its public importance, we ought to make. In a case of this kind, as we had occasion to remark the other day in cases of an agent suing a principal who has all the figures in his possession, or a partner suing a firm which has all the accounts and books in its possession, a plaintiff is absolutely at the mercy of the defendant who knows the facts unless he takes the steps which the law has provided, and unless the Court aids him in taking those steps, to discover the relevant documents which are in the possession of the defendant. So far as we know, there is really no power except in a suit, unless it be the power under the Criminal Procedure Code by means of a search warrant, by which any member of the public can get at documents relevant to the injury which he has suffered, if the public body which has the custody of these documents chooses to sit on them. The plaintiff in this case quite clearly, whatever else may be said about his motives, realising the difficulty, stated in his plaint that he did not know who was the author of his grievance but that it was impossible to resist the conclusion that his name was intentionally removed from the list. He has a right, and any Court trying such a suit has the duty, to insist that all documents in existence or which had been in existence which throw light on that question must be produced. The plaintiff made an effort to obtain discovery by the rather feeble machinery of a notice to produce the only effect of which is, if the other side refuses to produce, to entitle you to prove your own copy, and, as you have never seen the original it is not a very valuable right. That distinction is often lost sight of. A notice to produce is not a subpœna nor is it any part of the machinery for discovery. It merely gives you the right, if it is ignored, to prove any copy in your possession. Discovery is the machinery by which you discover what documents are in existence which are not in your possession. The defendants, not unnaturally, met the plaintiff half way, saying, no doubt correctly, that there were too many papers to file at that stage and that some might be lost, but they undertook to produce them at the proper time. It does not surprise us that the proper time never arose. It seldom does when vague promises of that kind are made. But under Order XI, rule 12 any party, like the plaintiff in this case, may without filing an affidavit apply to the Court for an order directing the other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. We think that in a case of this kind the plaintiff ought to have discovery, and it is not too late, and we direct the lower Court before hearing this suit again on the merits to make an order under that rule if the plaintiff makes a proper application, and not to reject it on the ground that it has been made too late. It is necessary in the case of a public body to explain how the rule should be worked. In the first place, the contention already made by the Board's Counsel that there are too many papers is based upon a misunderstanding. It is not necessary to produce all the papers in the possession of the Municipality, relating to the electoral roll and the candidates' list, of any kind whatever. All that is required is to produce for inspection the documents relating to the entry of the plaintiff's name on the candidates' list, and the electoral roll and every document, through whatever stage it has passed, relating to the plaintiff's name, whether there has been any alteration, addition, or subtraction from the original entry in such

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rolls of the plaintiff's name, and any correspondence between the members of the Board and the Executive Officer or Secretary or other official or clerk of the Board relating to the plaintiff's name and the corrections or alterations made on the list relating to the plaintiff. It is not necessary to flood the Court. It would be a breach of duty if the Executive Officer or the Secretary attempted to flood the Court with a number of irrelevant documents. If anything has been destroyed or weeded out it must be included by description in the affidavit in the class of documents which have been in the possession of the Municipality. There must be no attempt to bark that clause, which has been put in the rule for good reason. If a document has been in their possession, and is not now, its disappearance must be explained by an officer of the Board who knows what has become of it and why and when it was destroyed or removed. Lastly, following the ordinary practice in England with reference to a Municipal Corporation or limited company, the affidavit must be made on behalf of the Municipal Board by the Chairman or the Executive Officer, who, making their affidavits jointly as such officers, must swear that they have made all necessary enquiries of all employees in the Board with reference to the documents which they swear to in their affidavit, and if there is any document to which they make any objection, legally or otherwise, to produce, although it is relevant to this question, they must take their objection in the affidavit and the Court must decide it before hearing the case.

The appeal must be dismissed with costs.

STUART, J.—I concur in the order proposed,

J. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 33 OF 1921.

October 26, 1921.

Present:—Pandit Kanhaiya Lal, J. C.

BASANT LAL AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

SAJJAD HUSAIN—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 90—Execution of decree—Notice—Subsequent applications, continuation of first—Omission of fresh notice—Irregularity—"Shall be done" and "shall not be done," distinction between.

Where two successive applications made by the decree-holders for execution of a decree are practically applications to continue the previous execution proceeding the issue of a fresh proclamation under Order XXI, rule 66 of the Civil Procedure Code when the necessary particulars were duly ascertained in the previous execution proceeding is not absolutely necessary and if necessary the omission is a mere irregularity which can be made a ground for setting aside the sale under Order XXI, rule 90 of the Civil Procedure Code. [p. 989, col. 2]

A distinction must be drawn between cases in which a Court or an official omits to do something, which a Statute enacts shall be done, and cases in which a Court or an official does something which a Statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of a prohibited thing is *ultra vires* and illegal. [p. 984, col. 2.]

Appeal against a decree of the Subordinate Judge, Lucknow, dated 17th May 1921.

Mr. *Mukand Behari Lal*, for the Appellants.

Mr. *Laxmi Narain Shukla*, for the Respondent.

JUDGMENT.—This appeal arises out of an execution proceeding and the question for consideration is, whether the order of the Court below, setting aside the sale of an 8-annas share of a certain house, was justified and warranted by law.

In execution of a decree for sale of that house and other properties a notice was issued under Order XXI, rule 66 of the Code of Civil Procedure to the judgment-debtors, including the present objector, Sajjad Husain, asking them to furnish information as to the particulars to be specified in the proclamation of sale. The proclamation was issued thereafter and the property comprised in the decree was directed to be sold in four lots. Two of those lots were purchased by

Sajjad Husain, who was a transferee of some property from the original mortgagor. For the third lot an offer of Rs 1,000 was received; but the Court executing the decree considered that offer insufficient. For the 4th lot an offer of Rs. 50 was received; but that offer too was considered inadequate. The sale of both these lots was, therefore, adjourned; and as the decree-holders took no further steps to proceed with the sale, the execution proceeding was struck off on the 29th October 1919.

The decree holders applied again on the 17th December 1919 for the issue of a proclamation of sale in respect of lots Nos. 3 and 4 and asked that the sale of those properties might be proceeded with. They referred in their application to the proceedings which had taken place on the previous occasion and stated that the copies of the *khasra* and map then filed might be perused. As this application was within one year from the date on which the previous application for execution was dismissed and the necessary particulars required to be entered in the proclamation of sale had already been ascertained in the previous proceeding, the Court directed the issue of a proclamation of sale without the issue of a fresh notice under Order XXI, rule 66, of the Code of Civil Procedure. There was no higher bid than one for Rs. 1,500 and as the estimated value of the properties was about Rs. 2,500 the sale was again adjourned and the execution proceeding was struck off on the 20th February 1920.

The next application for execution was made on the 3rd March 1920. The decree-holders referred again to the proceedings taken on the first application and asked that the proclamation of sale might be re issued. The Court did so without issuing a fresh notice under Order XXI, rule 66 of the Code and the property in question was eventually sold and purchased by the decree-holders for Rs. 1,200. The sale took place on the 28th February 1920 and was confirmed on the 7th June 1920. No objection was filed by the present objector under Order XXI, rule 90 of the Code. The present objection was filed on the 1st March 1921, which the Court below has allowed. The contention of the objector was that the sale was effected in his absence without the issue of any notice to him under Order XXI, rule 66, and that he had suffered material injury in consequence

It is not disputed that the property was worth much more than the amount fetched at the auction-sale. But if there were no bidders forthcoming to offer an adequate amount, the Court, which had already adjourned the sale twice, had no option but to close it for such price and as could then be realized. The successive applications made by the decree-holders on the 7th December 1919 and the 3rd March 1920 were practically applications to continue the previous execution proceeding and the issue of a fresh proclamation under Order XXI, rule 66, after the necessary particulars had been duly ascertained in the previous execution proceeding, was not absolutely necessary. No purpose could have been served by issuing such a notice afresh when the necessary particulars had already been once ascertained. Even if the issue of such a notice had been necessary, the omission to issue it would have been nothing more than a mere irregularity, which could have been made a ground for setting aside the sale, if material injury had resulted therefrom, under Order XXI, rule 90 of the Code of Civil Procedure, had an application to set it aside been made within the period of 30 days specified in Article 166 of the Indian Limitation Act (IX of 1908). As pointed out in *Rameshur Singh* v. *Sheodin Singh* (1), a distinction must be drawn between cases in which a Court or an official omits to do something, which a Statute enacts shall be done, and cases in which a Court or an official does something which a Statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of a prohibited thing is *ultra vires* and illegal. In *Bogal Chunder Mookerjee* v. *Rameshur Mundul* (2) the omission to issue a fresh proclamation of sale was held to be a mere irregularity and did not *ipso facto* vitiate the sale. In *Tasadduk Rasul Khan* v. *Ahmad Husain* (3) their Lordships of the Privy Council held

(1) 12 A. 510 at p. 521, A. W. N. (1890) 188; 6 Ind Dec. (N. S.) 1167.

(2) 18 C. 496; 9 Ind. Dec. (N. S.) 331.

(3) 21 C. 63; 20 I. A. 176; 17 Ind. Jur. 584; 6 Sar. P. C. J. 824; Rafique and Jackson's P. C. No. 131; 10 Ind Dec. (N. S.) 676 (P. C.)

that the non-compliance with the provisions of section 290 of the old Code of Civil Procedure by which an interval of thirty days was required to intervene between the date of the servies of the proclamation and the date of the sale amounted only to a material irregularity and did not render the sale a nullity.

The failure to issue a notice under Order XXI, rule 66 of the Code of Civil Procedure is a much less serious omission than the holding of a sale before the lapse of the pericd required for a notice to the intending purchasers. In *Thekkedath Neelu Neithiar* v. *Subramania Moothan* (4) it was held that the failure to give notice to the judgment-debtor before settling a proclamation of sale would not of itself invalidate the sale.

Article 166 of the Indian Limitation Act (IX of 1908) is wide enough to include the grounds on which the sale is now sought to be set aside and does not allow a period of more than 90 days from the date of the sale for a motion to have it set aside.

There is no question of fraud, because the decree-holders had referred to the steps which they had already taken in the previous execution proceedings and asked the Court merely to proceed with the sale. Had the Court then insisted on making a fresh enquiry and issuing a notice under Order XXI, rule 66, there is no reason to think that the decree-holders would not have complied with the order. The objector was in Burma at the time the sale was held; but the house in question must have been in the occupation of some person on his behalf at the time. There is nothing to indicate that the decree-holders had deliberately done anything to keep the objector out of the knowledge of the projected sale and Article 181 of the Indian Limitation Act (IX of 1908) has, therefore, no application.

The question of injury is immaterial because no application to set the sale was made within the time allowed by law.

The appeal is, therefore, allowed and the order of the Court below is set aside. The appellants will get their costs from the respondent in both the Courts.

J. P. *Appeal allowed.*

(4) 53 Ind. Cas. 809; (1919) M. W. N. 897; 11 L. W. 59.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 168 OF 1920.

May 9, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

RAMASAMI AIYANGAR—PETITIONER—APPELLANT

versus

NARAYANA AIYANGAR AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 182, Expl I—Decree for partition between plaintiff and defendants—Joint decree—Execution—Limitation.

On 9th December 1901 a partition decree awarded the plaintiff and each of five defendants a share in certain properties, leaving the share of each to be ascertained. On plaintiff's application the shares were ascertained and one share delivered to plaintiff. One of the defendants subsequently applied for allotment and delivery of his share: the share was allotted, and on his applying on 9th April 1912 it was delivered to him. On 9th December 1913 another defendant sued to obtain his share, but, by order of the Appellate Court, his plaint was treated as an application in execution as having been presented on 9th December 913, when it was objected that it was out of time having regard to the three years rule:

Held, that the partition decree should be regarded as a joint decree the execution of which was subject to the second portion of Explanation I to Article 182 of the First Schedule to the Limitation Act, that the defendant was entitled to count the time from the last application for execution, *viz.*, the 9th April 19 2, and that, therefore, the application was not barred by limitation. [p. 991, col. 2]

Appeal against the appellate order of the Subordinate Judge, Salem, in Appeal Suit No. 17 of 1920, preferred against the order of the District Munsif, Namakal, in Execution Petition No. 27 of 1917 in Original Suit No. 48 of 1901.

FACTS appear from the judgment.

Messrs. *N. Swaminatha Iyer* and *K.G. Srinivasa Aiyar*, for the Appellant.—The decree was a partition decree and was a joint decree within the meaning of Explanation I to Article 182 of the Limitation Act. The third defendant is entitled to count time from the date of the last application by the 4th. The application is, therefore, in time. The decree as a whole should be taken into consideration, and its execution must be subject to the second portion of the Article *Sheikh Khoorshed Hossein* v. *Numbee Fatima* (1), *Mohun Ohunder Kurmokar* v.

(1) 3 C. 551; 2 C. L. R. 187; 1 Ind. Dec. (N. S.) 935

Mohesh Chunder Kurmokar (2).

Mr. *B. Sitaram Row*, for the Respondents.—The application by fourth defendant was not jointly for himself and others nor did it seek relief for the benefit of all the defendants. He only asked for delivery to him of his share. That will not save limitation for the relief open to others in execution.

JUDGMENT.—This appeal relates to the execution of what purports to be a partition decree passed on 9th December 1901. It was passed under the former Code and it awarded to plaintiff and each of the five defendants one share in the suit property, that share to be ascertained. The course taken by the subsequent proceedings was that, on plaintiff's application, the six shares, into which the property was to be divided, were ascertained but no allotment or delivery was made except of one share to plaintiff. Later, fourth defendant applied for allotment and delivery to him of his share and obtained allotment, but not delivery, the latter being ordered only on his filing a second petition, Execution Petition No 439 of 9th April 1912. The third defendant, here appellant, sued on 9th December 1913 to obtain his share. But the Appellate Court directed that his plaint should be treated as an application in execution; and it is with his application regarded as having been presented on 9th December 1913 that we have to deal. The main objection to it is that it is out of time with reference to the three years rule.

Third defendant's first answer to this objection is that the decree cannot be regarded as having been passed in his favour until the ascertainment of his share is complete; and it will not be complete until his present application is disposed of. Shortly, there can be no question of execution being barred against him, when the suit, so far as he is concerned, is still pending. *Krishnamachariar* v. *Kuppammal* (3) however, negatives this contention; and we must, therefore, deal with the objection more closely and with the alternative answer attempted, that the decree was passed in favour of several persons jointly within the meaning of Explanation I to Article 182, Schedule I of the Limitation Act and that third defendant can, therefore, count time from the last application for execution by another of those persons, *viz.*, from Execution Petition No. 439 by fourth defendant for delivery of his share on 9th April 1912

It is urged and it is no doubt the case that fourth defendant's application for delivery was not made by him in any sense jointly or to enforce any joint right to relief or for the benefit of his fellow decree-holders jointly with himself and in fact it was made by him severally distinguishing the portion of the subject-matter deliverable to him and so far could have been made with propriety in execution of a several decree, as such a decree is defined in the earlier part of the Explanation. But although there may be some anomaly in the succession of the different kinds of execution appropriate to joint and several decrees, which is involved, it does not follow that the description of the decree for the purposes of the application of Article 182 must be altered. That description attaches for those purposes in the words of the Explanation "when the decree has been passed" and, in the absence of provision to the contrary, it must be applied once for all and to the decree as a whole and for all purposes. This view is consistent with the decisions in *Sheikh Khoorshed Hossein* v. *Numbee Fatima* ( ), *Mohun Chunder Kurmokar* v. *Mohesh Chunder Kurmokar* (2) and *Narayan Ramchandra* v. *Vithal Sakharam* (4). The decree before us must, therefore, for the present purpose be regarded as a joint decree; and its execution must be subject to the second portion of the Explanation to Article 182.

The third defendant's application being in time, the remaining objection is that it is for the ascertainment and delivery not only of his own share but also of that of fifth defendant, alleged to have been transferred to him under Exhibit A, and that, as regards the latter, he has no transfer of fifth defendant's right to execute. It is not necessary for us to consider how far a transfer of property carries with it generally the right of the transferor to execute a decree for its possession. For, in the present case, Exhibit A clearly refers to fifth defendant's right under the decree and we are prepared to regard that right as transferred with the property

(2) 9 C. 568; 4 Ind. Dec. (N. S.) 1026.
(3) 31 M. 540; 5 M. L. T. 222.

(4) (1833) 6 Un. Bom. P. J. 233,

itself. The question whether Exhibit A evidences a transfer enforceable on its merits to third defendant alone has not so far been dealt with by the lower Appellate Court.

We, therefore, allow the appeal against the appellate order, set aside the lower Appellate Court's order and remand the appeal to it for disposal on the further question above referred to and in the right of the foregoing. Costs to date here and in the lower Courts will follow the result and be provided for in the lower Appellate Court's order.

M. C. P.
W. C. A.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1605 OF 1921.

December 20, 1921.

Present:—Mr. Justice Abdul Raoof.

GHANAYA—PLAINTIFF—APPELLANT

versus

HAZARA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation Sale in execution of decree—Collateral, right of, to challenge alienation.

The right of a collateral to challenge an alienation under the Customary Law of the Punjab extends to the case of a sale held in execution of a decree.

Second appeal from a decree of the District Judge, Jullundur, dated the 9th May 1921, affirming that of the Munsif, First Class, Nawanshahr, District Jullundur, dated the 8th November 1920.

Lala *Fakir Chand*, for the Appellant.

Mr. *Badr ud Din Qureshi*, for the Respondents.

JUDGMENT.—This second appeal has arisen under the following circumstances.

The defendant No. 2 first obtained a mortgage over the house from defendant No. 1. Then he attached the house in execution of a money-decree against defendant No. 1 and had it sold by an order of Court. The plaintiff, as a collateral, instituted the suit for a declaration that the mortgage as well as the execution sale shall not affect his reversionary interests inasmuch as they were without consideration and necessity. Both the Courts below have concurred in dismissing the suit on the following grounds:

(1) That a sale conducted in obedience to an order of Court cannot be challenged by a reversioner in this manner, and

(2) That as the mortgage merged into the sale no decree could be passed in respect of it also.

The plaintiff has come up in second appeal to this Court and the decisions of the Courts below are contested on his behalf by his learned Vakil, Mr. Fakir Chand. The learned Vakil relies upon the Full Bench ruling reported as *Sadhu Singh* v. *Secretary of State for India* (1), where it was held by a majority of the Judges constituting the Full Bench that where ancestral immoveable property held by a person subject to Punjab Customary Law is attached and sold by order of a Criminal Court under section 88 of the Code of Criminal Procedure the sale conveys the life interest of that person only, and does not extinguish the right of inheritance after his death of his male lineal descendants or of collaterals descended from the original holder of the property.

A perusal of the judgment of the majority of the Judges clearly shows that the rule there laid down applies in principle to the facts of the present case also. In this view it is not necessary to express an opinion, with regard to the question of the merger of the mortgage into the sale.

I accept the appeal and setting aside the decree of the lower Appellate Court remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, for a re-trial. Costs will abide the result. Court-fee on the memorandum of appeal in this Court shall be refunded.

Z. K.

Appeal accepted.

(1) 18 P. R. 1908 (F. B.); 19 P. W. R. 1908; 156 P. L. R. 1908.

PONNIAH TIRUMALI VANDAYA, *In re*.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 383 OF 1921.

November 4, 1921.

Present :—Mr. Justice Kumarasami Sastri.

In re PONNIAH TIRUMALI VANDAYA THEVAR AND OTHERS—PETITIONERS.

Criminal Procedure Code (Act V of 1893), s. 209 —Powers of Committing Magistrate—Committal to Sessions Court, when to be ordered.

All that a Committing Magistrate dealing with a case has to do under section 209, Criminal Procedure Code, is to see if a *prima facie* case has been made out, but he is not precluded from drawing reasonable inferences from facts deposed to by the prosecution witnesses where more than one inference can be drawn and to discharge the accused where the evidence is unworthy of credit. He has to see whether the evidence is such as to render the case a fit one for the Jury to decide between conflicting probabilities or whether it clearly points to there being no *prima facie* case for the accused to meet.

Petition under sections 435 and 439, Criminal Procedure Code, and section 107 of the Government of India Act, praying the High Court to revise the order of the District Magistrate, Ramnad, in Criminal Revision Case No. 5 of 1921 presented against the judgment of the Sub-Divisional First Class Magistrate, Sivakasi, in Criminal Case No. 73 of 1920.

Messrs. *T. Rangachariar* and *A. Swaminatha Iyer*, for the Petitioners.

Mr. *J. O. Adam*, Public Prosecutor, for the Crown.

ORDER.—The petitioners were charged under sections 147, 148, 379 and 323, Indian Penal Code, and the First Class Magistrate of Sivakasi discharged the accused as he was of opinion that no *prima facie* case was made out. On revision the District Magistrate directed the accused to be committed for trial to the Sessions Court. He was of opinion that if theft was the common object of the rioters the offence becomes one of dacoity and so triable exclusively by the Court of Session. He was also of opinion that the Magistrate is bound to commit if there is any evidence in support of the charge.

I am unable to agree with the view taken by the District Magistrate. In the present case the First Class Magistrate has written a careful judgment in which he discussed the evidence on the side of the prosecution and comes to the conclusion that it is not untrustworthy. The District Magistrate does not go into the evidence and says that the Magistrate's appreciation of the evidence is wrong. He thinks it would be out of place to go into the evidence.

Section 209 of the Code of Criminal Procedure gives the Magistrate power to discharge the accused charged with offences triable exclusively by a Court of Session if after going into the evidence he is of opinion that there are not sufficient grounds for committing the accused person for trial. To hold that, where there is some evidence, however untrustworthy in the Magistrate's opinion, he is bound to commit a person for trial will be to make the preliminary enquiry directed by the Code a mere matter of form while it is intended to be a safeguard against false or frivolous cases being sent up for trial and innocent men from being put to the trouble and expense of undergoing a trial in the Court of Session.

It is no doubt true that all that a Committing Magistrate has to see is, whether there is a *prima facie* case made out and that it is not his business to usurp the functions of the Sessions Judge or the Jury and I agree with the observations of Bakewell, J., in *National Bank of India, Ltd.* v. *Kothandarama Chetti* (1) so far. I respectfully dissent from his view that the Magistrate cannot draw reasonable inferences from facts deposed to by the prosecution witnesses where more than one inference can be drawn, and agree with the view taken by Sundara Iyer, J.

In *Bai Parvati, In re* (2) it was held that where the Committing Magistrate finds that the evidence tendered for the prosecution is unworthy of credit it is his duty, under section 209 of the Code of Criminal Procedure, to discharge the accused. A similar view was taken by Sadasiva Aiyar, J., in *Danappa Pillai, In re* (3).

It is not, as pointed out in *Bai Parvati, In re* (2), easy to draw the line between the Magistrate's duty and the Sessions Court's prerogative and each case must be

(1) 21 Ind. Cas. 129; (1913) M. W. N. 723; 14 M. L. T. 200; 4 Cr. L. J. 529.

(2) 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L. R. 923; 11 Cr. L. J. 692.

(3) 28 Ind. Cas. 741; 16 Cr. L. J. 373

SHIAMJI v. EMPEROR.

treated on its merits. What the Court has to see is whether the evidence is such as to render the case a fit one for the Jury to decide between the conflicting probabilities or whether it clearly points to there being no *prima facie* case for the accused to meet. In arriving at a decision the Committing Magistrate must have discretion and power to weigh the evidence.

In the present case the Magistrate has given excellent grounds for the conclusion he has arrived at. I reverse the order of the District Magistrate.

M. C. P.

Order reversed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 187 OF 1921.

February 14, 1922.

Present:—Sir Henry Drake-Brockman, Kt., J. C., and Mr. Batten, J. C.

SHIAMJI—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Penal Code (Act XLV of 1860), ss. 420, 423, 511—Offence requiring performance of series of acts—Commencement of series—Attempt—Preparation—Completion of act impossible—Attempt, whether punishable—Criminal Procedure Code (Act V of 1898), s. 182, scope of.

Where the commission of an offence requires the performance of a series of acts and a person commences this series with a view to carry it out to its completion, he has, in the language of section 511, Indian Penal Code, done an act towards the commision of the offence in the attempt to commit the offence. [p. 996, col. .]

Section 182, Criminal Procedure Code, does not apply only to cases where some place of trial cannot be laid down with absolute certainty but it applies to cases where the offence is a continuing one [p 996, col. 1.]

The accused was charged for cheating *A.* by sending Railway receipts from Harda to Bombay for 300 bales of cotton when he had only 200 bales, inducing *A* to pay Rs 40,000. It was urged for the accused that he should have been tried at Bombay and his trial at Harda was without jurisdiction and had caused failure of justice:

Held, that as the procuring of the receipt was an essential part of the deception which went to make up the offence of cheating and as nothing was left to be done for the accused but to present the receipt and to effect the delivery his act was more than that of preparation and his trial at Harda was perfectly legal [p 996, col. 1]

An attempt is possible, even when the offence attempted cannot be committed. [p. 999, col. 1.]

Application for revision of an order of the Magistrate, First Class, Harda, dated the 22nd June 1920, in Criminal Case No. 79 of 1920.

Mr. *G. L. Subhedar*, for the Applicant.

Mr. *S. B. Gokhale*, for the G. I. P. Railway.

Mr. *G. D. Dick*, for the Crown.

ORDER.

DRAKE-BROCKMAN, J. C.—The applicant, Shiamji, has been re-tried in accordance with the order passed by Batten, A. J. C., in Criminal Appeal No. 153 of 1920 on the 12th October 1920. In the new charge it is alleged that, by sending the Railway receipts (Exhibit P-38 for 200 bales and Exhibit P-42 for 100 bales) dated the 27th March 1919 to Arjun Khemji at Bombay when he had only 200 bales at Harda, the applicant deceived that firm and fraudulently induced it to pay Rs. 40,000. This charge was framed on the 22nd November 1920, the first date on which the applicant appeared after the disposal of his appeal. The Magistrate examined no additional witnesses for the prosecution. The applicant caused a number of witnesses already examined to be re summoned for cross examination and after this had been done made the following statement when called upon to enter upon his defence:—

"I am not guilty. I did not cheat Arjun Khemji. I had sufficient credit with him to cover the amount he paid on the *hundis* or the amount of *hundis*, taking into account the value of 200 bales which the Judicial Commissioner has found belonged to me on the 27th March 1919 as well as the balance which stood in my favour in Arjun Khemji's account on the 27th March 1919. I adduce no evidence in my defence. I do not wish to summon any."

The trying Magistrate, who was evidently of opinion that Batten, O. J. C., had finally determined that Arjun Khemji would not have advanced Rs 40,000 had they known that the two Railway receipts really covered 200 bales only, considered that the firm would not have taken into account any balance which the applicant already had at his credit. The practice of the firm being to advance only 65 to 70 per cent,

on the value of goods for which Railway receipts had reached them, the Magistrate held that Rs. 40,000 was the maximum amount which the firm would naturally have advanced in respect of 300 bales worth Rs. 63,000, the market-value on the 27th March 1919. Considering that the accused had been given an opportunity for rebutting the charge by proving that he had 300 bales and not 200 only to consign, he convicted and sentenced him under section 420, Indian Penal Code, to 18 months' rigorous imprisonment.

The applicant appealed to the Sessions Judge who took the same view. He was of opinion that the 300 bales of which Arjun Khemji eventually took delivery were really consigned under Railway receipts Nos. 162/64 (Exhibit P 28), 163/6 (Exhibit P 29) and 162/1 stake (Exhibit P-30) each for 100 bales. He had no doubt that the applicant intended to make good the shortage of 100 bales by subsequently procuring and despatching that quantity as he had done on a previous occasion. The offence was regarded as a serious one and the sentence was maintained.

The principal point pressed in this Court is that Arjun Khemji having advanced money (Rs. 40,000) on Exhibits P-38 and P 42 the cheating for which the applicant has been convicted took place at Bombay and the trial should, therefore, have taken place at Bombay as required by section 177, Criminal Procedure Code. It is urged, on the authority of *Queen* v. *Piran* (1), that there has been a failure of justice which prevents the mistake of jurisdiction being cured by section 531, Criminal Procedure Code. In Bombay the case would have been tried by a Presidency Magistrate to whom jurisdiction in that town is given by section 20, Criminal Procedure Code, and the appeal would have lain under section 411 to the High Court where it would have been heard by two Judges. It is also pointed out that a trial in Bombay would have been an entirely fresh one and that the trying Magistrate would have been less influenced by the pronouncements in the judgment of Batten, A. J. C., than the Harda Magistrate was; also that the accused would have been examined with special reference to the charge of cheating Arjun Khemji had such a charge been framed. Stress is also laid for the applicant on the fact that Arjun, the member of the firm by whose order Rs 40,000 was advanced, has not been examined and it is contended that this omission would not have occurred had the trial taken plaes in Bombay.

For the Crown it is contended that inasmuch as Exhibit P-42 (Railway receipt 162/32) was taken at and despatched from Harda, the Court at that place had jurisdiction. The contention is based on that portion of section 182, Criminal Procedure Code, which runs as follows:—

"Where an offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas".

For the applicant it is urged that taking of the false Railway receipt constituted no more than preparation for the final act of cheating and so was not one of a series of acts making up that offense. The applicant's position is said to be similar to that of a man who purchases a sword at one place and commits a murder with it at another. Cheating, according to the definition in section 415, Indian Penal Code, consists of two acts;

"(1) deceiving any person.

(2) fraudulently or dishonestly inducing the person so deceived to deliver any property to any person."

Section 182, Criminal Procedure Code, is said to apply only when there is room for doubt as to the local area in which a trial should take place, whereas no room for doubt can be said to exist where the offense committed is cheating.

In my opinion the applicant by taking the false Railway receipt did more than really prepare for cheating Arjun Khemji. He did what was in the circumstances an act essential to causing the deception and forthwith made the document over to his relative Deoji (P. W. No. 8) for delivery to Arjun Khemji. The carrier was left no discretion to retain the receipt and, in these circumstances, it seems to me clear that even if Deoji had not delivered the receipt, the applicant would have been guilty of an attempt to cheat. As re-

(1) 13 B. L. R. App. 4; 12 W. R. 65 Cr.

marked by J. D. Mayne in his Criminal Law of India (page 926, 3rd Edition), the real difficulty in distinguishing between preparation and attempt arises in determining where a given act or set of acts passes from the former stage into the latter. Where the commission of an offence requires the performance of a series of acts and the person commences this series with the view to carry it out to its completion, he has, in the language of section 511, Indian Penal Code, done an act towards the commission of the offence in the attempt to commit the offence. This view is supported by the decision in *Empress of India* v. *Mula* (2). There a money-lender sent one of his debtors to personate another and to purchase in that other's name a stamped paper in consequence of which the stamp-vendor endorsed the other debtor's name on the paper as purchaser. The intention was that the endorsement might be used against the other debtor in a judicial proceeding. It was held that the offence of fabricating false evidence had been actually committed and that the money-lender was properly convicted of abetting the commission of that offence. In the present case the procuring of the receipt was an essential part of the deception which went to make up the offence of cheating. So far as the applicant is concerned, nothing was left to be done but to present the receipt and to effect the delivery he selected an innocent agent whose act must, in the circumstances, be taken to be his own.

I consider it incorrect to regard section 182, Criminal Procedure Code, as applicable only to cases where some place of trial cannot be laid down with absolute certainty. For example, the section applies to cases where the offence is a continuing one, so that if *A* steals a buffalo in District W and takes it through District X into District Y, he may be tried for theft in any of the three districts though it is beyond doubt that District W would be a proper place of trial.

On the whole, I conclude, though not without hesitation, that the applicant was triable at Harda.

(2) 2 A. 103; 1 Ind. Dec. (N. s.) 616.

The next point pressed is that, according to the Sessions Judge, the applicant doubtless intended to obtain and despatch 100 bales to make up the full quantity of 300. The correct inference from this is said to be that the applicant had no fraudulent or dishonest intent. It is certainly a fact that the applicant had obtained 230 bales from the Mitsui Bhusan Company on the 23rd and 25th March 1919 and that on the 26th *idem* he had at Harda station 302 bales in all.

Moreover, the Mitsui Bhusan Company was under contract to supply him with 834 bales, of which 604 were still to be delivered. It was not till 4 P.M. on the 27th March that Ranchordas (P.W. No. 5) took over 100 bales from the applicant in part satisfaction of the applicant's debt to Radhakisan Jaikisan. In this connection, however, it has to be remembered also that the applicant had on the 22nd March made over to the agent of the Mitsui Bhusan Company 2 *hundis* of Rs. 25,000 each for which he had to send a consignment to Arjun Khemji. Whether the applicant obtained Exhibit P 42 (Railway receipt 162/32) before or after being obliged to relinquish 100 bales out of 300 to Ranchordas, it seems impossible to hold that he acted otherwise than fraudulently in allowing the receipt not represented by goods to reach Arjun Khemji. He did not, when examined at the first trial or in his defence at the second trial, allege any intention to make good the shortage; indeed, he could not well have done so seeing that he professed to have had 400 bales available when he relinquished 100.

For the applicant reliance is placed upon Illustration (*g*) to section 415, Indian Penal Code, which runs as follows: —

"*A* intentionally deceives *Z* into a belief that *A* means to deliver to *Z* certain quantity of indigo plant which he does not intend to deliver and thereby dishonestly induces *Z* to advance money upon the faith of such delivery. *A* cheats; but if *A* at the time of obtaining the money, intends to deliver the indigo plants and afterwards breaks his contract and does not deliver it he does not cheat, but is liable only to a civil action for breach of contract."

The facts of the present case, however, are quite different. The applicant admittedly knew that he should not have drawn any *hundi* on the strength of a consignment unless he had made over the goods to the Railway Company and received from Arjun Khemji an acknowledgment for the Railway receipt. In these circumstances, I do not think he can be heard to say that he intended, if possible, to find 300 more bales and despatch them by the time a waggon was available. He knew that there would be delay in loading and his action may be compared to that of a thief who, obtaining access to a receptacle which is only opened at intervals, abstracts money which he hopes to re-place before next opening. In the illustration relied upon, *A* was not found to be already in possession of indigo when he took money from *Z* and herein lies the difference between that case and the present one.

The fourth and fifth grounds in the application for revision are not pressed, the applicant's Counsel not challenging the finding that the applicant had only 200 bales available on the 27th March 1919 for despatch to Arjun Khemji.

The only other point which has to be considered is concerned with the attitude of Arjun, the then managing partner in Arjun Khemji, with respect to the sum of Rs. 40,000 which he paid on the two *hundis* given by the applicant to the Mitsui Bhusan Company. It is urged in this connection that the prosecution has failed to show that Arjun would not have paid Rs. 40,000 if he had known that 200 bales only were on their way to Bombay and that according to the evidence of Arjun Khemji's cashier, Jetha Bhai, (P. W. No. 27), given in cross examination after the revised charge was framed the applicant had a sum of Rs. 19,300 at his credit with the firm on the 27th March 1919.

It is an extraordinary feature of this case that though Arjun is said to have been cheated he himself was not examined for the prosecution. Both the trying Magistrate and the Sessions Judge have relied for their finding that so much as Rs. 40,000 would not have been paid on the *hundis* if the Railway receipts sent from Harda on the 27th March 1919 had covered 200 bales only on the evidence of Jetha Bhai to the effect that the practice of the firm was to advance not more than 65 to 70 per cent. of the market value of a consignment. Now, it is true that on the 14th February 1920 when examined in chief Jetha Bhai gave this practice as the reason why Rs. 40,000 were paid upon the *hundis*. At that time, however, no charge of having actually cheated Arjun Khemji was in contemplation and in cross-examination the witness was not questioned about the payment of Rs. 40,000. After the new charge was framed Jetha Bhai was re called for further cross-examination and on the 11th April last made statements from which it would appear that on the 27th March 1919 the applicant had a balance of Rs. 19,300 at his credit with Arjun Khemji. He was re-examined for the prosecution and then stated as follows:

"My master told me to pay Rs. 40,000 on the two *hundis* of Rs. 50,000 and I paid it. I cannot say why he told me to pay Rs. 40,000."

Jetha Bhai was a mere cashier and there is no ground for supposing that he was in a position to state with certainty the reasons which led his employers to make a particular payment. It is no doubt *prima facie* improbable that Arjun, in paying Rs. 40,000, was actuated by any other consideration than that 300 bales of cotton worth about Rs. 63,000 were on their way from Harda to Bombay. Section 60 of the Indian Evidence Act, however, requires that the best evidence of which a fact is susceptible should be given and, in the circumstances, no one but Arjun himself can say with certainty that he would not have paid Rs. 40,000 had he known that 200 bales only were available for despatch on the 27th March 1919 or what his actual reasons for making the payment were.

The Crown is unable to explain why Arjun himself was not examined by the prosecution at any stage of the trial and the Standing Counsel raised no objection to his being examined now. In my opinion it is essential, in the interests of justice, to have this man's evidence and accordingly under section 439, read with section 428, Criminal Procedure Code, I direct that

he be examined by the Sub-Divisional Magistrate, Harda. The applicant will be present when the additional evidence is taken, remaining on the same bail until his application has been finally disposed of by this Court. The District Magistrate will see that the bonds already given are, if necessary, extended so as duly to secure the applicant's attendance. The evidence to be now taken should be certified to this Court so as to reach it on or before the 18th October and the application will be taken up for final disposal on the 25th *idem*.

BATTEN, J. C.—This order is to be read in continuation of the order of Drake-Brockman, J. C., dated the 10th September 1921. In accordance with the directions therein given Arjun Khemji has now been examined as a witness. His evidence may conveniently be quoted in full:—

"My firm in Bombay is known as that of Arjun Khemji. We are cotton merchants as well as brokers. I am the senior partner of the firm. I know the accused Shiamji. In March and April 1919 I had dealings with Shiamji of Harda in cotton. I remember having received two Railway receipts from Shiamji towards the end of March 1919 and a *hundi* for Rs. 50,000 payable to Mithsu Bhusan and Company. I paid only Rs. 40,000 being 70 per cent. of the value of the goods for which receipts had been received. This is the usual practice of my firm. When I recieve Railway receipts for goods, I first examine the accounts of the person sending the receipts and then I add to that the value of the goods for which Railway receipts have been received at the then market rate and advance 70 per cent. on the total of both. I advanced Rs. 40,000 on the Railway receipts above referred to because the value together with the balance at credit of the accused's accounts amounted to Rs. 40,000 at 70 per cent. Had I known that the accused was sending me 200 bales of cotton instead of 300 for which receipts had been received, I cannot, after this lapse of three years, say whether I would have advanced Rs. 40,000 or not. Had I received a wire from some one in Harda telling me that the accused had deceived me and was despatching 200 instead of 300 bales, but had sent Railway receipts for 300 bales, I cannot still say whether I would have advanced him Rs. 4,000 or not. I advanced Rs. 40,000 on the Railway receipts for 300 bales.

"Cross-examined by Mr. Deoskar.

"Jetha Bai is my cashier. He gave evidence in this Court on my *bahikathas* which he brought with him. The accounts of the accused given by Jetha Bai are correct. Radakishen Jaikishen of Harda never had any dealings with my firm before 1919."

It is contended on behalf of the applicant for revision that, according to this evidence, it is not established that the firm of Arjun Khemji paid Rs. 40,000 to Mitsu Bhusan and Company because Arjun Khemji believed that the two Railway receipts covered 300 bales of cotton, and would not have paid that amount to Mitsu Bhusan if Arjun Khemji had known that only 200 bales of cotton had been despatched. It is further contended that, this being so, there has been no completed offence of cheating.

For the Crown it is represented that the evidence of Arjun Khemji given after such a lapse of time cannot be accepted as convincing. For the value of 200 bales was Rs. 42,000, and of 300 bales was Rs. 63,000. If the Rs. 19,300 already to the credit of the applicant be added to Rs. 63,000, the total comes to Rs. 82,300, 70 per cent. of which is Rs. 57,610, a sum greater than Rs. 50,000. If Rs. 19,300 be added to Rs. 42,000 the total comes to Rs. 61,300,70 per cent. of which is Rs. 42,910. Again 70 per cent. of Rs. 63,000 is Rs. 44,100. It is suggested that if Arjun Khemji had really taken into account the Rs. 19,300 already at applicant's credit, he would have paid Rs. 40,000 on the two *hundis* of Rs. 50,000, since he had no reason to suppose that there were only 200 bales, and must have paid only Rs. 40,000 as roughly 70 per cent. on Rs. 63,000 without taking into account the Rs. 19,300.

Arjun has not been very well examined and it is not made clear why he paid Rs. 40,000 instead of Rs. 50,000 but we must take his evidence as it stands, and that evidence does not prove that he would not have paid Rs. 40,000 even if he had known there were only 200 bales. It is thus not proved that he paid Rs. 40,000 because he believed there were 300 bales

The offense of cheating was, therefore, not complete.

The learned Standing Counsel, however, argues that the applicant is guilty of the offense of attempting to commit the offense of cheating under section 420, Indian Penal Code. The *hundies* were drawn for Rs. 50,000 and the applicant by sending Railway receipts whose apparent value was Rs. 63,000, though their real value was only Rs. 42,000, attempted to cheat by so inducing Arjun Khemji to pay Rs. 50,000. For the applicant reliance is placed on the wording of section 237 (2) Criminal Procedure Code, which runs: "When the accused is charged with an offense, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged". Special stress is laid on the words "that offense" and it is argued that no offense was charged in respect of Rs. 50,000, and that as regards the Rs. 40,000 mentioned in the charge, there can be no conviction of attempt to cheat, since Arjun, according to the evidence might have paid Rs. 40,000, even if he had known that there were only 200 bales of cotton. The words of the charge are set out in paragraph 3 of the Sessions Judge's judgment and the gist of it is given in my learned predecessor's order dated the 13th August 1921.

After careful study of the authorities I am of opinion that the appellant is guilty of the offence of attempting to cheat. The following is an abstract of the law in England on the subject, to be found at page 703 of Volume IX of Halsbury's Laws of England:-

"If a defendant is indicted for obtaining property by false pretences and the evidence proves that the defendant made the alleged false pretences, that they were false, and that the defendant had an intent to defraud, but the evidence fails to prove that the defendant obtained the property or *that the alleged false pretences led to the obtaining* the defendant may be convicted of the misdemeanour of the attempt to obtain by false pretences."

It is now settled law both in England and British India, that an attempt is possible, even when the offense attempted cannot be committed; as, when a person, intending to pick another person's pocket, thrusts his hand into the pocket, but finds it empty. That such an act would amount to a criminal attempt, appears from the illustration to section 511, Indian Penal Code. In doing such an act, the offender's intention is to commit a complete offense, and his act only falls short of the offense by reason of some circumstance which has prevented the completion of the offense. It is sought to distinguish the present case on the ground that the full offence was not impossible for Arjan might have been deceived, but he might on his evidence have paid the Rs 40,000 even if he had known there were only 200 bales, and, therefore, did not pay because he was deceived. But the nature of the obstacle which prevents the offense being completed makes no difference, as is recognised in the words underlined (*italicised*) in the above quotation from Halsbury's Laws of England, which are based on the case of *Reg* v. *Hensler* (3). That case has been referred to and followed in *Government of Bengal* v. *Umesh Chunder Mitter* (4), in which it was held that a person may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is, therefore, not cheated. In the Calcutta case the accused attempted to obtain payment of half currency notes alleging the other halves were lost. The Currency Office knew that the allegation was false, as the other halves had been cancelled and the holder of them had been paid. In that case the Currency Office did not pay the accused and never had any intention to pay. The case of *Reg.* v. *Hensler* (3) is, however, analogous to the present case. The accused was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent to the prisoner 5 shillings, but he stated in his evidence that he knew that the statements in the letters were untrue. It was held that the prisoner might be convicted of an attempt to obtain money on false pretences, and that the offence was committed as soon as the letter was posted. In that case the prosecutor paid the money although he was not deceived, just as in this case Arjun paid the Rs 40,000 irrespective of whether there were 200 bales or 300 bales.

My learned predecessor has observed that by delivering the Railway receipt to Dayji

(3) (1870) 11 Cox C. C. 570, 22 L. T. 691; 19 W. R. 108.

(4) 16 C. 310; 8 Ind. Dec. (N. S.) 204.

for delivery to Arjun the applicant committed an act essential for causing deception, and even if Deoji had not delivered the receipt the applicant was guilty of an attempt to cheat. To send a Railway receipt for 300 bales when there were only 200 was, in the circumstances of the case, clearly fraudulent. The applicant did an act towards deceiving Arjun Khemji into believing that 300 bales had been despatched, with a view to induce Arjun Khemji to pay money to a Japanese Firm. In this view of the case it makes no difference that the charge refers only to Rs. 40,000 since that sum is included in the Rs. 50,000 of the *hundis*, and the applicant's fraudulent intention covered the whole of the money which he hoped to be paid on his behalf on the strength of the false Railway receipt, even though there were Rs. 19,300 already to his credit. I am of opinion that the applicant is clearly guilty of the offence of attempting to commit an offence of cheating under section 420, Indian Penal Code.

All the grounds for revision have now been disposed of.

Under section 423 (1) (*b*) (2), Criminal Procedure Code, I alter the conviction into one under sections 420 and 511, Indian Penal Code, of an offence of attempting to commit an offence of cheating under section 420, Indian Penal Code. As the offence of cheating was not complete, I reduce the sentence to one of rigorous imprisonment for one year.

G. R. D. *Sentence reduced.*

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 57-B OF 1921.

May 30, 1921.

Present:—Mr. Justice Pratt.

R. M. P. A. ANNAMALAI CHETTY—APPLICANT

versus

MRS. BASCH *alias* MA THI—RESPONDENT.

Penal Code (Act XLV of 1860), s. 403—Criminal breach of trust—Jewellery entrusted for sale—Jewellery pledged—Pawnee, whether can be ordered to return jewellery—Magistrate, duty of.

A Criminal Court ought not to usurp the functions of a Civil Court and assist a complainant in recovering goods, which were made over to the accused to dispose of, from the person to whom they were disposed of, merely because the accused did not dispose of them in accordance with the instructions given to him. [p. 10 col. 2]

The complainant entrusted the accused with certain jewellery for sale. The accused, however, pledged them to a money-lender. The Magistrate convicted the accused for criminal breach of trust and ordered the return of jewellery to the complainant:

Held, that as possession of the jewellery was not obtained wrongfully by the accused, the Magistrate was not justified in ordering the return of the jewellery to the complainant in the absence of bad faith on the part of the pawnee. [p. 1001, col. 2.]

Review of an order of the Eastern Sub-Divisional Magistrate, Rangoon, dated the 14th February 1921, passed in Criminal Regular Trial No. 439 of 1920.

Mr. *Camragnac*, for the Applicant.

Mr. *Latker*, for the Respondent.

JUDGMENT.—Some time about the beginning of August 1920, the date is uncertain, Mrs. Basch made over a pair of diamond bangles, two diamond rings a diamond pin and a pair of diamond ear studs (Nadaungs) to Moung Gyi, a goldsmith, to sell on her account in order to raise money required by her for the purchase of a house.

Moung Gyi was a person in whom she placed the fullest confidence in fact, as she said, she considered him almost as her son.

Instead of selling the jewellery Maung Gyi pledged the diamond pin to Annamalai Chetty on the 8th August, the ear studs on the 8th September and the diamonds from the rings on the 10th September.

On each occasion Maung Gyi and his wife executed promissory-notes for the sums advanced and for the money borrowed on the 8th August and 8th September. Maung Nyun, a client of the Chetty, also signed the promissory notes.

Maung Gyi was convicted of criminal breach of trust with respect of these articles and the Magistrate, without giving reasons and apparently without hearing the Chetty, ordered the return of the diamonds and jewellery to Mrs. Basch.

I am asked to revise this order on the ground that the jewellery was handed to Mung Gyi by Mrs. Basch for disposal, that he did not obtain possession fraudulently and that the money was advanced by the Chetty in good faith.

ANNA MALAI CHETTY v. MRS. BASCH.

It is contended on behalf of the Chetty that, under section 178 of the Contract Act, a person who is in possession of any goods may make a valid pledge provided that the person acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person was acting improperly and provided also that such goods have not been obtained from their lawful owner by means of an offence or fraud.

In the present instance possession was not obtained wrongfully. Maung Gyi was entrusted with the articles to sell and had he sold them the property therein would undoubtedly have pased to the buyer.

It is difficult to see why the Chetty should hesitate to take in pledge articles which he admittedly might have bought without fear. In *Stephen Aviet* v. *King Emperor* (1). *A* entrusted some jewels to *B*. to sell. Instead of selling them *B* gave them to his niece *C*. who pawned them to *D*. *B*. was convicted of criminal breach of trust and the Magistrate ordered the return of the jewels to *A*. Irwin, J., set aside the order and directed the return of the jewels to *D*. laying down the broad principle that as *A*. had given the jewels to *B*. to dispose of for money he was not entitled to the assistance of a Criminal Court in recovering them from a person to whom they were so disposed of.

On behalf of Mrs. Basch it is argued that the pawnee was not acting in good faith and must have known that there was something suspicious about the transaction. It is argued that the list of artistles made by Inspector Xavier, when he searched the Chetty's house, shows that in the course of some two months he advanced to Maung Gyi upwards of Rs. 60,000, and received in pledge property to the value of Rs. 2,50,000, and that he must have known Maung Gyi had no right to dispose of all this property. Annamalai Chetty was not cross examined as to this list and was a witness for the prosecution in the breach of trust case. He did not attempt to conceal the articles pledged from the Police, and apparently the loans and the articles pledged were duly entered in his accounts in the ordinary course of business. There is nothing on the record as it stands to show that there was anything in the transaction to raise a reasonable presumption in the pawnee's mind that the pawner was acting improperly.

Maung Gyi was a person who was highly trusted and was given jewels to dispose of by jewellers of standing, as transpires in other proceedings. He was introduced to the Chetty by Maung Aung Nyun, a goldsmith and client of his, who actually signed two of the three promissory-notes taken for the advances on the articles in question as the guarantee of the genuineness of the transactions.

The circumstances are not similar to *Kong Lone* v. *Ma Kay* (2) since in that case there was *prima facie* evidence that the jewels had been obtained by fraud.

I cannot agree with the *obiter dictum* of Twomey, J., in *Nanalal Babu* v. *Maung Tun Yun* (3) that, in the case of a broker who sold jewels and misappropriated the sale proceeds, if the accused had pledged the jewels instead of selling them, it would be right to order the restoration of the jewels to the complainant.

The Magistrate would not have been justified in ordering the return of the jewellery to the complainant in the present case unless it was shown that there was bad faith on the part of the Chetty. This has not been found by the Magistrate, who has, as I have already pointed out, given no reasons for his order.

The Chetty may quite well have regarded Maung Gyi as a broker and acted in good faith. I am quite in accord with the principle enunciated in the *Stephen Aviet's case* (1); it is not for the Criminal Court to usurp the functions of a Civil Court and assist complainant in recovering from the person to whom they were disposed of goods which were made over to the accused to dispose of, merely because the accused did not dispose of them in accordance with the instructions given to him.

I set aside the Magistrate's order and direct that the articles in question be returned to the applicant R. M. P. A. Annamalai Chetty.

J. P. *Order set aside.*

(1) 4 L. B. R. 25; 6 Cr. L. J. 135.

(2) 4 L. B. R. 13; 6 Cr. L. J. 125.

(3) 11 Ind. Cas. 1003; 12 Cr. L. J. 467; 4 Bur. L. T. 170.

PATNA HIGH COURT.

DEATH REFERENCE No. 2 OF 1922

AND

CRIMINAL APPEAL No. 7 OF 1922.

February 8, 1922.

Present :—Mr. Justice Coutts and Mr. Rose.

LACHHMI LAL—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 288, 503—Commission to examine witness in serious trial not desirable—Identifier of parda-nashin *witness not put on oath Statement, whether admissible—Statement made before Committing Magistrate, portion of, when admissible before Sessions trial.*

The issue of a Commission for the examination of an important witness, such as an eye-witness, in a serious criminal trial is not desirable and should only be adopted for the most cogent reasons. [p. 1004, col 1.]

Where an identifier of a *parda-nashin* lady witness has not been put on oath the statement of the lady cannot be accepted in evidence, as there is no certainty that the woman examined is the same who was to be examined [p. 003, col 1.]

Statements of witnesses recorded by a Committing Magistrate cannot be used in evidence in a Sessions trial under section 288, Criminal Procedure Code, without the attention of the witness being drawn to the portion which it is desired to use. [p. 1003, col 2.]

Death reference under section 374, Criminal Procedure Code, as well as an appeal by the accused againt an order of the Judicial Commissioner, Chota Nagpur.

Mr. *Patel*, for the Appellant.

The Government-Advocate, for the Crown.

JUDGMENT.

COUTTS, J.—The appellant in this case, Lachhmi Lal, has been convicted under section 302 of the Indian Penal Code for the murder of one Nanhak Lal and has been sentenced to death by the Judicial Commissioner of Chota Nagpur. Lachhmi Lal is a relation of Nanhak and the case for the prosecution is, that Nanhak was returning home from Mirzagunj Bazar on the 27th of August last when, at about 6 P. M., he was attacked by Lachhmi Lal with a sword. The attack was made on a foot path in village Jaggernathdih where both the appellant and the deceased lived. Three persons are said to have witnessed the occurrence or some part of it; namely, *Musammat* Thagni Barbin, Dilo Singh and *Musammat* Laro Kumari. Nanhak's sister, *Musammat* Munshi Kumari, heard a cry that Lachhmi had cut Nanhak with a sword and on going out she saw Lachhmi running away. She then found her brother lying severely wounded on Kartik Lal's *bari*. She took him home on a *khatia*, called the villagers and the *chowkidar*. The *chowkidar* gave an information to the *thana* three miles off at about 1 A.M., the Sub Inspector came at once, Nanhak was sent to the hospital and died there on the 3rd of September.

I do not propose to discuss the evidence which has been adduced in this case, because the trial has been of such a perfunctory nature and there have been so many irregularities committed in the course of the trial by the learned Judicial Commissioner that the learned Government-Advocate has said that he is compelled to ask for a re-trial and that if his prayer be not granted he does not propose to try and support the conviction. The course he has adopted is, in my opinion, a very right one and the only course which was really open to him. We are, therefore, only concerned with the question of whether we should acquit the accused as we are asked to do by the learned Counsel for the appellant or to order a re trial.

The main grounds on which the prayer for a re-trial is based are three :—(1) that the evidence of the eye-witnesses, *Musammat* Thagni and Dilo Singh, has been so perfunctorily recorded that it is impossible to say from their evidence whether they really saw the occurrence or not; (2) that the evidence of one of the most important witnesses, namely, *Musammat* Laro, is not on the record and is, therefore, not available to the Crown; and (3) that the statement which was made to the Sub Inspector of Police by Nanhak before his death and recorded by him has not been properly brought on the record.

In regard to the first point a mere glance at the evidence of *Musammat* Thagni and Dilo Singh is sufficient to show that the comment on this evidence which has been made by the learned Government-Advocate is justified. Thagni's examination-in chief consists of five lines of print and Dilo's of about double this. It is impossible to discover from Dilo's evidence where he was

when he saw the part of the occurrence to which he deposes or whether in fact he could have seen any part of it. The same remark applies to *Musammat* Thagni's evidence and it is also impossible to discover where she was working or how she happened to see the occurrence, It may be that the witnesses are perfectly good witnesses whose evidence can be accepted, but it is so sketchily recorded that it is impossible to come to any conclusion on this point.

The next matter is in regard to the witness *Musammat* Laro Kumari. Here the learned Judicial Commissioner adopted a very extraordinary procedure. An application was made by the lady to be examined behind a *parda*. This is a very ordinary request which is made in the case of a *parda-nashin* woman and the usual procedure is for the woman to be brought into Court in a *palki* and examined by the Judge. If this had been done, there would have been nothing to be said although the request was one which probably should not have been granted as she appears to have been examined in the ordinary way before the Committing Magistrate; the learned Judicial Commissioner, however, treated the application as one for examination on Commission and directed Commission to issue to one Mr. Friend Pereira, apparently a Magistrate of the First Class. In the first place, the issue of a Commission for the examination of an important witness, such as an eye witness, in a serious criminal trial is a procedure which is much to be deprecated and which should never be adopted except for the most cogent reasons; yet not only in this case were there no cogent reasons but there was no application for issue of Commission and no reason at all for the issue of Commission was given. Further, no writ of commission appears to have been issued and there is no return to the Commission. The woman's evidence is merely placed on the record without comment. For these reasons alone I would not be prepared to take her statement into consideration, but there is another reason why it cannot be accepted in evidence; namely, that the identifier of the lady does not appear to have been put on his oath so that there is no certainty that the woman who has been examined is *Musammat* Laro. There is another matter in connection with *Musammat* Laro's evidence to which it is necessary to refer. Her deposition before the Committing Magistrate has been put in. There is nothing to show under what section this has been done, but presumably it has been put in under section 288. To put in such evidence is permissible, but it has been repeatedly laid down and it is now settled law that such statements should not be put in without the attention of the witness being drawn to the portion of the statement which it is desired to use. We are informed by the learned Government Advocate and by the learned Counsel for the appellant that this practice is not generally followed and if this is so I would suggest that the attention of the Courts be drawn to the matter.

The last point is the use which has been made of Nanhak's statement to the Sub-Inspector. The Sub-Inspector has put in the statemnt and it has been used by the learned Judicial Commissioner. The prosecution was, under certain circumstances, entitled to examine the Sub-Inspector as to what Nanhak had told him, but the statement of Nanhak recorded by the Sub-Inspector could not be evidence and it is somewhat surprising that a Judge of the experience of the learned Judicial Commissioner should have fallen into this error.

There are other matters in respect of which the procedure adopted by the learned Judicial Commissoner is open to criticism but the points which I have referred to are sufficient for the purpose of indicating that it is necessary that there should be a re trial. The learned Counsel for the appellant has urged that we should acquit the accused and this would, in ordinary circumstances, I think be the correct course to pursue, but in the peculiar circumstances of the present case I would accede to the prayer of the learned Government Advocate. There is evidence some of which has been so perfunctorily recorded that it is impossible to say whether it is of value or not and there is also evidence which is not properly on the record.

Possibly this may be partly due to the fault of the prosecution but it is also due to the fault of the Trial Court. What the value of this evidence may be we cannot say as not being on the record we cannot consider it. I would, therefore, as I have

already indicated, accede to the request of the learned Government Advocate and set aside the conviction and sentence and direct that the appellant be re tried.

Ross, J.—I agree.

At the request of the learned Government-Advocate and with the assent of the learned Counsel for the appellant we direct that the case be transferred to Gaya for trial by the Sessions Judge of that district.

J.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No 349 OF 1921.

June 14, 1921.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

GOURI NARAIN BARUA—ACCUSED—PETITIONER

versus

TILBIKRAM CHETRI—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 406—Duty of prosecution to establish charge—Truth or falsehood of defence immaterial—Accused entitled to acquittal, when case for prosecution false.

Before an accused person can be convicted it is necessary that the Court should be satisfied that the charge framed against him has been established.

If in a case under section 406, Indian Penal Code, the accused is charged with being entrusted, with a certain sum of money, and the prosecution cannot prove how he came by the money, they do not establish one of the first essentials of the offence charged, that he was entrusted with that money and he is entitled to be acquitted.

If the case of the prosecution is false on the whole the accused is entitled to an acquittal whether his defence be true or false.

Syed *Mohammad Saadulla*, for the Petitioner.

JUDGMEMT.—This Rule is directed against an order convicting the petitioner of an offence punishable under section 406, Indian Penal Code, and sentencing him to six months' rigorous imprisonment and a fine of 100 rupees or in default two months' further rigorous imprisonment.

On the findings arrived at by the lower Court this conviction cannot be upheld. The case appears to be one in which, as stated by the learned Additional Sessions Judge, both parties have adduced false or partly false evidence. But before the petitioner can be convicted it is necessary that the Court should be satisfied that the charge framed against him has been established. The charge as finally framed was that, on the 8th December 1919, being entrusted with certain property Rs. 666 belonging to the complainant he has committed criminal breach of trust. This sum of 666 rupees was money paid for 9 maunds of ghee supplied to a certain buyer. But it is found by the lower Appellate Court that it has not been proved beyond reasonable doubt how the petitioner came by the money. If the prosecution could not prove how the petitioner came by the money they did not establish one of the first essentials of the offence charged, that he was entrusted with that money. It appears that both the Court of first instance and the Appellate Court, although they did not believe the case for the prosecution, have convicted the petitioner because he has set up a false defence. If the case of the prosecution is false on the whole the accused is entitled to an acquittal whether his defence be true or false.

We make this Rule absolute and direct that the petitioner be acquitted and the fine if paid be refunded. The petitioner's bail-bond will now be discharged.

B. N.

Rule made absolute.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 619 OF 1920.
February 8, 1921.
Present :—Mr. Justice Teunon and Mr. Justice Ghose.

ASWINI KUMAR CHATTERJEE—ACCUSED—APPELLANT
versus
EMPEROR, ON THE COMPLAINT OF SANTOSH KUMAR DUTT—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 420—Sharp practice—Fraud.

The accused resorted to a trick whereby he obtained the possession and use of the complainant's monies and to the injury of the complainant secured for himself the position of advantage properly belonging to the complainant:

Held, that sharp practice of this sort constituted fraud and made the accused liable to conviction under section 420 of the Indian Penal Code. [p. 1006; col 1; p. 1008, col 2.]

Babu *Manmatha Nath Mukherjee*, for the Appellant.

Moulvi *Syed Mohammad Saadulla*, for the Crown.

JUDGMENT.

TEUNON, J.—This case arises out of certain transactions in shares,

The complainant is a clerk in the Presidency Commissioner's office, while accused is a share broker, though not a member of the Stock and Share Association.

On the 25th of May last, there were, it is not disputed, two contracts between the parties, one for the sale by complainant of 100 Ghusick and Muslea at Rs. 25 8, and one for the purchase by complainant of 200 Bridge and Bolts. The case for the complainant is that the contract regarding Bridge and Bolts was that the price was Rs. 14 4, while the case for the appellant now is that to Rs. 14 4 should be added the paid up capital per share, namely, Rs. 7-8 or Rs. 21 12 in all.

In fact, later on in the day the accused bought 200 Bridge and Bolts from one Sham Kishore Khanan at Rs. 12 10 'premium' that is, therefore, at Rs. 20-2.

The further case for the complainant was that on the 25th neither he nor the accused knew that Bridge and Bolts were only partly paid up; that when the accused discovered his mistake, the contract was cancelled by mutual consent. On the other hand the accused, says that complainant refused to take delivery of the Bridge and Bolts because of the fall in price.

It is not necessary for me in the present case definitely to find whether in fact the contract was cancelled as alleged by the complainant. If it were not cancelled there remained a contract about the terms of which the parties were not agreed. The complainant's understanding of the contract is supported by the *Chit* Exhibit 2, and the contract itself Exhibit 3, also by the quotations in the Exchange Gazette (Exhibits H and B) while the *Chit* (Exhibit F) now produced by the appellant as that obtained from the complainant when the contract Exhibit 3 was delivered, is denied by the complainant, and when compared with other documents, *e.g.*, Exhibit 2 written and signed by the complainant does not appear in my judgment to be genuine. Having regard to Exhibits 2 and 3 I see no improbability in the cancellation of this contract. But if there were no cancellation, there then remained a disputed contract which neither party could enforce otherwise than by litigation.

Instead of seeking his remedy in the Court, the appellant had recourse to a trick. On the 31st of May he induced the complainant to hand over to him the scrip for the 100 Ghusick and Musleas on the promise that he would forthwith bring to the complainant the proceeds of these shares (Rs. 2,550 less Rs. 15, the price of stamps, net Rs. 2,535) in cash. That promise he has never fulfilled and from his conduct as set out in his Pleader's letter of the said 31st of May, (Exhibit G) he never intended to fulfil. That the promise or representation was as stated by the complainant, is placed beyond all doubt by Exhibit 1.

On the 31st of May the appellant did not bring the cash to the complainant. On the contrary, by Exhibit G he proposes to credit the amount against the sum due to him according to himself over the Bridge and Bolts, and later by Exhibit K of 2nd of June, he tenders the amount less the loss substained by him over Bridge and Bolts. Neither of these courses is a fulfilment of the promise or respresentation on the faith of which on the 31st of May the

complainant handed over to the appellant the Muslea scrip.

But it is said that the trick resorted to does not amount to fraud inasmuch as the sum claimed by the appellant was in fact due to him on the Bridge and Bolts contract. But the complainant denied and still denies any liability over the Bridge and Bolts contract. In the absence of agreement or arbitration, the complainant's liability, if any, to the appellant, can be ascertained only by litigation. By the trick resorted to, the appellant, while his dispute with the complainant still remained unsettled, obtained the possession and use of the complainant's monies and to the injury of the complainant secured for himself the position of advantage properly belonging to the complainant.

Sharp practise of this sort, in my judgment, constitutes fraud and this appeal will, therefore, be dismissed.

GHOSE, J.—The accused in this case, Aswini Kumar Chatterjee, who carries on business as a share and stock broker in Calcutta was charged before the Third Presidency Magistrate of Calcutta with having on or about the 31 st day of May 1920, cheated one Santosh Kumar Dutt, in respect of 100 Ghusick Muslea Coal shares valued at Rs. 2,535 by falsely representing to him that the accused would pay cash for the same which he never did and thereby having committed an offence punishable under section 420 of the Indian Penal Code. He was convicted on the 3rd September last by the learned Magistrate under the above section and sentenced to be detained till the rising of the Court on that date and to pay a fine of Rs. 800 and in default to undergo rigorous imprisonment for a period of six months. The learned Magistrate directed that out of the fine, when realised, a sum of Rs. 650 should be paid to the complainant as compensation.

The facts appearing on the record, in chronological order, are as follows: On the 25th May 1920, the complainant, one Santosh Kumar Dutt, agreed to sell to the accused 100 shares in Ghusick Muslea Coal Company Ltd., of which he was the holder, at Rs. 25 8 per share. On the same date and at the same time he agreed to purchase from the accused 200 shares in the Bengal Bridge and Bolts Limited at Rs. 14 4 per share. Two memoranda, or slips as they are called, evidencing the contracts in question were exchanged between the parties on or about the 25th May. These are Exhibits 2 & E. The contracts in respect of the said two transactions are contained in one document, viz., Exhibit 3. The parties agreed that the date of delivery and payment of cash under both the above contracts should be the 28th May. At the time when Exhibit 3 was handed over to the complainant, a receipt for the same was, it is alleged, taken from him by the accused. This receipt, the genuineness of which is in question, is Exhibit F. The complainant alleges that the accused had made a mistake about the rate in respect of the shares in the Bengal Bridge and Bolts Limited, and that the correct rate was Rs. 14-4 on account of premium plus Rs. 7-8 on account of paid-up capital per share, and that on the accused discovering or admitting his mistake on or about the 25th May, the contract in respect of these shares was at the request of the accused cancelled. The complainant further alleges that he noted the fact of such cancellation on the back of Exhibit 3, on the 29th May in these words "cancelled as requested by A. K. Chatterjee." The complainant goes on to add that on the 31st May, the accused obtained from him 100 shares in the Ghusick Muslea Coal Company Limited being Nos. 128101 to 128200 and a blank transfer deed on the representation that he would bring Rs. 2,535 being the price of the shares in cash within a quarter of an hour, but that instead of bringing cash the accused caused a letter to be written to the complainant by his Pleader on the same date asking the complainant to take delivery of the 200 shares in the Bengal Bridge and Bolts Limited after paying the difference between the price of the latter (Rs. 4,350) and the price of the shares in the Ghusick Muslea Coal Company Limited which the accused had obtained from the complainant and stating that, in default of compliance, the accused would re-sell the said shares in the Bengal Bridge and Bolts Limited, at the complainant's risk and on his account and would hold him responsible for all losses. The letter referred to above is Exhibit G. It was immediately replied to by the complainant's Pleader (see Exhibit 4) and in it the complainant

emphatically denied having entered into any contract with the accused for the purchase of 200 shares in Bengal Bridge and Bolts Limited at the price quoted in Exhibit G, but stated that he had contracted with the accused for the purchase of Bengal Bridge and Bolts shares at Rs. 14 4, per share clear or for Rs. 2,850 in all. The complainant went on to add that he had sold through the accused as self for principal 100 shares in the Ghusick Muslea Coal Company Limited at Rs. 25-8, per share clear and had handed over the shares Nos. 128101 to 128200 with the blank transfer deed and a bill for Rs. 2,535 after deducting the charges for stamps. The complainant stated that if the accused failed to pay the amount of the bill or to return the shares to him, he would forthwith take criminal proceedings against the accused for breach of trust. The accused failed to comply with the complainant's request and on the 2nd June the present complaint was laid before the Chief Presidency Magistrate.

The case for the defence was that Exhibit F was a genuine document, it being stated therein that Rs. 7-8 was the paid up capital in respect of each share in the Bengal Bridge and Bolts Limited; that it was well-known to the complainant that the paid-up capital per share plus the premium or less the discount had always to be paid when shares were purchased; that it was wholly untrue that there had been any cancellation in respect of the contract relating to the shares in question or that the accused had requested the complainant to cancel the said contract; that on the 28th May which was the due date, the accused called upon the complainant to perform the two contracts referred to above but the latter made excuses and put off the performance of the contracts till the 31st May; that on the last mentioned date, the accused obtained delivery of the shares in the Ghusick Muslea Coal Company Limited, from the complainant; that he pressed the complainant at the same time to pay for and take delivery of the shares in the Bengal Bridge and Bolts Limited, but that the price of the latter shares having meanwhile gone down, the complainant wanted to back out of the transaction relating to the shares in the Bengal Bridge and Bolts Limited; that on the 31st May, the accused addressed to the complainant a letter through his Pleader being Exhibit G; that as the complainant did not perform the contract in respect of the Bengal Bridge and Bolts shares and as the price thereof was going down, the accused after due notice to the complainant sold the last mentioned shares and thereby incurred a loss of Rs. 650; that on the 2nd June 1920 the accused forwarded a cheque to the complainant for a sum of Rs. 1,885 being the difference between the price of the Ghusick Muslea shares (Rs. 2 535) and the loss on the Bengal Bridge and Blots shares, and that, having regard to the fact that the accused had himself purchased the Bengal Bridge and Bolts shares at Rs. 12-10, *plus* Rs. 7-8 per share, it was ridiculous to suggest that the accused had offered to sell the same share at Rs. 14-4 inclusive of the paid-up capital per share.

The learned Magistrate has found that the accused made a mistake about the rate in respect of the Bengal Bridge and Bolts shares; that on the complainant's attention being drawn to the matter he refused to perform the contract in respect of these shares, and that the contract was thereupon cancelled; that the transaction in respect of the Ghusick shares was separate and distinct from Muslea the transaction in respect of the Bengal Bridge and Bolts shares; that the accused had no right to detain the sale-proceeds of the Ghusick Muslea shares and set off the loss in respect of the Bengal Bridge and Bolts shares against the same, and that he dishonestly made the complainant deliver the Ghusick Muslea shares to him.

Of course, if the finding of the learned Magistrate about the cancellation of the contract relating to the Bengal Bridge and Bolts shares is correct, then the accused was clearly guilty of an offence punishable under section 420, Indian Penal Code, and nothing more need be said about the the matter. I do not think this finding is correct. In the first place, it is noteworthy that the complainant does not mention anything about the cancellation of the contract in question either in his petition of complaint before the Magistrate or in his Pleader's letter Exhibit H. If there had been such a cancellation as suggested by the complainant, it is reasonable to assume that the complainant would have

put the fact on record in some communication or other addressed to the accused. There was no such communication. At any rate, seeing that he was alive to the necessity of there being some record of the cancellation one would have expected that the complainant would have got the accused to agree to some such endorsement as appears on the back of Exhibit 3, if his story was true. This was specially important from the complainant's point of view, namely that the rate mentioned in respect of the Bengal Bridge and Bolts shares was an inclusive rate and that the word 'clear' in Exhibits 2 & E did not mean clear of brokerage as contended for on behalf of the accused. In passing, it may be noticed that the word 'clear' does not appear in Exhibit 3. But there was indeed no reason whatsoever why the accused should request the complainant to cancel the contract in question. The accused, it is true, denied that Exhibit F bore his signature. Exhibit F is a receipt, purported to have been granted by the complainant at the time when Exhibit 3 was delivered to him and it contained a reference to the fact that the paid-up capital per share in the Bengal Bridge and Bolts Limited was Rs. 7-8. The complainant admitted in his cross examination that the accused had obtained a *chit* from him when he delivered the contract to him; but leaving aside the question whether that *chit* was Exhibit F or not, there cannot be any doubt on the admission of the complainant in his cross-examination that it was well-known to him that the paid up amount of a share *plus* the premium or less the discount had to be paid when shares were purchased. No doubt, it may be said that the complainant did not know that the shares in question had been partly paid up, but, however that may be, I find it difficult to accept as true the complainant's account of the cancellation of the contract in question; in my opinion, the inference may not unreasonably be drawn that the complainant having found out that the market in respect of the Bengal Bridge and Bolts shares was against him was trying to wriggle out of the contract in respect thereof. The position, therefore, on the 31st May was this: the complainant did not want to perform the contract in respect of the Bengal Bridge and Bolts shares, while it was to the interest of the accused, as he had himself purchased the requisite number of these shares from another person on the 25th May (see Exhibit N) for the purpose of giving delivery to the complainant, that the complainant should somehow or other be made to perform the contract or in the alternative should be made to suffer the loss on these shares by reason of the market having gone down. How was this to be done? According to both parties, the contract in respect of the Ghusick Muslea shares was subsisting; but the complainant, in the events which had happened, was unwilling to part with them, except for cash. The accused, therefore, falsely represented to the complainant that he would bring cash in exchange for the Ghusick Muslea shares and thereby induced the complainant to hand over the Ghusick Muslea shares to the accused. Having got possession of these shares, the accused proceeded to dictate his terms through his Pleader to the complainant (Exhibit G). It is argued, however, on behalf of the accused that inasmuch as the complainant was bound to give delivery of the Ghusick Muslea shares, no offence had been committed by the accused in getting possession of these shares by means of a trick. I am unable to accede to this contention. The accused's proper course was to put the matter in a Court of law, but instead of doing that he had recourse to a trickery. The action of the accused was dishonest and fraudulent and, in my opinion, he was guilty of an offence punishable under section 420, Indian Penal Code. I am, therefore, of opinion that this appeal fails and should be dismissed. See *Queen-Empress* v. *Sri Ohurn Ohungo* (1).

E. N.

Appeal dismissed

(1) 22 C. 1017 (F. B.); 11 Ind. Dec. (N. s.) 676.

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Accounts, *suit for, against agent—Claim for period before death of principal—Limitation—Contract Act (IX of 1872), s. 201—Limitation Act (IX of 1908), Sch. I, Art. 89.*

An agency is terminated by either the principal or agent dying, and a suit for accounts against the agent for the period during which he acted as agent under his deceased principal must be brought within three years of the death, as laid down in Article 89 of the Limitation Act. **C** SARASHIBALA DASSI *v.* CHOONI LAL GHOSE, 26 C. W. N. 320 **219**

Acquiescene, *what amounts to.*

For a defence of acquiescence to be successful, it is necessary that the defendant should have acted in good faith, believing that he had a valid right to do the act in question and that the plaintiff, knowing that the defendant was under this mistaken belief, should have abstained from doing anything to prevent his spending money in doing that act. **O** JAGANNATH *v.* DIN MUHAMMAD, 8 O. L. J. 474 **705**

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Admission *of party—Presumption.*

What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established. **O** GHULAM SARWAR KHAN *v.* MUHAMMAD ALI KHAN, 8 O. L. J. 609 **398**

Adverse possession *by co-owner—Acquiescence, effect of.*

Every case of an adverse possession by a co-sharer must be considered on its own facts, and the principle that the possession of one co-sharer is, in law, the possession of all, should not be pressed too far.

Where the co-owners, who are mere cousins by marriage, succeed to a certain property, and one of them occupies more than his share, under circumstances which do not suggest in any way that he is doing so on behalf of the other, or in any other way than wrongfully, it cannot be said that he does not really oust adversely the other co-sharer from the portion so occupied.

There are cases in which consent to usurpation is not inconsistent with its becoming adverse, as for instance, where a person consents to usurpation not thinking it worthwhile to interfere. **A** MUSTAFA KHAN *v.* DULARI, 3 U. P. L. R. (A.) 5 **75**

—— *by trespasser—Land submerged during part of year—Constructive possession—Presumption.*

A trespasser does not acquire any right by adverse possession in respect of a land which is subject to submergence for a part of every year. No presumption either of constructive possession on account of previous actual possession or on account of contiguity of the land with other land in actual possession of the trespasser can be made in his favour. **O** BACHCHA SINGH *v.* CHANDRES SINGH, 8 O. L. J. 50 **769**

—— *Landlord and tenant — Non-payment of rent—Abandonment of possession—Constructive possession—Trespasser—Revenue Records, entries in—Presumption.*

Where a person is entered as a tenant in the Revenue Records in respect of a plot of land, the

Adverse possession—concld.

mere fact that he has not paid any rent in respect of the plot cannot clothe him with any higher position than that which is given to him by those entries. If liability for the payment of rent is fixed on such person by the entries, the non-enforcement of that liability on the part of the landlord and the non-compliance of the same obligation on the part of the tenant do not make the latter the owner of the plot in dispute.

Limitation does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the Act. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The Act applies not to want of possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time.

As a general rule, possession of part is in law possession of the whole if the whole is otherwise vacant; but constructive possession of this kind can only be presumed when there is a claim based upon title. Possession by a trespasser is confined to the land actually occupied by him.

In the absence of any evidence to the contrary, the entries in the revenue papers must be deemed to be correct. **O** DURGA *v* RAM PADARATH, 8 O. L. J. 495 **749**

Agra Rent Act (XII of 1881), s. 9—*Succession—Sharing in cultivation—Hindu Law—Reversioners.*

Where succession to the estate of an occupancy tenant opened out prior to the passing of the Agra Tenancy Act, the succession is governed by the Agra Rent Act, XII of 1881, and not by the ordinary rule of Hindu Law, and a collateral can only inherit if he was joint in cultivation with the deceased tenant. **A** BECHU SINGH *v.* BALDEO SINGH, 20 A. L. J. 165; 4 U. P. L. R. (A.) 12 **507**

Agra Tenancy Act (II of 1901), s. 22—*Occupancy holding—Succession—Widow succeeding to her husband in* 1868—*Widow's death after* 1901—*Succession, how governed—Bengal Rent Act (X of* 1859*), s.* 6—*N. W. P. Rent Act (XVIII of* 1873*).*

The right of an occupancy tenant was created for the first time by the provisions of section 6 of Act X of 1859 and that right was neither transferable nor heritable. Until the passing of Act XVIII of 1873 there was no rule of succession provided for occupancy holdings and succession was governed by custom which varied in different villages.

One *N*, an occupancy tenant, died about 1868. On his death his widow entered into possession of the occupancy holding. In 1893 the widow made a gift of the property to the defendant. The widow died in 1915 and the plaintiffs, her reversioners, sued for possession:

Held, that as the widow was permitted to continue cultivation of the holding after her husband's death, she acquired in her own right after twelve years the right of an occupancy tenant and that, consequently, succession was governed by section 22 of the Agra Tenancy Act, 1901, and that as the plaintiffs did not share in the cultivation at the widow's death they could not succeed. **A** MANPAL SINGH *v.* RAJ PARTAB SINGH, 20 A. L. J. 131 **824**

——— s. 158—*Rent-free grant in favour of idol —Priest, whether grantee—"Successor to original grantee," meaning of—Appeal—New point—Misconstruction of document.*

In case of a rent-free grant of land in favour of an idol worshipped in a shrine the particular priest who for the time being may be in charge as manager of the affairs of the temple in question, or of the worship of the idol as conducted therein cannot be regarded as himself the grantee within the meaning of section 158 of Act II of 1901, nor can any priest who from time to time may succeed to the office be treated as a successor to the original grantee within the meaning of that section.

In order to maintain in second appeal or in a Letters Patent appeal in a rent-free grant case that the use of the word "*shankalap*" as a description of the nature of the grant involves a transfer of proprietary rights in the land it is incumbent on the person raising it to plead, and to show from the record, that documentary evidence establishing his contention of fact has either been disregarded by the Court of first appeal or misinterpreted. **A** MATHURA PRASAD *v.* RAMESHWAR, 19 A. L. J. 964 **371**

——— s. 164—*Suit for profits—Jurisdiction, exclusive—Civil Procedure Code (Act V of 1908), s.* 11—Res judicata.

K. purchased from *B.* on 26th April 1915 a share in a village. After the sale, *B.* sued *G.* for profits for Rabi 1322 and Kharif 1323 *F* and got a decree. *G.* had already paid *K.* sums of money alleged to be equivalent to the above profits *G.* sued *K.* for refund of the above, with costs, etc. The dispute was referred to arbitration and by an award the suit was decreed for Rs. 950. *K.* then sued *G.* to recover his profits for the above period and also for 1329 *F.* *G.* resisted the suit on the ground of *res judicata* and estoppel. The First Court decreed the suit, holding that the question of profits could not be and was not in issue in the civil suit, and so section 11, Civil Procedure Code, could not bar the suit, the lower Appellate Court held against *K.* *K.* appealed to the High Court:

Held, that *K*, being a recorded co-sharer, was entitled to sue for profits and that the suit was exclusively triable by the Revenue Court and that *G.* was not entitled to defeat the suit *in limine* by producing in evidence the decree of a Civil Court in which *K* was held liable to pay a certain sum of money to *G.* as several matters involved in the present suit were not there in issue in the previous one. **A** KUNJ BIHARI LAL *v.* GHANSHAM DAS, 4 U. P. L. R. (A) 3 **530**

——— s. 164—*Suit for profits—Lambardar—Negligence - Non-realization of decree, effect of—Interest, proper rate.*

Where a Lambardar makes collections to the extent of 76 per cent. of the gross rental, and for the rest brings suits and obtains decrees against defaulting tenants, he acts like a prudent Lambardar, and the mere fact that some of the decrees cannot be realised, cannot constitute negligence on his part, and in such a case the co-sharers are entitled to their shares on the basis of actual collections.

In a suit for profits interest at 12 per cent. is a proper rate to be allowed and it should run up to the date of realisation. **A** RAM CHANDRA SARUP *v.* KIRPA DEVI **648**

——— s. 167—*Two rival Zemindars—One fraudulently entering other's name as sub-tenant, obtaining ex parte decree for rent and suing for ejectment—Revenue Court, if has jurisdiction—Civil Court, if bound by decree.*

One of two rival Zemindars fraudulently entered the other Zemindar's name as sub-tenant, obtained an *ex parte* decree for arrears of rent from the Revenue Court and then sued for ejectment. The other Zemindar raised the defence of proprietary possession, and was thereupon directed to bring his suit within three months in a Civil Court. In the Civil Court, he asked for a declaration of his proprietary title. It was alleged that the suit was barred by *res judicata* and also by limitation as it was brought more than six years after the entry of the plaintiff's name as sub-tenant:

Held, that the suit was not barred by *res judicata* as the Revenue Court was not competent to decide this case, that a fresh cause of action arose when the decree for rent was obtained and that that decree was not binding on the Civil Court and could not operate as estoppel against the plaintiff.

A claim for a declaration of title by an alleged owner cannot be brought within section 167 of Agra Tenancy Act.

A Civil Court, in such a case, is not bound by any findings arrived at in the Revenue Court. It is entitled to take an independent view of its own, having regard to all the circumstances of the case. **A** RAM DHARI UPADHIA *v.* BABU LAL UPADHIA, 3 U. P. L. R. A. 21 **101**

——— s. 177—*Civil Procedure Code (Act V of 1908), s.* 144—*Restitution—"Court of first instance," meaning of—Order of Revenue Court refusing restitution—Appeal, maintainability of.*

In a suit under the Agra Tenancy Act the "Court of first instance" referred to in section 144, Civil Procedure Code, is the Revenue Court which heard the suit and not the Civil Court which heard the appeal from the order of the Revenue Court.

An application for restitution in a suit for ejectment under the Agra Tenancy Act on the reversal of the decree for ejectment by the Civil Court on appeal must be made to the Revenue Court which tried the suit and not to the Civil Court.

An order of a Revenue Court refusing to direct restitution is not a decree and is not appealable to the Civil Court **A** KASHI PRASAD SINGH *v.* BALBHADDAR SINGH, 20 A. L. J. 133 **798**

——— s. 202—*Ejectment, suit for—Defendants holding as tenants "of a person in possession of the holding from the plaintiff"—Procedure.*

In a suit for ejectment by the plaintiff as the proprietor of the plots in dispute, it was pleaded that the defendants were only the sub-tenants of a third person who was the ex-proprietary tenant of the plots and that the plaintiff was entitled to get rent from that third person and had no right to eject the defendants:

Agra Tenancy Act—concld.

Held, that inasmuch as the defendants pleaded that they held the plot in suit as tenants of a person in possession of the holding from the plaintiff the provisions of section 202 of the Agra Tenancy Act applied to the case and the procedure there laid down ought to be followed. **A** MUHAMMAD YAKUB *v.* BECHU AHIR **251**

Agreement, *terms of—Loan—Document inadmissible in evidence—Lender, when can fall back and sue upon loan itself—Consideration, failure of—Equity.*

Where the terms of an agreement can be distinguished from the fact that an agreement was come to and such fact is itself also in issue, the Court can allow the fact to be proved and even the document to be used in evidence for collateral purposes.

The question whether a loan was given and taken can in certain cases, such as those of collateral securities, be distinguished from the question of the terms of the loan and of its re-payment. Where it can be so distinguished, if the document embodying the terms is inadmissible, the lender may fall back and sue upon the loan itself and prove it by other evidence, as an implied contract to re-pay money arises from the fact that the money was lent.

The basis of such an action is not the document, but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed should return the money to the payer.

The defendant asked the plaintiff to lend him Rs. 400. The latter agreed to pay Rs. 200 at once and half later. On payment of Rs. 200 the defendant executed in favour of the plaintiff a document for Rs. 400 and stamped it with one anna stamp. Out of the remaining Rs. 200, Rs. 30 only were paid to the defendant some days later. The plaintiff sued the defendant for recovery of Rs. 230 which he had lent. The document was held to be inadmissible in evidence for want of stamp:

Held, that, as the giving of the loan of Rs. 230 and the agreement to lend Rs 400 and its terms as embodied in the inadmissible document were distinguishable, notwithstanding the fact that the document itself was excluded from evidence and could not be acted upon, the plaintiff was entitled to fall back upon the sums actually lent to the defendant and to sue and to prove that they were lent and obtain a decree in respect of them. **S** NARAINDAS *v* JASSOMAL, 15 S. L. R. 135 **37**

Ajmere-Merwara Regulation (III of 1877), Ch. II, ss. 6, 9—*Pre-emption—Sale—Muhammadan Law—Transfer of Property Act (IV of 1882), s 54, applicability of.*

In deciding whether a right to sue for pre-emption has arisen in Ajmere-Merwara, the definition of sale contemplated in Muhammadan Law in accordance with the ruling in *Begam* v. *Muhammad Yakub* where there has been no registered sale-deed, should be followed, inasmuch as section 9 of the Ajmere-Merwara Regulation provides that a right of pre-emption arises in certain cases in respect of property to be sold, not necessarily property which has been sold already. **A** RAM SUKH *v.* MRS. L. E. O'NEAL, 20 A. L. J. 59 **103**

Alluvial land—*Suit for possession—Re-formation in situ of permanently settled estate—Thak and Survey maps, state of things described in, evidentiary value of—Burden of proof—Quinquennial papers,* Hakikat Chauhaddi *papers and hand-sketches drawn on their basis, evidentiary value of—Miscalculation or misstatement in returns, if can defeat title to estate—Adverse possession of waste lands, nature of—Dispossession of trespasser by* vis major *of floods—Constructive possession of true owner—Revenue sale—Adverse possession against purchaser, when commences to run—Suit to recover possession by plaintiff who became entitled to possession on determination of limited estate—Limitation Act (IX of 1908), Sch. I, Arts.* 140, 142, 144.

It cannot be presumed as a matter of law that the state of things described in the *thak* and Survey maps existed at the time of the Permanent Settlement. The question, what lands were included in the Permanent Settlement, is a question of fact and not of law which may or may not be satisfactorily proved by subsequent Survey maps. The onus of proving that any particular lands were included in the Permanent Settlement of 1793 is on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the *thak* and Survey maps showing that specific lands are included in a particular estate. The *thak* and Survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement.

The quinquennial papers prepared by the Revenue Authorities under the provisions of Regulation XLVIII of 1793 are admissible in evidence.

The *Hakikat Chauhaddi Bandi* papers are boundary papers prepared by the owners of the estates and submitted to Government.

Reliance can be placed upon hand-sketches drawn by the parties on the basis of the information derivable from the quinquennial papers and the *Hakikat Chauhaddi* papers.

Importance cannot be attached to the areas of the Mouzas as mentioned in the quinquennial papers. If, in fact, the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate.

The nature of the possession required in an adverse possessor of waste lands sufficient to take the title out of the true owner, is that it must be adequate in continuity, in publicity, and in extent of area.

No rational distinction can be drawn between cases where re-formed land is after a few years again submerged by the flood for a time, and cases where the re-flooding is seasonal and occurs for several months in each year.

On the dispossession of a trespasser by the *vis major* of floods, the constructive possession of the land is in the true owner, in other words, the land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner

In a sale held under Act XI of 1859 what is sold is not the interest of the defaulting owner which is determined on the failure to pay the Government assessment but the interest of the

Alluvial land – concld.

Crown subject to the payment of the Government assessment, and, therefore, the period of limitation for adverse possession against the purchaser at such a sale only commences to run from the date of the sale.

A suit to recover possession of a land from a trespasser by the plaintiff who became entitled to possession only after the determination of a limited or particular estate held by another, whatever its precise nature might have been, and when that estate did not fall into possession until the death of the holder of the limited estate, is governed by Article 140 of Schedule I to the Limitation Act. In such a case Article 142 cannot apply where the plaintiff was never in fact dispossessed; nor can Article 144 apply, as possession of a trespasser cannot be deemed adverse against a person not entitled to be in possession at that time. **C** SECRETARY OF STATE FOR INDIA *v.* WAZED ALI KHAN PANE, 34 C. L. J. 141 **866**

Appeal (Civil)—*Appellant's duty to show judgment appealed from is wrong.*

In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. **P C** NABAKISHORE *v.* UPENDRAKISHORE, 10 A. L. J. 22; (1922) M. W. N. 15; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 253; 24 BOM. L. R. 346; 15 L. W. 417; 30 M. L. T. 224; 3 P. L. T. 311 **305**

——— ——— *Appellate Court, duty of, in reversing judgment of first Court.*

In reversing the judgment of a first Court an Appellate Court should take into consideration the evidence relied upon by the Court of first instance. **C** MOHAMMED NURAL HUQ *v.* BAKSU MANDAL, **509**

——— ——— *Bench cases—Parties, position of—Evidence, which, to be referred to—Printing of record.*

In appeals triable by a Bench, if either party desires to make use of any evidence in support of his argument, whether for the purpose of supporting the judgment of the lower Court or attacking it, it is incumbent on him to get it printed. If he omits to do so in the expectation that his opponent will be kind enough to get it printed for him, he runs the risk of his opponent disappointing his expectation. **O** MUMTAZ-UN-NISA BEGAM *v.* WAZIR ALI, 8 O. L. J. 569 **308**

——— ——— *Burden of proof—Relief, different, whether can be given.*

In an appeal it is for the appellant to clearly establish that the judgment under appeal is wrong.

Where a plaintiff sues for certain land on the basis of a survey map, though a reference is made to a *thak* map in plaint as well as in issues, and fails, he cannot, in appeal, claim that he should be given a decree for the land to which he may be found entitled on the basis of the *thak* map. **C** TARAMONI *v.* GOPAL DAS **182**

——— ——— *Pleadings — Point of limitation cannot be raised for first time in second appeal.*

A High Court in second appeal cannot enter into the question whether the plaintiff's suit was barred

Appeal (Civil)—contd.

by limitation or not unless the point was taken before the lower Courts. **C** HARI CHARAN *v.* JITENDRA NATH **601**

——— ———, summary dismissal of—Judgment. *See* CIVIL PROCEDURE CODE, O. XLI, R. 1 **479**

——— ———, *first, matter abandoned in—Second appeal, matter if can be taken in.*

A matter abandoned in first appeal cannot be allowed to be re-agitated in second appeal. **O** MAHADEO TEWARI *v.* SITLA BAKHSH SINGH, 8 O. L. J. 660 **408**

——— **(second)**—*Evidence offered on one side or other, whether question of law.*

The question of whether any evidence has been offered on one side or the other is essentially a question of law. **O** GHULAM SARWAR KHAN *v.* MUHAMMAD ALI KHAN, 8 O. L. J. 603 **398**

——— ——— *Finding of fact.*

A finding that certain land is a graveyard is one of fact, and cannot be challenged in second appeal. **L** JAI GOPAL *v* MUHAMMAD BAKHSH **647**

——— ——— *Finding of fact—Evidence ignored—High Court, power of, to interfere*

Where a finding of fact is arrived at upon no evidence, the finding is liable to be set aside in second appeal.

A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, a High Court will interfere and should interfere in second appeal. **L** FIRM MANSA RAM-GORDHAN DAS *v.* FIRM MANGAL SAIN-DUNI CHAND **497**

——— ——— *Findings of fact—Judgment of lower Appellate Court—Hindu Law—Separation.*

It is not necessary for a Court of first appeal to refer in detail to every piece of evidence on the record. So long as its judgment leaves no doubt that all the available evidence has been given due weight to, its findings on questions of fact cannot be attacked in second appeal.

Whether or not there has been a separation of a joint Hindu family is a question of fact. **L** NATHU SHAH *v.* HAVELI SHAH **475**

——— ——— *Issue dependent on facts cannot be raised for first time.*

It is not open to an appellant to raise, for the first time in second appeal, an issue which would depend upon a finding of fact. **C** HRIDAY NATH MONDAL *v.* TALA BEWA **706**

——— ——— *Limitation, plea of—Question of law.*

An objection that an appeal presented to the lower Appellate Court was barred by time can be taken in second appeal. **L** NIGAHIA RAM *v.* BHAGU MAL **580**

——— ——— *Oral evidence, weight of, whether matter for second appeal.*

The weight to be attached to oral evidence is not a matter for second appeal. **O** BHUDHAR SINGH *v.* BHIKHAN SINGH, 8 O. L. J. 629 **370**

——— ——— *Pleadings—New point, when not allowed.*

A new point should not be allowed to be taken for the first time in second appeal in the High Court when there is no evidence on the record and no

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finding to support it. **Pat** CHANDRA MOHAN DUTTA *v.* SASI BALA DASI, (1922) PAT. 89; 4 U. P. L. R. (PAT.) 7 **277**

——— *Questions not to be allowed to be raised.*

The question of sufficiency or insufficiency of an amount tendered for the redemption of a mortgage cannot for the first time be gone into in a second appeal when it cannot be decided without going into evidence.

A mortgagor should, after tender, keep the money ready for payment but the question whether the money was kept ready or not involves a consideration of the evidence and cannot be allowed to be raised for the first time in a second appeal. **Pat** JAG SAHU *v.* RAM SAKHI KUER, (1922) PAT. 58; 3 P. L. T. 332 **666**

Appellant, *duty of—Translation of documents.*

In an appeal whose value does not exceed Rs. 50 it is the duty of the appellant under the rules to provide translations of documents upon which he wishes to rely and if he does not provide he cannot refer to them. **Pat** KALI DAYAL *v.* UMESH PRASAD, (1922) PAT. 33 **256**

Approver—*Corroboration—Confession of co-accused.*

In cases where a large number of persons have been arrested by the Police and confessions are obtained one after the other, it is likely enough that those confessions should agree with each other, and each man would be likely to name as far as possible those persons who have already been named in the previous confessions. The fact of any particular person having been named in the confessions of more than one of the co-accused cannot, therefore, be regarded as sufficiently reliable corroboration of the statement of the approver In such a case, each person accused is entitled to claim that as against him the statement of the approver shall be corroborated by some reliable evidence. **L** LALA *v.* EMPEROR, 3 P. W. R. 1922 CR.; 23 CR. L. J. 158 **622**

Arbitration—*Award when binding.*

Before a party can be held bound by an award, it must be shown that it was a valid award and that all the requirements of the law with respect to the appointment of an arbitrator and with regard to the actual reference to arbitration, had been duly fulfilled. The proceedings of the arbitrators must also be above board, and it must be shown that they had given full opportunities to both parties to appear and represent their case to him. **L** FIRM MANSA RAM-GORDHAN DAS *v.* FIRM MANGAL SAIN-DUNI CHAND **497**

——— *Notice to parties—Award.*

An award which is given in the absence of any party to the arbitration, and without any notice to him as to the time or place where the arbitrators would sit to decide the dispute, is illegal. **L** RAJA RAM-PUNAM CHAND *v.* JUGAL KISHORE-RAMRICHHPAL **577**

——— *Private enquiry by arbitrator—Misconduct—Award, invalidity of—Construction of agreement of reference—Jurisdiction—Revision—Civil Procedure Code (Act V of 1908), s. 115.*

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The making of private enquiries by an arbitrator, where he is not empowered to do so by the terms of the reference, amounts to legal misconduct and vitiates the award.

Where a Court misinterprets the terms of an agreement of reference it does not act in the exercise of its jurisdiction either illegally or with material irregularity to entitle a High Court to interfere in revision. **A** GANGA SAHAI *v.* BALDEO SINGH. 20 A. L. J. 117 **779**

——— *without intervention of Court—Reference to several arbitrators—Majority, decision by, no provision as to—Refusal of any arbitrator to arbitrate, effect of—Award of majority, whether good—Suit with regard to matter referred to arbitration, whether barred.*

Where a reference to the arbitration of several persons is made without the intervention of a Court, and the reference provides for a decision by all the arbitrators appointed by the parties to the reference and not merely by a majority of them, the refusal of any of the arbitrators to take part in the arbitration invalidates the award, and the submission to arbitration also does not remain in force and does not bar a suit subsequently filed in Court with regard to the matter referred to arbitration. **O** LACHHMAN PRASAD *v.* PRAN NATH, 8 O. L. J. 285 **339**

Arbitration Act (IX of 1899), s. 19—*Reference by one party—Suit by other party—No application to stay suit—Waiver of right to arbitration.*

Where under the terms of reference a party refers a dispute to arbitration, and the other party brings a suit but the first party having knowledge of the suit deliberately makes no application under section 19 of the Arbitration Act for stay of the suit, the first party must be taken to have waived his right to arbitration **A** CHIMMAN LAL POSTI MAL *v.* PHOOL CHAND FATEH CHAND, 20 A. L. J. 125 **795**

Arms Act (XI of 1878), s. 19—*Punjab Government Notification of 11th May 1917*—Kirpan, *what is—Burden of proof.*

Every sword is not a *kirpan*. A person who claims that a particular kind of sword is a *kirpan* and that he is entitled to carry it with impunity under the Punjab Government Notification of 11th May 1917, must prove that the weapon in question is a *kirpan*.

In this case it was held that a sword 3 inches long with a blade length of 22 inches had not been proved to be a *kirpin*. **L** BACHITTAR SINGH *v.* EMPEROR, 23 CR L. J 93 **430**

——— **s. 19 (f)**—*Arms—Possession*—Chhavi *found in bed of two persons in third person's house.*

Two persons were lying on a bed in the house of a third person and a *chhavi* was found in the bedding wrapped in a piece of cloth:

Held, that even if it were assumed that the *chhavi* did not belong to the owner of the house, these two persons could not be convicted of an offence under section 19 of the Arms Act, inasmuch as it could not be said which of them was actually in possession of the *chhavi*. **L** NARINJAN SINGH *v.* EMPEROR, 23 CR. L. J, 95 **447**

Assam Land and Revenue Regulation I of 1886), s. 97—*Partition of portion of estate, application for, maintainability of —Jurisdiction—"Actual possession of interest," meaning of.*

Under the Assam Land and Revenue Regulation, a Revenue Court has jurisdiction to entertain an application for partition of a portion of a revenue-paying estate, where the applicant has no interest in the remaining portion.

The words "in actual possession of the interest" in section 97 of the Assam Land and Revenue Regulation simply mean that at the time of the application it must not appear that the interest of the person seeking partition has been transferred or been otherwise lost. They do not signify that the applicant should be in *actual physical possession of the land* C BIRENDRA KISHORE MANIKYA *v.* KRISHNA CHANDRA DEB **83**

Attachment of decree *before formally drawn up, validity of—Date of decree—Civil Procedure Code (Act V of 1908), O. XX, r. 7, O. XXI, r. 53.*

When a decree is signed it relates back to the date of the judgment. It is in existence on the date of the judgment except for certain purposes (such as the computation of the period of limitation prescribed for an appeal).

Under a judgment passed in a suit for partition, one *M.* obtained certain immoveable properties in his share and was held entitled to certain sums of money (as owelty money from certain persons. Before the decree was drawn up and signed a creditor of *M.* applied for attachment of the money portion of the decree, and on the day following the Court sent the notice of attachment attaching the decree. Objection was made (1) that there was no decree which could have been attached, and (2) that at any rate the attachment being of the decree (*i.e*, the whole decree) was bad as the decree related in part to immoveable property, the procedure prescribed for attachment of which had not been followed:

Held, (1) that there was a decree in favour of *M.* in the ordering portion of the judgment though the formal decree was not drawn up and signed and (2) that the notice, in so far as it directed the attachment of the other portion of the decree no doubt must be treated as ineffectual, but that did not affect the attachment of the decree in so far as it awarded a certain sum of money. C RAM KANAI PAL *v* PURNA CHANDRA, 34 C. L. J 494 **650**

Bengal Alluvion and Diluvion Act (IX of 1847), ss. 3, 6—*Assessment—Special survey—Notice under s. 6 can be amended*—Thak *boundary, evidentiary value of.*

There is no provision in Act IX of 1847 which requires that before an assessment of revenue is made under the Act, there must be a special survey carried out under the terms of section 3 of the Act. There is nothing to show that the assessment contemplated by section 6 could not be based upon a survey carried out for a purpose other than that contemplated by section 6. Where there was a survey for the purposes of Settlement under the Bengal Tenancy Act, the result of that survey could be utilised to form the foundation of assessment under section 6 of the Bengal Alluvion and Diluvion Act.

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A notice served for the purposes of assessment under section 6 of Act IX of 1847 can be amended.

The mere circumstance that the river-bed is shown to be included within the *thak* boundaries of a particular estate, does not necessarily lead to the inference that at the time of the Permanent Settlement the bed of a large navigable river was as a matter of fact settled with the Zemindar. C SOUDAMINI DASYA CHOUDHURANY *v.* SECRETARY OF STATE FOR INDIA **76**

Bengal Government Indemnity Regulation XI of 1882, s. 36. *See* TALUK **145**

Bengal Land Revenue Settlement Regulation IX of 1825, ss. 2, 5. *See* TALUK **145**

Bengal Local Self-Government Act (III B. C. of 1885), ss. 78, 139, 140—*Encroachment on road—District Board, power of, to frame Bye-Laws—Bye-laws, whether* ultra vires.

A District Board is empowered under sections 139 and 140 of the Local Self-Government Act to make a Bye-Law for carrying out the purposes of the Act and has impliedly, if not expressly, power to provide, by its Bye-laws, for the punishment of encroachment over its roads in order to carry out the provisions of section 78 of the Act, *i. e*, to provide for the repairs and maintenance of its roads, etc. and such a By-Law framed by the District Board is not *ultra vires.* Pat MAHESH SHAH *v.* DARBARI HUSSAIN, 23 CR L J. 139 **571**

Bengal Municipal Act (III of 1884), s. 261, *interpretation of—Place of business likely to be offensive or unwholesome, whether come within section.*

Section 261 of the Bengal Municipal Act covers not only cases which are *per se* offensive or noxious but also a manufactory or place of business from which offensive or unwholesome smells may arise. C GOBINDA CHANDRA MULLIK *v.* CHAIRMAN OF THE HOOGHLY AND CHINSURA MUNICIPALITY **518**

——— s. 363, *applicability of—Suit against Chairman for breach of contract—Limitation.*

Section 363 of the Bengal Municipal Act is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise or honestly supposed exercise of their statutory powers. It has no application to a suit against the Chairman of a Municipality by an inspecting Pundit of Pathshalas or primary schools under the Municipality to recover his pay. Such a suit is for breach of contract, and not for anything done under the Act. C PANCHANAN CHATTERJEE *v.* SANTOSH KUMAR BOSE **105**

Bengal Rent Act (X of 1859), s. 6. *See* AGRA TENANCY ACT, s. 22 **824**

Bengal Tenancy Act (VIII of 1885), s. 22—*Amending Act (I B. C. of 1907), whether retrospective.*

Where a tenure-holder bought the subordinate *raiyati* interest of a tenant before the amendment of section 22 of the Bengal Tenancy Act in 1907 the subordinate right did not cease to exist by the alteration in the law subsequently made by the Amending Act of 1907.

Act I B. C. of 1907 is not retrospective in its effect. **C** ABDUL RAKIB KHAN *v.* JALAL AHMED **584**

——— **s. 22 (2)**—*Co-proprietors—One co-proprietor purchasing* kasht *land—Partition—*Kasht *land fallen to share of other co-proprietor, effect of* —Kasht *and* Bakasht, *meaning of.*

A co-proprietor who purchases *kasht* land in his Zemindary, which on a partition falls into the *takhta* of the other co-proprietor, is entitled to hold possession of the land on payment of rent to the other co-proprietor under section 22 (2) of the Bengal Tenancy Act.

The terms *kasht* or *bakasht* are words of art introduced in the Revenue Records for the purpose of understanding the possession of lands by the proprietors and the tenants. The former term is one of recent creation by the Settlement Authorities. The latter, in its true sense, equally applies to the cultivation of lands by the proprietors and the tenants. **Pat** NANDKISHORE SINGH *v.* MATHURA SAHU, 3 P. L. T. 13 **586**

——— **s. 22, cl. (2)**—*Occupancy holding, purchase of, by co-sharer landlord—Partition between co-sharers, effect of—Holding allotted to share of another co-sharer, effect of—Bengal Tenancy Amendment Act (I of* 1907*).*

Where a co-sharer landlord purchased the occupancy holding of a tenant before the amendment of section 22 (2) of the Bengal Tenancy Act in 1907 and thereafter on partition between co-sharers landlords the holding is allotted to the share of the other co-sharer, the holding does not cease, only the occupancy right comes to an end under section 22 (2) of the Act and the purchaser co-sharer is entitled to remain in possession.

Quære:—What will be the position of such a co-sharer purchaser of holding under the Amending Act of 1907? **Pat** BASUDEO NARAIN *v.* RADHA KISHUN, 3 P. L. T. 22; (1922) PAT. 55 **281**

——— **ss. 29, 147A.** *See* LANDLORD AND TENANT **581**

——— **ss. 30 (b), 105, 188**—*Enhancement of rent—Non-joinder of parties—Receiver appointed by mortgagee of one co-sharer's property not necessary party—Appeal, second, maintainability of—Receiver, position of.*

Where a Receiver appointed in respect of an eight-annas share of one of the two landlords in a Mouza at the instance of a mortgagee to ensure the re-payment of a mortgage-debt was not made a party to a proceeding under section 105 of the Bengal Tenancy Act for enhancement of rent under section 30 *(b)* of the Act but both the landlords who alone were shown by the Record of Rights to have title as landlord were parties to the proceeding:

Held, that it might have been well to allow the Receiver to be added as a plaintiff but his absence did not vitiate the trial and that the provisions of section 188 of the Bengal Tenancy Act were complied with in joining the two landlords as plaintiffs.

No second appeal lies from the decision of a Special Judge settling fair and equitable rent under the Bengal Tenancy Act but a second appeal lies from the decision of such a Judge regarding the

maintainability of suits under section 105 of the Bengal Tenancy Act.

A Receiver is entitled to be represented in a suit the result of which may be to affect the property in *custodia legis*. Though the appointment of a Receiver may in many cases operate to change possession it has no effect whatever on the title of the party to the property which is placed in the possession of the Receiver. **Pat** MADHEVA SURENDRA SAHI *v.* AWADH MISSIR, 3 P. L. T 316 **349**

——— **s. 49**—*Ejectment—Under-*raiyat, *whether can acquire occupancy right in homestead—Admission of evidence at appellate stage, propriety of.*

A settled *raiyat* of a village holding a homestead, though as an under-*raiyat* or under a *raiyat*, acquires a *raiyati* right in that homestead. It is not necessary that the homestead should be the only residential place of the *raiyat* of the village. **C** ISAR ALI *v.* SATIS CHANDRA ROY **504**

——— **ss. 50, 105, 105A.** *See* LANDLORD AND TENANT **589**

——— **s. 103B (3)**—*Entry in Record of Rights with regard to* chandina *or* bazar *land—Presumption.*

If an entry is made in the Record of Rights with regard to land which does not come within the scope of the Bengal Tenancy Act, such as *chandina* or bazaar land, the presumption of its correctness arising under section 103B (3) of the Act cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the Record of Rights. **C** SASI KANTA ACHARJYA *v.* SANDHYA MONI DASYA, 34 C. L. J. 504; 26 C. W. N. 483 **4**

——— **ss. 104H, 111A**—*Claim under s.* 104*H barred by limitation—Suit under s.* 111*A, maintainability of.*

A plaintiff is entitled to maintain a suit coming under section 111A of the Bengal Tenancy Act although his claim under section 104H of the Act may be barred by limitation. **C** PALAN MIAH *v.* SECRETARY OF STATE FOR INDIA **669**

——— **ss. 104J, 192,** *applicability of—Construction of* kabuliyat—Kabuliyat *executed before Act—Enhancement of rent.*

The predecessor-in-interest of plaintiffs created a permanent tenure at a fixed *jama* in favour of the predecessors-in-title of the defendants in the year 1860. The tenure comprised lands within the permanently settled Zemindari of the plaintiffs as well as some lands which formed the subject of diluvion and reformation. There was a provision in the *patta* that if any *chur* or any alluviated or *taufir* land was separately settled after "becoming Government *khas*," the *talukdar* shall not get any reduction of the *jama* mentioned in the *kabuliyat*. It was expressly stipulated in the *kabuliyat* that the rent was never to be increased or decreased. Some of the lands were resumed by Government and afterwards settled with the plaintiffs in 1900 as *dearah* lands. The Government revenue was separately fixed for the lands and the rent payable by the tenants was also fixed. In 1914, there was a fresh Settlement by Government and the Settlement Authorities assessed higher revenue by the plaintiffs and higher rent payable by the tenure-holders under

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the plaintiffs. Plaintiffs brought a suit for recovery of the rent fixed in the Settlement proceedings. The defence was that the plaintiffs were not entitled to any additional rent over and above the rent payable under the *kabuliyat* of 1860:

Held, that the intention of the parties being that the lease should comprise all the lands within it and the rent having been settled at a lump sum for all the lands leased out, it could not be said that the tenants would have no right to the lands even if they were settled with the Zemindar after resumption by Government, and that, therefore, the tenants were entitled to hold the lands as part of the *taluk* at the same rent under the original *kabuliyat*.

Section 192 of the Bengal Tenancy Act does not, either expressly or impliedly, give power to a Revenue Officer to fix a rent so as to affect contracts entered into before the passing of the Act. The words "contract or lease" in the section do not include contracts entered into before the passing of the Act.

Section 104J of the Bengal Tenancy Act does not apply to a case where there is a *kabuliyat* executed before the passing of the Act. **C** PRAFULLA NATH *v* FWEDDIE, 35 C. L. J. 14 **234**

——— **s. 105,** enhancement of rent under—Landlord, right of, to recover enhanced rent. *See* CESS ACT, s. 20 **3**

——— **ss. 105, 109**—*Settlement of rate of rent—Suit for rent decreed at another rate of rent—Decision as to rate of rent not* res judicata *in subsequent suit.*

Where the rate of rent payable by a tenant has already been decided in a proceeding under section 105 of the Bengal Tenancy Act, a Civil Court deciding a suit for arrears of rent brought subsequently has no jurisdiction, by reason of section 109 of the same Act, to pass a decree fixing the rate of rent and if it does so, the decision is not *res judicata* in any later suit for arrears of rent. **Pat** RAMESHWAR SINGH BAHADUR *v.* YOUNUS MOMIN, 6 P. L. J. 588; 3 P. L. T. 130; (1922) PAT. 68 **474**

——— **s. 148A, Sch. III. Art. 3**—*Dispossession by landlord—Landlord also auction-purchaser—Suit for possession by tenant—Limitation—Arrears of rent, recovery of*

One of the heirs of a deceased tenant sued to recover his share of the holding, which was sold in execution of a rent-decree against the other heirs and purchased at the execution sale by the landlords themselves It was admitted in the plaint that the dispossession was not effected by the landlords at the time of the delivery of possession to them as auction-purchasers but subsequently by tenants, who had been settled upon the land by the landlords, and with the help of the landlords' *naib*:

Held, that in these circumstances the question of the landlords being the auction-purchasers did not arise and that the suit was governed by the special rule of limitation contained in Article 3, Schedule III of the Bengal Tenancy Act.

A suit for rent to fall under section 148A of the Bengal Tenancy Act, must be for the recovery of the whole of the arrears due, but it need not be for the entire rent payable for the holding. **C** PROFULLA CHANDRA *v.* BABURAM MONDAL, 34 C. L. J. 462 **1**

Bengal Tenancy (Amendment) Act, (I B. C. of 1907). *See* BENGAL TENANCY ACT, s 22 **584**

——— *See* BENGAL TENANCY ACT, s. 22, CL. (2) **281**

Berar Inam Rules 1859, class III, r. V—*Inam Estates in Berar—Devolution—Lineal descendants—Descendants through females included—Muhammadan Law*—"Farzandan," *meaning of.*

The devolution and incidents of an Inam Estate in Berar are regulated by the Berar Inam Rules of 1859, subject to the Sanad or certificate or other document evidencing the special terms of the grant in the particular case.

The Berar Inam Rules were made for the settlement of Jagir and Inam claims throughout Berar, both by declaring the grants the Government of India was prepared to recognize, and treating each recognition as a fresh starting point to provide conditions for its future enjoyment and devolution.

In the Province of Berar, an old "Sanad" from the Muhammadan Government of the time granting a personal or subsistence grant or Inam is not binding on the Government of India and the real starting point of the grant, so far as the Government of India is concerned, is the time when the grant is first recognised by it under the Berar Inam Rules of 1859.

Where a maintenance grant given by a Muhammadan Ruler in perpetuity to the grantee and his children (*bafarzandan*) was recognised by the Government of India without using the word "*farzand*" or the expression "lineal descendants" in the certificate of recognition:

Held, (1) that the condition "*bafarzandan*" mentioned in the original grant was not continued by necessary implication when the grant was recognised;

(2) that the recognition intended merely to continue the grant and not its original conditions;

(3 that under the circumstances the devolution should be governed by the personal law of the parties subject to any limitation imposed by the Inam Rules;

(4) that the case fell under class III of the Berar Inam Rules and was governed by rule V in which the expression "direct lineal heirs" was not intended to be used in the restricted sense in which the word "*farzandan*" is used in Muhammadan Law and that consequently a daughter's son was a lineal descendant.

Obiter.—The term "*farzandan*" according to the interpretation put upon it by the writers on Muhammadan Law means offspring or lineal descendants and includes daughters but not the children of daughters, inasmuch as lineage is derived from the father and not from the mother. **N** CHOTU *v.* AKABAR ALI **72**

Berar Municipal Law of 1886, ss. 51, 53—*Municipal tax—Suit for refund—Jurisdiction of Civil Court—Malkapur Municipality—Professional tax—Outside income, whether taxable—Plaint, allegations in—Jurisdiction.*

A Civil Court has jurisdiction to entertain a suit for the refund of a Municipal tax, if the assessment thereof is *ultra vires*, and to enter into account

Berar Municipal Law—concld.

and direct the refund of the amount realised in excess. It has no jurisdiction to go into the question of correctness or otherwise of a calculation of assessment if the assessment is not *ultra vires* In such a case if there be any mistake in calculation, it can be set at right only on appeal, as provided by the Municipal Law.

The Malkapur Municipality in Berar cannot, under Notification No. 64?, dated 16th October 1906, of the Local Government, assess professional income derived by the assessee outside its Municipal limits, unless such income is brought in and mixed with the income made within the Municipality

The jurisdiction of a Court depends upon the allegations in the plaint and not upon those which may ultimately be found true. The allegations may, after the trial of the suit, be held to be unfounded, in that case the suit would be dismissed, not because the Court had no jurisdiction, but because the allegations on which it was based were found to be untrue. At the same time, a Court would not have jurisdiction merely upon a bare assertion in the plaint The plaint must make distinct allegation of fact or of law which may bear out the assertion. **N** MUNICIPAL COMMITTEE, MALKAPUR *v.* AMRIT WAMAN DALAL **532**

Bombay Rent (War Restrictions) Act (II of 1918), s. 9 (2)—*Object of Act—Landlord and tenant—Ejectment—Accommodation for staff of employees of landlord—Sufficient cause.*

The object of the Bombay Rent (War Restrictions) Act is not the expropriation of the landlord but the prevention of profiteering.

Under section 9 (2) of the Bombay Rent (War Restrictions Act, the discretion of the Court in determining what is a satisfactory cause is unfettered.

The accommodation of a staff of employees is sufficient cause under section 9 (2) of the Bombay Rent (War Restrictions) Act to eject a tenant.

The test to determine whether the staff are occupying the premises as servants of the landlord or as their tenants is, whether this occupation is necessary to or ancillary to the performance of the servants' duties.

Where the occupation is by way of remuneration or part payment for services, the servant occupies not as a servant but as a tenant. **B** NIPPON MENKWA KAISHIKI PORTLOCK, 24 BOM. L. R. 64 **677**

Burma Laws Act (XIII of 1898), s. 13 (1)—*Burmese Buddhists—Breach of promise of marriage—Suit for damages—Appeal—Lower Burma Courts Act (VI of 1900), s. 30—Civil Procedure Code (Act V of 1908), s. 100.*

Suits for damages for breach of promise of marriage between Burmese Buddhists are suits of the nature described in section 13 (1) of the Burma Laws Act as involving questions regarding marriage, and appeals in such suits lie under section 30 of the Lower Burma Courts Act, and not merely under section 100 of the Civil Procedure Code. **L, B** MAUNG GALE *v.* MA HLA YIN, 11 L. B. R. 99 **411**

Calcutta Improvement Tribunal—*Calcutta Rent Act (III B. C of 1920), ss. 18, 24—Power of President exercising jurisdiction under s. 18—Order for costs passed by him.*

The jurisdiction exercised by the President of the Calcutta Improvement Tribunal under section 18 of the Calcutta Rent Act is civil jurisdiction, so that in proceedings under that section, the President is a Court of Civil jurisdiction within the meaning of the Code of Civil Procedure, and under section 41 of that Code as well as under the specific provision of section 24 of the Rent Act, the procedure laid down in the Code in regard to suits applies, as far as may be, to such proceedings.

Consequently the President being vested with all the powers of a Civil Court for the trial of suits has power to award costs and has inherent power to enforce an order for costs passed by him. **C** BATA KRISTO PRAMANIK *v.* A. K. ROY, 26 C. W. N. 30 **177**

Cause of action—*Admission of defendant, effect of—Plaintiff entitled to decree on admission.*

Where the plaint discloses a cause of action and there is an admission on the part of the defendant, and there is nothing to show that there is no cause of action, the plaintiff is entitled to a decree **Pat** BAUL DAS MISRA *v.* DIGAMBAR KURI, 1921, PAT. 97 **644**

———, *definition of—Marriage, dissolution of, suit for—Divorce, declaration of, suit for—Conjugal rights, restitution of suit for—Limitation Act (IX of 1908), s. 23, Sch. I, Art. 120.*

A cause of action includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action.

In 91? defendant, husband, filed a suit against plaintiff, his wife, for restitution of conjugal rights. The plaintiff pleaded divorce and cruelty. The suit was dismissed on the ground of cruelty but no specific finding was given on the question of divorce. The plaintiff thereafter sued for a declaration that the relationship of wife and husband between the parties ceased to exist in consequence of a divorce effected by the defendant and in the alternative for a decree for dissolution of the marriage and the cause of action was stated to have arisen on the date on which the Appellate Court delivered its judgment in the previous suit. The defendant denied the alleged divorce and cruelty and pleaded limitation:

Held, that the opinions expressed in the judgments of the previous litigation as to the affirmation of cruelty and the negation of divorce could not form a cause of action for the present suit of the plaintiff, and that any admission of evidence of acts of cruelty and of divorce other than the acts and the divorce mentioned in the plaint would amount to a departure from the cause of action on which the suit was brought and that the plaintiff could not prove them.

As a suit for dissolution of marriage or for a declaration as to an accomplished divorce is essentially different in cause of action from a suit for restitution of conjugal rights, the former suit does not fall within the purview of section 23 but is governed solely by Article 120, Schedule I, of the Limitation Act. **O** MUHAMMAD HAMIDULLAH KHAN *v.* FAKHRJAHAN BEGAM, 8 O. L. J. 650 **452**

C. P. Court of Wards Act (XXIV of 1899), s. 31—*Ratification.*

Section 31 of the Court of Wards Act does not forbid ratification of agreements by a ward, after restoration of his estate, made on his behalf by the Court of Wards while the estate was under its management, as the section deals only with promises made by the ward personally. **N** JIWANDAS *v.* JANAKI **53**

C. P. Land Revenue Act (XVIII of 1881), s. 83. *See* LIMITATION ACT, SCH. I, ARTS. 14, 120 **970**

C. P. Municipal Act (XVI of 1903), ss. 122, 67 (2), 239, *applicability of—Encroachment made by previous owner—Present owner, whether guilty—Remedy.*

Section 122, Central Provinces Municipal Act, cannot be interpreted as making punishable an omission to remove an existing encroachment not made by the accused person.

The word "obstructs" in section 122 of the Act applies to the person who built or caused to be built the encroachment and not to the accused who originally had nothing to do with the erection of the encroachment.

Sub-section (2) of section 67 read with section 139 of the Central Provinces Municipal Act provides a remedy for an encroachment not made by the present owner or occupant of the erection which is an encroachment. **N** CHUNNILAL *v.* MUNICIPAL COMMITEE ARVI, 23 CR. L. J. 127 **559**

C. P. Tenancy Act (XI of 1898), s. 39—*Gift of absolute occupancy holding by tenant—Consent of landlord, effect of—Surrender—Alienation—Widow, powers of—Landlord, power of, to confer status of absolute occupancy tenant—Hindu Law—Gift by widow with dying wish of husband—Reversioners, whether bound.*

The transfer by a tenant of an absolute occupancy holding by gift with the consent of the *malguzar*, even though it is a subsequent consent, is equivalent to a surrender to him by the tenant and a fresh grant by him to the donee.

In respect of surrenders, an absolute occupancy right is a tenancy and not a proprietary right.

A surrender by a widow of her tenancy rights to the *malguzar* is binding on the reversioners inasmuch as the limitations of her interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation.

In a suit for possession, the plaintiffs having no title cannot succeed on the weakness of the defendant's title when he is in possession.

A landlord is entitled to lease a parcel of land with the condition that the lessee is to have all the rights and liabilities that an absolute tenant has and though such a lessee may not be called an absolute occupancy tenant as defined in section 59 of Act XI of 1898 or section 4 of Act I of 1920 yet his rights and liabilities and legal status would be the same whatever he is called

Obiter dicta—A gift made by a widow in accordance with the expressed dying wishes of her husband, especially one entailing many spiritually beneficial acts to be performed, is binding on the reversioners. **N** RAMCHANDRA BALKRISHNA *v.* RAMCHANDRA JAIRAM **952**

C. P. Tenancy Act—contd.

——— s. 41—*"Pre-emption"—Landlord's right—Intended sale not taking place—Suit for pre-emption, maintainability of—Limitation Act (IX of 1908), Sch I, Arts 10, 120, distinction between.*

A landlord is entitled to claim pre-emption under section 41 of the C. P. Tenancy Act irrespective of the fact whether the intended sale has taken place or not.

Article 10, Schedule I of the Limitation Act applies to a pre-emption suit when the sale has actually taken place.

Article 120 of the Act applies to suits for pre-emption where the sale has not taken place. **N** BAI *v* SADAKALLI **959**

——— s. 41 (2)—*Construction of document—Lease or mortgage—Test.*

The test for determining whether a document is a lease or a mortgage for the purposes of section 4 (2 of the C P Tenancy Act is whether the transfer was made for the purpose of securing the debt or was for the purpose of discharging it

A document which purported to be a lease for a certain number of years in consideration of a lump sum, provided that in case the transferee was dispossessed from the land, he would be entitled to recover from the transferor the principal amount together with interest thereon at 2 per cent. per mensem from the date of the document:

Held, that the debt was intended to be subsisting throughout the whole of the term and was not meant by the parties as discharged when the document was executed, and that, therefore, the document was a mortgage for the purposes of section 41 (2) of the C. P. Tenancy Act. **N** RAMPRASAD *v.* CHANDULAL **241**

——— s. 41 (2)—*Notice by tenant to* Malguzar *—Intenion to mortgage—Details of holding not given—Notice, validity of.*

A notice under section 41 (2) of the C. P. Tenancy Act given by a tenant to his *Malguzar* intimating an intention to mortgage his holding on the terms mentioned in the request contained in it for a loan unless the *Malguzar* himself is willing to advance a loan on mortgage, need not be worded with the accuracy of a plea and a failure to give the details of holdings when the details are within the landlord's knowledge, or are available to him with ordinary diligence, does not invalidate the notice. **N** RAGHOJIRAO *v.* RAJESHWAR **816**

——— s. 70—*Landlord and tenant—Personal law.*

In all matters of tenancy the personal law applies except in so far as it is limited or altered by the Tenancy Law. **N** SUNDARLAL *v* BISAMBHAR **180**

——— s. 93—*Disputes between neighbouring tenants—Jurisdiction of Revenue Officer.*

The C. P. Tenancy Act is an Act mainly to provide for the relations between landlords and tenants and contains no provisions for settling disputes between neighbouring tenants, who must have recourse to the Common Law.

Section 93 of the C. P. Tenancy Act is not intended to be a precursor of suits between neighbouring tenants. **N** MOTIRAM *v.* HARI **67**

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——— s. 95—*Co-sharers—Re-distribution—Suit between tenant and former landlord—Jurisdiction of Civil and Revenue Courts.*

The division of *khudkasht* or *sir* among co-sharers of a village to be held in severalty is a partial private partition of the village lands and each co-sharer's separately held parcel of land is a separate *patti* of the village, of which he is the sole landlord, and if he leases that land to a tenant, he is still the sole landlord. But there is nothing to prevent the co-sharers having a re-distribution of the lands held in separate ownership at any time, and either *khudkasht* or tenancy land can always be transferred to another *patti* or to, what may be called, the *shamilat patti*. Of tenancy land so returned to the body of co-sharers they are the landlords and are ordinarily represented by the *lambardar*, and the co-sharer who held the land previously in separate ownership is no longer the landlord. A suit between him and the tenant in respect of that land is, therefore, not a suit between landlord and tenant as such and is cognisable by a Civil Court. **N** JAGANNATH *v.* SAHEBRAO **127**

——— s. 95—*Revenue Officers, powers of, to award costs—Costs not awarded—Civil suit to recover costs, maintainability of.*

All Revenue Officers holding enquiries of the nature described in section 95 of the C. P. Tenancy Act, which includes enquiries under section 93 of the Act, have, by rules having the force of law, been given the powers of Civil Courts in the matter of costs and if they do not award costs, they must be held to have disallowed them and a subsequent suit for the recovery of the costs incurred in the revenue proceedings will not lie. **N** MOTIRAM *v.* HARI **67**

Cess Act (IX of 1880), ss. 5, 41, Ch. IV, ss. 52, 64—*Public Demands Recovery Act (I of 1895)—Sale of holding for non-payment of cess, effect of—Previous incumbrance on holding—Priority—Rent-free tenure, cess on, liability to pay, when arises—Notice under Cess Act—Evidence Act (I of 1872), s.* 114 (e)—*Presumption*—Onus—*Contract to pay cess not illegal—Previous decree for cess*—Res judicata.

A purchaser of a holding in execution of a decree for cess purchases only the right, title and interest of the tenant; but the holding itself does not pass so as to entitle the purchaser to hold it free from encumbrance created upon it by the tenant previous to the sale and, therefore, he cannot have the encumbrance annulled nor recover possession of the holding from a purchaser of it in execution of a decree based on the encumbrance.

The payment of road cess is a liability to the Government, but the liability enforced by section 52 of the Cess Act does not in itself create any charge on any estate or tenure. So far as the liability to the Government is concerned, it is a personal one, which is enforced by the Public Demands Recovey Act and for the realization of which the right, title and interest only of the judgment-debtor passes.

In order to make cess payable under the provisions of the Cess Act with respect to rent-free lands the requirements of Chapter IV of the Act must be complied with. It is only after the publication of the extracts from the valuation roll

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that the liability to pay cess to the superior landlord arises in the case of a rent-free tenure. When the provisions of Chapter IV of the Cess Act are fully complied with, then a cess becomes payable under the Act and such a cess a superior landlord is entitled to realise "with the same penalty and in the same manner as if it were an arrear of rent."

No presumption of section 114, clause *(e)* of the Evidence Act applies with respect to the notice provided by section 52 of Cess Act and the person, who claims that a right or obligation, such as the payment of cess by a tenure-holder, has accrued, must prove that the liabilities had been incurred and the things described in the Act had been actually done. The owners of rent-free lands are not bound to pay road cess before the publication of the valuation rolls under section 52.

A previous decree for cess does not operate as *res judicata*, inasmuch as a cess is a recurring charge.

A contract to pay cess is not at all illegal, nor is it prohibited under the provisions of section 41 or any other provision of the Cess Act. **Pat** PITAMBER CHOWDHRY *v.* RAHMAT ALI, 3 P. L. T. 282 **138**

——— s. 20, *applicability of—Rent entered in road cess return—Bengal Tenancy Act (VIII of 1885), s* 105, *enhancement of rent under—Landlord right of, to recover enhanced rent.*

Section 20 of the Cess Act is no bar to a landlord recovering rent at a higher rate than that entered in the road cess return, if subsequent to the lodging of the road cess return the rent is enhanced under section 105 of the Bengal Tenancy Act. **Pat** NAZIR RAI *v.* KESHO PROSAD SINGH, 6 P. L. J. 622; (1922) PAT. 57 **3**

Champertous bargains — Unconscionability—Undue influence. *See* CONTRACT ACT, s. 16 (3) **129**

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 2A, 3, 21B—*Suit pending—Estate taken under management—Effect on suit.*

Section 21B of the Chota Nagpur Encumbered Estates Act does not restrict the provisions of section 3 of the Act as it refers to suits other than proceedings in regard to the debts or liabilities referred to in section 2A.

Therefore, a suit against a party whose estate is, after the institution of the suit, taken under management under the Chota Nagpur Encumbered Estates Act is barred by section 3 of the Act. **Pat** BANSIDHAR DHAR *v.* TIKAIT HARNARAYAN SINGH, 6 P. L. J 685; 1922) PAT. 112 **283**

Chota Nagpur Tenancy Act (VI of 1908), ss. 87, 224 (2)—*Suit under s.* 87 *—Appeal, second, to High Court, maintainability of—Civil Procedure Code (Act V of 1908), s.* 104.

No second appeal lies to the High Court from the decision of the Judicial Commissioner in an appeal arising in a suit under the provisions of section 87 of the Chota Nagpur Tenancy Act either under section 224 (2) of the Chota Nagpur Tenancy Act or under the provisions of the Civil Procedure Code. **Pat** FOUJDAR SAHU *v.* NEMA BHOGTA, 6 P. L. J. 634; (1922) PAT. 109 **285**

Civil Procedure Code (Act V of 1908), s. 11—*Evidence Act (I of 1872), s. 115*—Res judicata *and estoppel, difference between—Auction-purchaser in execution of money-decree, whether representative of judgment-debtor—"Person claiming through another," meaning of—Landlord and tenant, decision between, whether* res judicata *in suit between landlord and auction-purchaser of tenant's rights—Transferee, title of.*

There is a difference in the principle upon which the doctrines of *res judicata* and estoppel are based. *Res judicaia* in this country is founded on the principle that there should be an end to litigation as to any issue between the parties when once that issue has been directly determined between them by a Court of competent jurisdiction, and it affects not only the original parties but all others afterwards claiming under them and litigating under the same title. It bars fresh litigation at the outset. Estoppel is a rule of evidence based on the principle that a man who by his acts or statements has induced another to believe a thing to be true, should not afterwards be heard to deny the truth of that thing to the prejudice of the other who acted upon the belief so induced.

No man can transfer to another a better title than he himself possesses.

An execution-purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of *res judicata*.

A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by Statute or common law, he can have no better title than the person through or under whom he claims.

Therefore a purchaser at an execution sale, who purchases the right, title and interest of a tenant judgment-debtor is a person claiming under the latter and is bound by the rule of *res judicata* and cannot again in a suit between himself and the landlords re-open the matters already decided between his predecessor-in-title and the landlords. **Pat** KALI DAYAL *v.* UMESH PRASAD, (1922) PAT. 33 **466**

——— s. 11, Explanation IV—Res judicata—*Suits by Hindu son to avoid father's debts—Want of necessity and immoral nature of debts, pleas of.*

In execution of simple money-decrees against *L. B.* put the immoveable properties of *L* and his son *M.* to sale. *M.* brought a suit for a declaration that the properties were joint family properties and there being no legal necessity, they could not be sold. *M.*, however, did not allege that he was not liable as the debts were of a nature which he was not liable under the Hindu Law to pay. The suit was dismissed. The property was sold and *M.* brought the present suit for a declaration that the debts were tainted with immorality and he was not liable. The first Court dismissed the suit holding that it was barred by *res judicata*, the lower Appellate Court held that it was not barred. On appeal of the defendant :

Held, that the suit was barred by *res judicata* as the present ground of attack that the debt was tainted with immorality ought to have been made a ground of attack in the previous suit, if *M.* wanted to avoid the sale of family property. **A** BADRI PARSHAD *v.* MOHAR SINGH, 4 U. P. L. R. (A.) 15 **511**

——— ss. 18, 21—*Jurisdiction, territorial—Objection in appeal—Failure of justice—Suit for possession of land re-formed* in situ*—Settlement—Limitation Act (IX of 1908), Sch. I, Art. 45, applicability of—Partition by Civil Court.*

In view of the provisions of sections 18 and 21 of the Code of Civil Procedure, unless there has been a failure of justice, a decree of a Trial Court cannot be set aside by the Appellate Court on the ground that it is doubtful whether the subject-matter of the litigation lay within the territorial jurisdiction of the Trial Court.

A person can sue for declaration of title to, and possession with mesne profits of, a land re-formed *in situ* without, in the first instance, obtaining a settlement of the same from the Revenue Authorities

When the object of a suit is not to set aside an award made by the Revenue Authorities but to recover possession of a land, section 45 of the First Schedule to the Limitation Act has no application.

Where the title of a plaintiff seeking for possession and partition of a property has not been made precarious, by virtue of its periodical Settlement for the assessment of revenue in favour of the defendant, there is nothing to prevent a Civil Court from effecting its partition. **C** MIDNAPUR ZEMINDARY CO., LD *v.* NARESH NARAIN ROY, 33 C. L. J. 457 **833**

——— s. 20—*Jurisdiction—Firm carrying on business in different places—Identity, determination of—Procedure—"Carrying on business," explanation and meaning of—Winding up and carrying on business—Stage of insolvency—Offence against insolvency law.*

In the case of firms carrying on business in different parts of the country or of the Province, sometimes constituted of the same people, sometimes constituted with the omission of one person who has no interest in a branch business in one of the towns, or with the addition of a new person who has an interest confined only to that branch business, a Court should analyse the facts as thoroughly as it can, in order to determine whether the firms or persons so carrying on business are really the same legal entity or person in each place.

A firm, without being a branch in the sense that it is subordinate to and under the control of a firm in a different town and compelled to render an account to the latter, might still be, in substance, the same business so as to make it carry on business in its own place, if it is transacting the business of the other firm in its own place as agent for that firm, purchasing and selling goods and obtaining orders, forwarding or receiving orders to and from that firm and merely remunerating itself by being allowed to make a definite profit out of certain transactions or a limited profit out of all transactions.

"Carrying on business" is used in section 20, Civil Procedure Code, as distinct from personally working; of course a man personally working in a particular place is carrying on business, but a man may carry on business, and thousands of people do, in a place where he does no personal work of any kind, and a firm may be carrying on business at

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a particular place either through an agency or through a manager or by its servants without ever having left its own town. It means, in the section, having an interest in the business transactions at the particular place : a voice in what is done; a share in the gain or loss, as the case may be, and some control, if not over the actual method of working, at any rate, upon the existence of the business. It necessarily means making provision for the future.

Winding up or disposing of goods with a view to winding up is just as much carrying on business while it lasts, as purchasing goods or investing capital in carrying on business.

When a man reaches the stage of insolvency, he commits an offence against the insolvency laws unless he winds up his affairs, that is to say, he goes on incurring liabilities and incurring losses when he is unable to pay his debts. He still carries on business if with a view to winding up his business and preventing any further losses and committing a breach of the insolvency laws, he proceeds to dispose of his stock. **A** KIRPA RAM SITA RAM *v.* MANGAL SEN BISHEN MAL, 3 U. P. L. R. (A.) 18; 19 A. L. J. 696 **93**

——— s. 20—"*Reside*," *meaning of*—Animo residendi.

The term "residence" may be used in two senses, the one denoting the personal habitual habitation, the other the constructive, technical and legal habitation. When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides : the places of his personal and legal residence are the same. When, on the other hand, a person has no permanent habitation or family, but dwells in different places as he happens to find employment, there can equally be no doubt as to the place where he resides : he must be considered as residing where he actually or personally resides. But some individuals have permanent habitations, where their families constantly dwell, yet they pass great portions of their time in other places ; such persons have a legal residence with their families and a personal residence in the other places, and the word "reside" may, with respect to such persons, be used in relation to either their personal or their legal residence.

The word "residence" should not be construed narrowly as having always a reference to *animo residendi*. In the case of a lunatic it should be interpreted as implying not intelligent residence, but bodily presence **C** ANILABALA CHOWDHURANI *v.* DHIRENDRA NATH, 25 C. W. N. 178; 48 C. 577 **57**

——— ss. 20, 21—*Place of suing—Breach of contract—"Carries on business," meaning of—Failure of justice.*

Plaintiff, residing at Sialkot, leased a house situate at Murree, from defendants, who resided at Rawalpindi The negotiations were carried on by correspondence between the parties, and at some stage, the plaintiff posted a cheque to the defendents from Sialkot It was found that defendants leased out certain property which they owned at Sialkot, through an agent. Plaintiff sued defendants at Sialkot for damages for breach of contract :

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Held, (1) that the contract was formed at Rawalpindi ;

(2) that the breach, if any, had taken place at Murree ;

(3) that the mere posting of the cheque by the plaintiff from Sialkot did not have the effect of completing the contract at Sialkote ;

(4) that it was doubtful whether the mere leasing of house property at Sialkot by the defendants through an agent amounted to carrying on business at Sialkot within the meaning of section 20 of the Civil Procedure Code ;

(5) that, therefore, the Sialkot Courts had no jurisdiction to entertain the suit, but that as there was no failure of justice in consequence of the suit having been tried at Sialkot, objection as to place of suing could not be sustained by High Court by reason of section 21 of the Civil Procedure Code. **L** SOHAN SINGH *v.* RIDDICK **865**

——— ss. 20 (c), 115—*Jurisdiction, wrong decision as to—Revision—High Court, power of interference of.*

A High Court will exercise its revisional powers in the case of interlocutory orders where a failure to do so would result in irremediable damage to the parties. **L** DURGA PARSHAD-MUTSADDI LAL *v.* RULIA MAL-DOGAR MAL **282**

——— s. 24—*Transfer of case—Plaintiff's right to chose forum—Ground of transfer—Convenience.*

An applicant for transfer of a case from one Court to another must make out a strong case of the balance of convenience.

In such a case the convenience of the parties in the conduct of litigation is certainly a relevant consideration and it is rather the basis of nearly all statutory jurisdiction on the civil side.

A plaintiff has a *prima facie* right to decide the place of trial, but the defendant may show exceptional circumstances for trial of the case at another jurisdiction.

A suit for cancellation of a deed of gift executed in the Central Provinces by a deceased person while in the state of ill-health under undue influence was transferred from a Court within the jurisdiction of the Allahabad High Court where the parties resided to the Court in the Central Provinces on the ground that the balance of convenience was in favour of the latter Court inasmuch as all available witnesses resided at the place in the Central Provinces. **A** INAYATULLA KHAN *v.* NISAR AHMAD KHAN, 20 A. L. J. 118 **782**

——— s. 26—*Plaint, presentation of, at residence of Judge after Court hours—Jurisdiction to receive.*

The presentation of a plaint after the usual Court hours at the residence of the Judge is valid and a Judge has jurisdiction to receive it at his residence even after the Court hours, though he is not bound to do so. **N** MADHORAO *v.* MANOHARLAL **674**

——— ss. 47, 115, O. XXI, r. 100—*Relief sought for in revision—Other remedy open to petitioner—Practice—Application under r. 100, whether can be made by representative.*

Where a party has got a remedy open to him to obtain the relief which he is seeking under section 115 of the Code of Civil Procedure, a High

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Court will not ordinarily interfere unless there has been a very serious miscarriage of justice.

Quære.—Whether a person who is a representative within the meaning of section 47, Civil Procedure Code, is competent to maintain an application under Order XXI, rule 100, Civil Procedure Code. C GIRIBALA DASI *v.* PRIANATH PAL **476**

——— s. 43, cl. 2 (a)—"*Fraud*", *interpretation of—Execution of decree delayed through judgment-debtor's fraud—Limitation*

Where execution of a decree has been obstructed by fraud on the part of the judgment-debtor for more than 12 years from the date on which it was passed, the decree-holder is entitled to further opportunity under section 48, clause 2 (*a*) of the Civil Procedure Code.

Per *Walsh, J.*—The word "fraud" dealt with by section 48 (2) (*a*) of the Civil Procedure Code is such as prevents the execution of a decree within twelve years, and Judges ought to take a broad view of conduct deliberately adopted by judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections, which are dishonest upon the face of them. The word "fraud" in this section should not be narrowly interpreted. A LALTA PRASAD *v* SURAJ KUMAR, 20 A. L. J. 185 **877**

——— s. 60—*Sewing machine, whether tool of artisan—Exemption from attachment.*

A sewing machine is a tool of an artisan within the meaning of section 60 of the Civil Procedure Code and is, as such, exempt from attachment under that section in execution of a decree. N VITHOBA *v.* BABULAL **416**

——— s. 64—*Attachment—Objections—Attachment raised—Transfer—Subsequent attachment—Revival.*

Where an attachment is raised in consequence of a claim suit being decreed but the suit is finally dismissed in appeal, a subsequent application for execution would operate to revive the previous attachment and a transfer made even during the period the attachment was raised is void as against all claims enforceable under the attachment. N BHURIA *v* BALIRAM **220**

——— s. 73—*Execution—Rateable distribution—Court distributing assets, whether can inquire if decree obtained by fraud.*

A Court distributing assets under section 73 of the Civil Procedure Code cannot go behind the decrees, which are presented by the various decree-holders asking for rateable distribution, to deal with the question whether any of the decrees had been obtained by fraud or other improper means. B DATTATRAYA GOVINDSETH *v.* PURSHOTTAM NARAYANSETH, 24 BOM. L. R. 1 **600**

——— s. 73 (2), O. XXI, rr. 91, 93—*Execution of decree—Sale—Judgment-debtor having no saleable interest—Sale-money—Rateable distribution—Auction-purchaser—Suit to recover purchase money, maintainability of.*

Where a Statute creates an obligation and provides for enforcing its performance in a particular manner, performance must be obtained in that manner and in no other.

Section 73 (2) of the Civil Procedure Code contains no indication that a sale by virtue of which assets have been made available for rateable distribution can be attacked under it. The cause of action recognised by that section arises out of a wrong distribution of assets and is entirely without relation to the manner in which those assets were obtained.

The right of an auction-purchaser to obtain a refund of the purchase-money when the judgment-debtor is found to be without a saleable interest, is entirely the creature of rules 91 and 93 of Order XXI of the Civil Procedure Code, the result being that without getting the sale set aside through the Court and by the method prescribed by the Code, the auction purchaser has no remedy. The general principle of *caveat emptor* affects the purchaser unless he chooses to adopt the remedy given to him by the Statute.

A suit by an auction-purchaser for recovery of the purchase-money from persons to whom it has been paid, on the ground that the judgment-debtor does not possess a saleable interest in the property sold, is not maintainable. N LAKHMICHAND *v.* CHATURBHUJ **230**

——— s. 89, O. XXIII, r. 3, Sch. II, r. 1 (1)—"*Any matter in difference between the parties,*" *meaning of—Reference to arbitration—Jurisdiction of Court to refer matters not in dispute—Award on such reference, validity of*

The expression "any matter in difference between them" in paragraph 1, Schedule II, Civil Procedure Code, should not be given an extended meaning so as to include matters in dispute between the parties not included in the suit.

A reference to arbitration on such matters is not a valid reference and the award on such a reference can neither be treated as a valid award, nor a lawful compromise of the suit claim under Order XXIII, rule 3, Civil Procedure Code

An award under an invalid reference, being self invalid, gives no right either as an award or as a compromise.

Semble.—Section 89 of the Civil Procedure Code is a bar to such an award being accepted as a lawful agreement or compromise of the suit under Order XXIII, rule 3, Civil Procedure Code. M PEDDAPALAYAM BODACHARI *v.* PEDDAPALAYAM MUNIRACHARI, (1921) M. W. N. 765; 14 L. W. 666 **92**

——— ss. 100, 103—*Appeal, second—Finding of fact—High Court, power of, to go into evidence—Remand.*

It is not for a High Court, sitting in second appeal, even if it thinks that certain evidence has been improperly rejected by the lower Court, to weigh that evidence as against the evidence on the other side and arrive at a conclusion of fact upon the matter when that determination of question of fact does not come under section 103 of the Civil Procedure Code.

In such a case the matter should be remanded to the lower Appellate Court for determining the issues of fact upon the evidence.

Per *Jwala Prasad, J.*—A finding of fact of a lower Appellate Court is conclusive in second appeal but there is nothing to prevent a High Court from going into the evidence on the record and deciding any issue whether actually raised or not in the Court below if the finding of fact is set aside on

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the grounds mentioned in section 100 of the Civil Procedure Code.

Section 103 of the Civil Procedure Code has widened the power of the Appellate Court to go into evidence and determine any issue not determined by the Court below. **Pat** LOCHAN RAI *v.* SANT PRASAD, 3 P. L. T. 303 **536**

——— s. 105, O. VI, r. 17—*Amendment of plaint—General conditions on which amendment should be granted—Amendment, when should not be allowed.*

An amendment of pleadings is allowed subject to three general conditions, (1) *bona fides* on the part of the applicant, (2) possibility of amendment without such prejudice to the other party as cannot be compensated by costs and (3 the amendment is not such as to turn a suit of one character into a suit of another character.

In a suit for damages and permanent injunction, the plaintiffs in their plaint asserted that they had title to and possession of the land in suit; the defendants denied the plaintiffs' title, and pointed out that the suit could not be maintained as framed, as the plaintiffs were out of possession. Then the plaintiffs applied for amendment of the plaint and the only amendment which they wanted was that there should be a prayer for declaration of their title. That was disallowed by the Court of first instance. The Appellate Court by a remand order directed an amendment in terms of the plaintiffs' petition. After the case went back on remand, the plaint was amended with a prayer for declaration of the plaintiffs' title. Thereafter the plaintiffs put in another petition for further amendment, of the plaint with a prayer for recovery of possession. This was objected to by the defendants, on the ground that the amendment was illegal and altered the character of the suit. This objection was, however, disallowed and the case was tried out, with the result that the suit was decreed by the First Court and the decree was affirmed on appeal. On second appeal by the defendants:

Held, (1) that in all the circumstances of the case the Court ought not to have allowed the second amendment.

(2) that although the defendants not having appealed against the order of remand directing amendment, were debarred by the provisions of section 105, sub-section (2) of the Code of Civil Procedure, from disputing the correctness of the order, they were not precluded by the provisions of that section from showing that they had been prejudiced by the further amendment made in the course of the re-trial. **C** GYANENDRA NATH *v.* PORESH NATH PAL, 26 C. W. N. 73; 35 C. L. J. 25 **39**

——— s. 105 (2), O. XLI, r. 23, O. XLIII, r. 1 (u)—*Remand, order of—Appeal not preferred—Order, whether can be questioned—Burden of proof—Question of law.*

An order of remand which purports to be made under Order XLI, rule 23 of the Civil Procedure Code, if not appealed against, cannot be subsequently questioned, in an appeal from the decree passed after the remand.

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The question, upon which party the *onus* of proving any particular point lies, is a question of law **L.** NIAMAT BIBI *v.* MUHAMMAD FAIZ **745**

——— s. 110—*Appeal to Privy Council—Suit for declaration that plaintiff member of an agricultural tribe—Value of subject-matter—"Property."*

The words "the decree must involve, directly or indirectly, some claim or question to or respecting property of like amount or value" in section 110 of the Civil Procedure Code refer to some specific property and do not contemplate property which a party may be desirous of acquiring.

The valuation for purposes of jurisdiction is not always the real value of the subject-matter of the suit for purposes of section 110 of the Civil Procedure Code.

Plaintiff brought a suit for a declaration that he was a Rajput by caste and valued the suit for purposes of jurisdiction at Rs. 11,000. The defendant accepted that valuation. The suit was dismissed by the High Court. Plaintiff applied for leave to appeal to the Privy Council. It was objected that the value of the subject-matter of the suit was not Rs. 10,000 or above The plaintiff replied that his object in bringing the suit was to establish that he was a member of an agricultural tribe entitled to acquire land under the provisions of the Punjab Land Alienation Act, and that he intended to purchase a large quantity of land:

Held, that it could not be said that the value of the subject-matter of the suit amounted to Rs. 10,000 or that the decree involved any claim or question to or respecting property of like amount or value. **L** GHULAM RASUL KHAN *v.* SECRETARY OF STATE, 2 L 297 **239**

——— s. 115—*Error of judgment or law—Revision.*

A High Court in revision, under section 115 of the Civil Procedure Code, cannot interfere with any error of judgment or of law committed by a Subordinate Court where another remedy is available. **C** GURUDAS KUNDU *v.* DASARATHI HALDAR **512**

——— s. 115—*Exclusion of evidence—Revision.*

A mere error of law committed by a subordinate Court in excluding certain evidence does not justify a High Court in interfering under section 115, Civil Procedure Code. **C** GOLAM SOBHAN *v.* ALI HOSSAIN BAHADAR **696**

——— s. 115—*Misconstruction of rules—Revision—Jurisdiction—Patna High Court Rules for Subordinate Courts, rr. 37-B, 40, 41.*

A misconstruction of certain rules by a Subordinate Court with respect to Pleader's fees is not revisable under section 115 of the Civil Procedure Code. **Pat** RAMKISHUN DAS *v.* BENI PROSAD, 3 P. L. T. 314 **355**

——— s. 115—*Order fixing valuation for Court-fees—Revision does not lie—Error of law, whether ground for revision.*

No revision lies against a decision of a subordinate Court on a question of valuation determining the amount of Court-fee, inasmuch as no case has been decided by that Court within the meaning of section 115, Civil Procedure Code,

An error of law may be a good ground for second appeal, but it is not a ground for revision under section 115 of the Civil Procedure Code. **N** GOVIND *v.* DAJI **327**

——— s. 115—*Other remedy open—Revision—Powers of High Court.*

Revision should ordinarily not be granted even in a case in which no appeal lies, if some other remedy is provided which can be called reasonably efficacious in respect of the circumstances of the particular case. But in cases where some other remedy is provided, if the decree is wrong and the slower remedy by regular suit will still leave the person suffering injustice and undue hardship, the revisional powers of a High Court should be exercised in favour of the person suffering injustice. **N** RAMCHANDRA FATE *v.* SRIDHAR **351**

——— s. 115—*Revision where another remedy available—Court's duty where minors are concerned.*

A High Court will be slow to exercise its powers of revision, unless the party applying to the Court has no other remedy.

When an order is made on a reference to arbitration, and some of the parties concerned are minors, the Court should endeavour to ascertain, as far as possible, that the reference is for the benefit of the minors, as in the case of compromise, to which minors are parties. **S** EMNABAI *v.* FAKIR MAHOMED, 15 S. L. R. 165 **50**

——— s. 115—*Section to be interpreted liberally.*

The power under section 115, Civil Procedure Code, must receive a liberal rather than a narrow interpretation, particularly when the applicant has no other remedy. **S** NARAINDAS *v.* JASSOMAL, 15 S. L. R. 135 **37**

——— ss. 115, 151, O. XXI, r. 1, O. XXIII, r. 1—*Execution petition, withdrawal of—Sale of property notwithstanding withdrawal—Jurisdiction—Appeal—Inherent power of Court.*

A decree-holder applied for execution of his decree by sale of the judgment-debtor's property, but on the date fixed for the sale applied to the Court to dismiss the execution case. The Court rejected the second application and proceeded to sell the properties. Against the order rejecting the application an appeal was made to the District Judge who set aside the order of rejection. On an appeal to the High Court, a single Judge set aside the order of the District Judge as being without jurisdiction. On a Letters Patent Appeal:

Held, that no appeal lay to the District Judge against the order of the Munsif rejecting the application of the decree-holder and ordering the sale of the property in question.

Held, also, that the Munsif had no jurisdiction to reject the prayer of the decree-holder to dismiss his petition for execution, inasmuch as there was nothing to prevent a decree-holder from withdrawing his execution and getting it dismissed, if he did not want to claim any relief in respect of the execution.

Held, further, that under such circumstances the High Court had power under section 115 of the Civil Procedure Code to set aside the order of the Munsif, which was without jurisdiction. **Pat** RAM PRASAD RAI *v.* MAHEN KANT **122**

——— ss. 115, O. XXI, r. 66—*Revision—Valuation on sale proclamation cannot be fixed before date fixed—Jurisdiction.*

A Court has no jurisdiction to fix the valuation on a sale proclamation before the date fixed for the hearing of the matter. **Pat** SUKHRAJ BAHADUR *v.* DEBI BUKHSH, 3 P. L. T. 342 **360**

——— s. 115, O. XXI, r. 94—*Sale certificate, amendment of, without notice to judgment-debtor, legality of—Revision—High Court, discretion of, where no prejudice caused to judgment-debtor—Limitation.*

The amendment of a sale certificate at the instance of an auction-purchaser without notice to the judgment-debtor is a material irregularity in procedure.

Where, however, the irregularity has not prejudiced the judgment-debtor, a High Court will not interfere with the order in revision under section 115, Civil Procedure Code.

It is in the discretion of a High Court, in proper cases, to excuse the delay in presenting a revision petition after 90 days from the date of the lower Court's order. **M** YAGNASAMI IYER *v.* CHIDAMBARANATHA MUDALIAR, (1922) M. W. N. 130 **732**

——— s. 115, O. XXXIII, r. 2—*Application to sue in forma pauperis—Cause of action not disclosed—Rejection, order of—Revision, maintainability of.*

An application for leave to sue *in forma pauperis* should be rejected if it discloses no cause of action against the principal defendant.

Per *Piggott, J.*—*Quære.*—Whether an application for revision lies against an order rejecting an application for leave to sue *in forma pauperis.*

Per *Walsh, J.*—An order rejecting an application for leave to sue *in forma pauperis* is not a "case decided" within the meaning of the decision of the recent Full Bench Court and no application for revision lies against such a decision. **A** MAHADEO SAHAI *v.* SECRETARY OF STATE FOR INDIA, 20 A. L. J. 55 **255**

——— s. 115, Sch. II, para. 15—*Arbitration—Arbitrator getting private information but communicating it to other arbitrators—Award, validity of—Revision—High Court, power of.*

A High Court will proceed very warily in allowing revision in the case of awards.

Where in a case referred to arbitration one of the arbitrators gets private information about the case but takes care to communicate it to the other arbitrators in the presence of the parties and they have opportunity of checking the information or of contradicting it, the award is not vitiated. **M** MOHIDIN SAHIB *v.* RAMASWAMI CHETTY, (1921) M. W. N. 509; 41 M. L. J. 276; 14 L. W. 394 **676**

——— s. 144, *scope of—Letters Patent Appeal—Order of abatement set aside—Restitution—Order for costs, whether also set aside.*

Section 144, Civil Procedure Code, is not confined to cases where restitution is claimed on the reversal of the decree in a first or second appeal. Whenever a decree is varied or reversed, the section applies, however the reversal or variance may have been effected.

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Where an order declaring the abatement of a suit awards costs to the defendant, and the order of abatement is set aside on appeal, the order as to costs is also set aside, if, apart from the abatement of the suit, there was no other conceivable reason for the award of the costs to the defendant. **M** SITALAKSHMI AMMAL *v.* KRISHNASWAMY IYER, (1922) M. W. N. 186 **797**

——— **s. 145**—*Execution of decree—Arrest of judgment-debtor—Surety to produce judgment-debtor or to pay amount—Judgment-debtor sentenced to imprisonment—Surety aware of criminal proceedings when standing surety—Surety, liability of.*

A judgment-debtor who was arrested in an execution of decree was released from custody on a surety undertaking to produce him whenever the Court required and the surety gave a surety-bond to the Court binding himself, on failure to produce the judgment-debtor whenever required, to pay the amount himself. One month's time was given to the surety for the payment of the money and he was directed to produce the judgment-debtor on the expiry of the month. A criminal charge of embezzlement against the judgment-debtor was pending at the instance of the decree-holder at the time the surety-bond was given and this very surety went bail for the judgment-debtor in the Criminal Court. On the date on which the judgment-debtor was to be produced in Court, he was sentenced to imprisonment and thereupon the surety applied in Court for his discharge but no order was passed. On decree-holder's application for process against the surety:

Held, that the surety was not discharged from his obligations inasmuch as it could not be said that the surety could not have contemplated the possibility, or even the probability, of the judgment-debtor being in jail within a month of his executing the surety-bond when he knew that at that time criminal proceedings were going on against the judgment-debtor and that, therefore, execution could issue against the surety. **A** RAMESHWAR SINGH *v.* SRI LAL, 19 A. L. J. 968 **374**

——— **s. 149, O. XLIV, r. 1**—*Leave to appeal as pauper—Application dismissed—Memorandum of appeal—Court-fee paid within time allowed—Limitation.*

There is a distinction between applications to sue as a pauper, and applications to appeal as such. In the former the plaint is an integral portion of, the application; in the latter the memorandum of appeal is a separate document.

Appellant applied for leave to appeal as pauper, and along with his application filed a memorandum of appeal as required by Order XLIV, rule 1 of the Civil Procedure Code. The application was made within the period of limitation allowed for an appeal. Eventually, long after limitation had expired, the application was dismissed and the Court made an order requiring the appellant to pay in Court-fees by a certain date, which was done. At the hearing it was objected that the appeal was barred by time:

Held, (1) that the dismissal of the application for leave to appeal as a pauper did not involve a dismissal of the appeal;

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(2) that the order of the Court directing payment of Court-fees was made under section 149 of the Civil Procedure Code;

(3) that on payment of the Court-fees, the presentation of the memorandum of appeal was, under section 149 of the Code, validated as from the date of its original presentation and that, therefore, the appeal was within time. **L** DIYAL DAS *v.* SUNDAR DAS **741**

——— **s. 150, O. IX, r. 13,** *applicability of—Transfer of territorial jurisdiction from one Court to another*—Ex parte *decree, application to set aside—Forum, proper.*

Where the territorial jurisdiction of a Court in respect of a certain area is transferred to another Court, the Court to which the jurisdiction is so transferred can, under section 150 of the Civil Procedure Code, entertain an application under Order IX, rule 13 of Civil Procedure Code to set aside an *ex parte* decree passed by the former Court in a suit concerning the subject-matter within the area so transferred.

The expression "the Court by which the decree was passed" in Order IX, rule 13 of Civil Procedure Code is not so definite and precise as to create an exception to the general rule introduced by section 150 of the Civil Procedure Code.

Per *Krishnan, J.*—Section 150, Civil Procedure Code, is an enabling provision which prescribes what is to be done, in the ordinary course, to get an *ex parte* decree set aside. There is nothing in the section to restrict the making of an application to set aside an *ex parte* decree to the Court which passed it. **M** SRINIVASA RAO *v.* HANUMANTHA RAO, 42 M. L. J. 344; 15 L. W. 458 **727**

——— **s. 151, O. IX, r. 13**—*Limitation Act (IX of 1908), Sch. I, Art. 164*—Ex parte *decree—Refusal to set aside—Appeal—Application to set aside* ex parte *decree—Inherent power of Court to extend time.*

No appeal lies from an order purported to have been passed under section 151, Civil Procedure Code, refusing an application under Order IX, rule 13, Civil Procedure Code, to set aside an *ex parte* final decree in a mortgage suit.

A Court is not entitled by purporting to act under section 151 of the Civil Procedure Code to extend the period prescribed by Article 164 of Schedule I to the Limitation Act for an application to set aside an *ex parte* decree. **Pat** AJODHYA MAHTON *v.* PHUL KUER, (1922) PAT. 61 **341**

——— **ss. 151, 152**—*Amendment of decree by Court other than that which passed decree, legality of—Transfer of application for amendment of decree, whether valid.*

An order of a Court amending in execution a decree of another Court is wholly *ultra vires* and is not saved by sections 151 and 152 of the Civil Procedure Code.

A transfer by a District Judge of an application for amendment of a decree passed by him to another Court for disposal is improper and out of order. **M** KORALLA BUCHILINGAM *v.* KORALLA SATYANARAYANAMURTHI, 15 L. W. 301 **710**

——— O. I, r. 8—*Leave to sue in representative character—Notice, necessity of—Court, duty of—Omission to issue notice—Irregularity—Remedy—Procedure.*

The provisions of Order I, rule 8, of the Civil Procedure Code as to the issue of notice in a suit brought in a representative capacity are peremptory and a Court is bound to issue notice as required by the rule. If it omits to issue notice, it commits an irregularity and a grave irregularity, and the proper course to follow for the Appellate Court in such a case is to send back the case to the Court of first instance, with directions to take up the case at the stage at which it ought to have issued notice and to issue notice and then proceed with the suit and re-try it.

No Court should overlook or omit to carry out what the law requires.

Per *Walsh, J.*—Permission in terms of rule 8 of Order I to a plaintiff to sue in a representative capacity is fundamental to representative procedure. A Court has no jurisdiction to ignore or to break its own rules or to grant the decree in the face of a breach of law. **A** SHYAM LAL *v.* LALLI, 20 A. L. J. 73 **259**

——— O. II, r. 2—*Failure to sue for portion of claim*—Bona fide *mistake—Subsequent suit for that portion, whether maintainable.*

Where in a previous suit for profits the plaintiffs under an impression that the profits were paid annually failed to include in the claim profits of six months which had fallen due and it subsequently transpired that the profits were paid half-yearly a subsequent suit for the profits of those six months is not barred by Order II, rule 2 of the Civil Procedure Code. **A** NIHAL SINGH *v.* NAJUBAN, 4 U. P. L. R. (A.) 16 **585**

——— O. II, r. 2—*Mortgage—Lease—Suit for rent—Suit on mortgage, whether barred.*

The defendant mortgaged his house to plaintiff for Rs. 606; possession was to be with the plaintiff, who was entitled to charge interest at 1 per cent. per mensem and was to set off against the interest any sums received by way of rent. It was open to him to induct any tenant he chose, but he gave the house to defendant on a year's lease at Rs. 6 per mensem. In 1911 the plaintiff sued the defendant for Rs. 90, being rent for 15 months, and obtained a decree. Subsequently he brought another suit to recover the mortgage-debt and interest:

Held, that the causes of action in the two suits were different and that, therefore, the subsequent suit was not barred by the provisions of Order II, rule 2 of the Civil Procedure Code. **L** MUHAMMAD HUSSAIN *v.* ABDUL GHAFUR KHAN **102**

——— O. II, r. 2—*Mortgage, simple—Mortgage for term—Option to sue for interest or principal and interest—Suit for interest alone after expiry of term—Subsequent suit for principal and interest, maintainability of—Cause of action, what is.*

The cause of action is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings.

A simple mortgage-deed, containing no express covenant for the payment of the principal and interest, provided that the interest would be paid monthly and if no interest was paid for six months the creditor would be entitled to sue for interest alone or for both principal and interest. No interest was paid and after three years—the expiry of the period of the mortgage—the mortgagee, relying on the cause of action arising on the non-payment of interest for six months, sued for interest alone and got a decree. Subsequently he sued for the principal and the further interest that had accrued due:

Held, that the subsequent suit was barred by Order II, rule 2 of the Civil Procedure Code. **P C** MUHAMMAD HAFIZ *v.* MUHAMMAD ZAKARIYA, 20 A. L. J. 17; 26 C. W. N. 297; (1922) M. W. N. 89; 35 C. L. J. 126; 42 M. L. J. 248; 15 L. W. 377; 24 BOM. L. R. 341; 30 M. L. T. 224; 3 P. L. T. 279; 1 P. W. R. 1922 **79**

——— O. II, r. 2—*Suit for deceased's estate—Omission to sue for one bond—Second suit for that bond not maintainable.*

Z., as heir of her father-in-law, *K.*, obtained a decree against a debtor on a bond executed by him in favour of *K.* Meanwhile *B.* and others filed a suit against *Z.* for the estate of *K.* on the ground that they were *K*'s heirs and *Z.* was in unlawful possession of *K*'s estate. They then knew of the bond but omitted to sue for it. In a subsequent suit for a transfer to them of the decree on the bond against the debtor:

Held, on appeal, that the suit was barred under Order II, rule 2 of the Civil Procedure Code **N** BHUDMAL SHEOLAL *v.* ZUNKARI **338**

——— O. V, rr. 10 to 18, O. IX r. 5, O. XLI, r. 18—*Service of summons—Duty of appellant to supply identifier—Appeal, dismissal of.*

Under law no obligation is cast upon an appellant to supply an identifier when the peon goes to effect service of the summons. The identifier referred to in rule 18 of Order V of the Civil Procedure Code need not necessarily be one supplied by the party. He may be a person in the village knowing the defendant.

No identifier is required for a service of a notice upon a respondent in an appeal pending in the High Court An appeal cannot be dismissed for an appellant not supplying an identifier. **Pat** NAGENDRA NATH GHOSH *v.* SAMBHU NATH PANDE **49**

——— O. V, r. 17—*Service of summons—Agent or person competent to accept service present—Diligence to effect personal service, whether compulsory.*

The application of the words "after using all due and reasonable diligence" in rule 17 of Order V is specially restricted to the case where there is no agent empowered to accept service on behalf of the defendant nor any other person on whom service can be made.

Where there is such a person, the serving officer need not make such diligent efforts to effect personal service, even if the agent or adult member of the defendant's family refuses to accept service on his

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behalf. It is, however, still necessary to prove that the defendant "cannot be found." **N** MADAN SINGH *v.* KESHEOPRASAD **44**

——— O. VII, r. 6—*Bar of limitation—Facts stated in plaint, whether can be controverted.*

Where the plaintiff satisfies the requirements of Order VII, rule 6, of the Civil Procedure Code by stating in the plaint the ground showing how his claim is within limitation, he ought not to be debarred from taking another and even an inconsistent ground to get over the bar of limitation. **N** ONKARLAL *v.* RAJ MOHAMUD, 17 N. L. R. 209 **279**

——— O. IX, rr. 8, 9, O. XVII, r. 2—*Dismissal of suit on merits on plaintiff's non-appearance—Restoration—Jurisdiction.*

Order IX, rule 8, of the Code of Civil Procedure read with Order XVII, rule 2, does not contemplate the hearing of a suit on the merits in the absence of the plaintiff or his pleader. Therefore a suit dismissed on the merits in plaintiff's absence can be restored and re-heard. **A** RUKAM *v.* TARA CHAND, 20 A. L. J. 123 **775**

——— O. IX, r. 13, O. XLIII, r. 1 (d)—*—Ex parte decree by Munsif having Small Cause Court powers—Application to set aside* ex parte *decree rejected by Munsif having no powers—Appeal.*

Where a suit in the nature of a Small Cause Court suit was decreed *ex parte* by a Munsif exercising jurisdiction as a Small Cause Court Judge but an application to set aside the *ex parte* decree under Order IX, rule 13 of the Civil Procedure Code, was made to, and rejected by, his successor who was not invested with Small Cause Court powers:

Held, that as the decree, being that of a Small Cause Court, was final and not open to appeal, no appeal lay from the order passed by the Munsif under Order IX, rule 13 of the Civil Procedure Code. **A** HIRA LAL *v.* JHUNNI LAL, 20 A. L. J. 203 **967**

——— O. XI, rr. 14, 15, 21—*Production and inspection of documents—General description in order for inspection, whether sufficient—Penalty for non-compliance.*

In an order for the production or for the inspection of books and documents, a general description would be sufficient so long as that description would suffice for the identification of the document or book sought to be produced or inspected.

The penalty provided in rule 21 of Order XI of the Civil Procedure Code should only be imposed in extreme cases and as a last resort.

When books relating to a partnership, the business of which is carried on at several places, are ordered to be produced, it is an extreme measure to penalise the failure of the defendant to produce one out of many books by striking his defence out.

The provisions of rule 21, Order XI, Civil Procedure Code, are applicable to the case of an omission to produce any document under rule 14 of Order XI of the said Code.

Semble:—The omission of the word "production," which appears in rule 14, in rule 21 of Order XI of the Civil Procedure Code, is due to the fact that it is redundant there. **L** RAM NATH *v.* PARABHU DAYAL **661**

Civil Procedure Code—1908—contd.

——— O. XX, r. 1—*Notice announcing result of case posted on notice board—Compromise—Petition—Court, jurisdiction of.*

The posting of a notice upon the notice-board of a Court announcing the result of an appeal is not a sufficient compliance with the requirements of Order XX, rule 1, Civil Procedure Code, as to the pronouncement of judgments in open Court, and the appeal is still pending for want of a delivered judgment, and the Court has jurisdiction to entertain a petition of compromise. **M** TARIGOPULA NAGIAH *v.* KOMINENI SESHAMMA, 41 M. L. J. 335; 14 L. W. 514; (1921) M. W. N. 866 **82**

——— O. XXI, r. 2—*Full satisfaction of decree certified to Court—Subsequent withdrawal by decree-holder of sum deposited by another judgment-debtor in Court by mistake—Application for refund of money so withdrawn—Execution—Execution Court, jurisdiction of—No separate suit necessary.*

A decree-holder was paid out of Court by one of the judgment-debtors and an application was made to the Court under Order XXI, rule 2, Civil Procedure Code, certifying that the full decretal money had been paid. Subsequently, another judgment-debtor deposited the decretal money in Court not knowing that the decree-holder had already been paid off in full. The decree-holder withdrew this money out of Court. The judgment-debtor then made an application for refund of this money:

Held, that the Executing Court was the proper Court to decide the matter notwithstanding that the decree had already been executed some time before and that no separate suit was necessary. **Pat** GOPAL RAI *v.* RAMBHANJAN RAI, (1922) PAT. 53 **307**

——— O. XXI, r. 2 (3)—*Execution—Decree, satisfaction of, not certified to Court, cannot be recognised.*

Under Order XXI, rule 2 (3) of the Civil Procedure Code a payment or adjustment of a decree which has not been certified or recorded cannot be recognised by any Court executing the decree. **M** ARUNACHALA CHETTIAR *v.* PANCHALI PADAYACHI, (1922) M. W. N. 189 **830**

——— O. XXI, r. 57—*Execution—Attachment—Default by decree-holder—Application dismissed but attachment maintained—Order, whether proper.*

A Court executing a decree found itself, on a particular date, unable to proceed with the execution of the decree by reason of the default of the decree-holder, but instead of dismissing the application or adjourning it to a further date as provided by Order XXI, rule 57 of the Civil Procedure Code, passed an order that the execution case should, for the time being, be dismissed, but that the attachment should remain in force. On a subsequent date the decree-holder applied to the Court to proceed with the sale of the property without any fresh attachment:

Held, that although the order passed by the Court was not a proper order for the Court to have passed, it could not be treated as a nullity and as having no effect upon the parties between whom

it was passed and that the property could be sold without a fresh attachment **A** MUHAMMAD MUBARAK HUSSAIN *v.* SAHU BIMAL PRASAD, 20 A. L. J. 113 **91**

——— O. XXI, rr. 66, 90—*Execution of decree—Notice—Subsequent applications, continuation of first—Omission of fresh notice—Irregularity—"Shall be done" and "shall not be done," distinction between.*

Where two successive applications made by the decree-holders for execution of a decree are practically applications to continue the previous execution proceeding, the issue of a fresh proclamation under Order XXI, rule 66 of the Civil Procedure Code when the necessary particulars were duly ascertained in the previous execution proceeding is not absolutely necessary and if necessary the omission is a mere irregularity which can be made a ground for setting aside the sale under Order XXI, rule 90 of the Civil Procedure Code.

A distinction must be drawn between cases in which a Court or an official omits to do something, which a Statute enacts shall be done, and cases in which a Court or an official does something which a Statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of a prohibited thing is *ultra vires* and illegal. **O** BASANT LAL *v.* SAJJAD HUSAIN, 24 O. C. 391 **988**

——— O. XXI, r. 69—*Execution sale taking place on date to which it was not adjourned, effect of—Material irregularity—Substantial injury.*

Where an execution sale, which had been adjourned to take place on a particular date, was adjourned till another date and the sale did not take place on that adjourned day but was held on a subsequent date, to which date the sale had never been adjourned under Order XXI, rule 64, Civil Procedure Code:

Held, that there was a material irregularity in the conduct of the sale which would justify its reversal if it was established that the judgment-debtor had suffered a substantial injury by reason of the irregularity. **C** HARI SADHAN ROY *v.* SHIB GOPAL MITRA, 35 C. L. J. 140 **746**

——— O. XXI, rr. 71, 84—*Auction-sale—Failure of purchaser to deposit 25 per cent. of purchase-money — Re-sale — Damages — Purchaser, liability of—Decision, whether appealable.*

Certain property belonging to judgment-debtor was put up for sale in execution of a Civil Court decree. In the execution-sale the appellant was the highest bidder and was declared to be the purchaser but he failed to pay the deposit of Rs 25 per cent. of the purchase-money as required by Order XXI, rule 84 (1) of the Civil Procedure Code. The sale Officer announced that the property would be re-sold next morning and it was re-sold On the second sale the price fetched was much less. The judgment-debtor made an application under Order XXI, rule 71 to make the first purchaser liable for the difference in price:

Held, that the first purchaser was liable for the difference in price inasmuch as there was a re-sale within the meaning of Order XXI, rule 84, Civil Procedure Code, and as under Order XXI, rule 71 a purchaser was liable for a default both in the making of the original deposit and in the subsequent payment of the balance due.

Held, also, that the adjudication in the matter amounted to a decree and that an appeal lay from that decree.

Per *Walsh, J.*—*Quære*—Whether a suit for the difference of the sale price consequent on the failure of the first purchaser is expressly excluded by the provisions of Order XXI, rule 71 of the Civil Procedure Code. **A** SITA RAM *v* JANKI RAM, 20 A. L. J. 105 **813**

——— O. XXI, r. 89—*Application to set aside sale—Deposit by one of several judgment-debtors, whether enures for benefit of co-judgment-debtors*

Where one of several judgment-debtors makes a deposit in Court of the amount stated in a sale proclamation and the 5 per cent. of the purchase-money, quite independently and not conjointly with the other judgment-debtors, it is not open to a co-judgment-debtor to take advantage of such deposit in support of an application under Order XXI, rule 89 of the Civil Procedure Code **M** OBLA K. SUBBAYAR *v.* THOPPAI MUTHAYAR, 14 L. W. 631; 42 M. L. J. 71; 30 M. L. T. 83 **983**

——— O. XXI, r. 90—*Execution—Auction sale—Encumbrance not mentioned in proclamation—Auction-purchaser, whether can apply to set aside sale.*

An auction-purchaser is a person whose interests are affected by a sale within the meaning of Order XXI, rule 90 of the Civil Procedure Code and can, therefore, maintain an application under the rule for setting aside an auction-sale when an encumbrance existing on the property sold has not been mentioned in the sale-proclamation. **N** SHIVPRASAD *v.* SANTOOJI **875**

——— O. XXI, r. 92—*Decree—Sale—Satisfaction admitted by decree-holder—Confirmation—Powers of Court.*

The very foundation of the powers of a Court to execute a decree, *viz*, the existence of a decree capable of execution, disappears after a decree is admitted by the decree-holder to be satisfied and the Court's powers in execution also cease thereafter Therefore, an auction sale held previous to the admission of the satisfaction of a decree cannot be confirmed after satisfaction is notified to Court, as the confirmation of a sale is a proceeding in execution. **N** NILKANTH *v.* YESHWANT **331**

——— O. XXI, r. 99—*Execution of decree—Obstruction—Sub-tenant of judgment-debtor.*

A sub-tenant of a tenant judgment-debtor cannot claim to be in possession of the leased property on his own account or on account of some person other than the judgment-debtor, within the meaning of rule 99 of Order XXI of the Civil Procedure Code and an auction-purchaser of such property is entitled to get possession of it from the sub-tenant. **B** JAIRAM JADOWJI *v.* NOWROJI JAMSHEDJI, 28 BOM. L. R. 1316 **212**

——— O. XXII, r. 1—*Malicious prosecution and obstruction of right of way—Damages, suit for—Death of defendant—Tort—Personal action.*

A suit was filed for damages for (1) malicious prosecution and (2) for obstruction of right of way.

Civil Procedure Code—1908—contd.

Before the suit came on for hearing the defendant died. There was no suggestion that the estate of the wrongdoer had benefited by his act of wrongful obstruction:

Held, (1) that the action was in each case for tort and was a personal action;

(2) that defendant's liability for his wrongful acts died with him.

(3) that as defendant's estate was not benefited by his wrongful act, no legal remedy could be pursued against it. **U B** MA SHWE THIT *v.* MAUNG PO AUNG, 4 U. B. R. (1921) 73 **66**

——— **O. XXII, r. 1**—*Suit, withdrawal of, with liberty to bring fresh suit—Court trying subsequent suit cannot question propriety of order.*

Where a suit was allowed to be withdrawn with liberty to bring a fresh suit, the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit, had properly made such order. **C** SAMADDI SHEIKH *v.* FULBASH BEWA **704**

——— **O. XXII, rr. 1, 11**—*Abatement of appeal—Order, whether appealable.*

No appeal lies from an order declaring that an appeal has abated. **A** MUHAMMAD ISMAIL *v.* MANOHAR DAS, 20 A. L. J. 214 **838**

——— **O. XXII, r. 3**—"*Legal representatives,*" *meaning of—Application by some—Abatement, whether of entire suit.*

The words "legal representatives" in Order XXII, rule 3, of the Civil Procedure Code of 1908 cannot be construed to mean all the legal representatives. They must include any legal representative to whom the right to sue survives. The question to be decided in each case is, whether the omission of one of the representatives is fatal to the suit or appeal.

Where, therefore, some only of all the legal representatives to whom the right to sue survives apply to have their names substituted for that of a deceased appellant, the appeal does not abate as a whole but abates to the extent of the claim of such of the legal representatives as have not jointly or severally applied for their substitution of their names. **N** NARAYAN *v.* AMRITA, 18 N. L. R. 21 **542**

——— **O. XXII, r. 4**—*Abatement of appeal—Death of respondent.*

Where in a suit by certain proprietors against the remainder of the proprietary body of the village for a declaration relating to the *shamilat deh*, one of the defendants dies and his legal representatives are not brought on the record, a declaration cannot be given against the remaining defendants and the whole suit abates. **L** SHAH MUHAMMAD *v.* KARAM ILAHI **121**

——— **O. XXII, r. 5**—"*Court,*" *meaning of—Question as to legal representatives of deceased party—Determination—Jurisdiction.*

The word "Court" in Order XXII, rule 5, Civil Procedure Code, means 'the Court before which the question arises,' that is to say, the Trial Court if the question arises at the trial stage and the Appellate Court if the question arises when the Appellate Court is in seisin of the case.

Civil Procedure Code—1908—contd.

Therefore, where there is any dispute as to the legal representative of a deceased party to an appeal the Appellate Court should determine the question itself and should not ask the Trial Court to report upon and determine the question but may direct the Trial Court to take evidence upon the question as to who is the proper legal representative of the deceased party and return the evidence to the Appellate Court. **Pat** CHANDMANI *v.* KARTICK SINGH **131**

——— **O. XXIII, r. 1**—*Withdrawal of suit—Appeal.*

An order granting permission to a plaintiff to withdraw a suit is not a decree, and is, therefore, not appealable. **L** SANT RAM *v.* SAHIB KAUR **719**

——— **O. XXIII, r. 3**—*Compromise to be recited in entirety—Decree not to be passed beyond suit.*

When a compromise has been effected between the parties to a suit, the proper course to follow is to recite the compromise in the decree in its entirety, but to pass a decree in accordance therewith only in so far as it relates to the suit. **C** JIVAN KRISHNA *v.* RAMES CHANDRA DAS **47**

——— **O. XXXII, r. 4 (3)**—*Guardian ad litem—Appointment without consent—Certificated guardian—Presumption as to consent—Suit against minor unrepresented by guardian—Decree—Jurisdiction.*

In a suit against a minor a Court is not entitled to presume that a certificated guardian (of the person and property of the minor under Act VIII of 1890 will consent to be appointed guardian for the suit, and should not, without his consent to such an appointment, in contravention of the express direction of sub-rule 3 of rule 4 of Order XXXII of the Civil Procedure Code, appoint him as guardian for the suit.

The provision as to the consent of the person proposed to be appointed guardian for the suit is mandatory and imperative.

Therefore when, a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect upon him.

When a Court proceeds to make a decree against an infant who is not properly represented by a guardian, as contemplated by the Code of Civil Procedure, the Court acts without jurisdiction, inasmuch as a decree is made against a person who is in essence not before the Court.

In a suit notices were duly served upon a minor defendant and his certificated guardian for the latter's appointment as guardian *ad litem* of the minor in the suit. The certificated guardian did not appear, but was nevertheless appointed by the Court as guardian *ad litem* He, however, never appeared and took no steps to protect the interests of the infant. On the suit being decreed *ex parte* against the minor, the certificated guardian preferred an appeal, which was dismissed. The minor meanwhile attained majority and preferred a second appeal:

Held, that, inasmuch as the fact that the proposed guardian had preferred an appeal could not be taken as an index that he had consented to his appointment as guardian for the suit, the decree made against the minor could not be maintained and must

Civil Procedure Code—1908—contd.

be vacated. **C** ANNADA PRASAD *v.* UPENDRA NATH DEY, 34 C. L. J. 293 **18**

——— O. XXXII, r. 7, Sch. II, paras. 15, 16—*Jurisdiction, facts ousting, must be patent—Minor—Reference to arbitration on behalf of minor—Sanction of Court not obtained—Reference voidable—Objection to legality of reference and award overruled—Judgment pronounced in accordance with award—Appeal—Revision—Award, finality of.*

Facts ousting jurisdiction must be patent on the face of the record before it can be predicated of a Court that it has exercised a jurisdiction not vested in it by law in terms of clause *(a)* to section 115, Civil Procedure Code.

A reference to arbitration on behalf of a minor without the sanction of the Court is not void but only voidable and it is entirely within the province of the Court, before which an award is filed in pursuance of such a reference, to determine whether the reference was void from its inception. But where an objection as to the legality of the award on the ground of absence of Court's sanction is taken and the Court holds the reference and award to be valid, its decision, even if it is erroneous, is on a point of law and as such is not open to revision, inasmuch as section 115 of the Civil Procedure Code is not directed against conclusions of law or facts in which the question of jurisdiction is not involved.

The words "being otherwise invalid" at the end of sub-clause (1) *(c)*, paragraph 15, Schedule II, Civil Procedure Code, are intended to give effect to the principle of finality in cases of arbitration, and where the judgment of the Court is pronounced according to the award under paragraph 16 (2), not only there is no appeal but there is no revision as well. Otherwise the principle of finality of awards would be destroyed. **S** EMNABAI *v.* FAKIR MAHOMED, 15 S. L. R. 165 **50**

——— O. XXXIII, r. 7 (3)—*Suit* in forma pauperis—*Court-fee, payment of, during inquiry into pauperism, effect of—Withdrawal of application.*

Where a person applies for leave to sue as a pauper, and along with his application presents a plaint, but during the course of the inquiry into his pauperism, he files the requisite Court-fee, the suit, for the purposes of limitation, must be treated as having been instituted on the day on which the original application for leave to sue as a pauper was made, and not on the day when the Court-fee was filed. The withdrawal of the application to sue as a pauper, which is involved in the subsequent payment of the Court-fee is not equivalent to a refusal of permission such as is contemplated by rule 7 (3), Order XXXIII of the Civil Procedure Code. The withdrawal is an admission of nothing more than that at the time of payment the applicant is no longer a pauper. It is a submission to an order of dispauperisation under rule 9 *(b)*, not to one of refusal of his original application. **N** GOPIKISAN *v.* BULAKIDAS **506**

——— O. XL, r. 1, cl. (2)—*Suit for partition—Receiver appointed to take possession—Objection by persons who are no parties to suit—Duty of Court to come to definite finding—Court, whether can delegate enquiry to Receiver.*

Civil Procedure Code—1908—contd.

Where in a suit for partition a Receiver is appointed to take possession of the properties in suit, the Court, on an objection being made by persons who are no parties to the suit claiming the properties to be theirs and in their possession, is bound by clause (2) of rule 1 of Order XL of the Civil Procedure Code to come to a definite finding as to the truth of these allegations before it can make an order directing the Receiver to take possession of the properties.

It is not the duty of a Receiver of a property to enquire into the claim of title made by third parties, and the Court has no power under the Code to delegate an enquiry on this point to the Receiver. **C** HAMIDA RAHAMAN *v.* JAMILA KHATUN, 34 C. L. J. 123 **837**

——— O. XL, r. 4, O. XLIII, r. 1 (s)—*Order directing Receiver to deposit money in Court, whether appealable.*

An order requiring a Receiver to deposit a certain sum of money due by him into Court unaccompanied by any direction as to the attachment of his property, is not an order made under rule 4 of Order XL of the Civil Procedure Code, and consequently is not appealable under rule 1 *(s)* of Order XLIII of the Code. **M** PALANIAPPA CHETTY *v.* PALANIAPPA CHETTY, (1921) M. W. N. 806 **403**

——— O. XLI, r. 1—*Appeal, copy of decree not filed with—Appeal admitted and argued—Copy of decree filed after limitation—Appeal, validity of—Jurisdiction, want of—Objection.*

Rule 1 of Order XLI, Civil Procedure Code, makes it obligatory on the appellant to file a copy of the decree with the memorandum of appeal.

A Court is bound to take cognizance of the fact that it has no jurisdiction, however that may be brought to its notice and at whatever stage of the proceedings.

A memorandum of appeal was filed without a copy of the decree appealed against. The appeal was admitted and finally argued. But before writing the judgment the Judge noticed that there was no copy of the decree on the record. Upon this the Judge gave time to the appellant, who filed a copy of the decree long after the period of limitation for filing an appeal had expired. The question was raised whether that copy could be accepted or whether the appeal should fail:

Held, that there was no proper appeal before the Court until long after the period allowed by the law of limitation and that the Court could not overlook this defect because of the fact that the appeal had, as a matter of fact, been admitted and argued. **U B** MAUNG PO SAUNG *v.* MA MUN, 4 U. B. R. (1921) 75 **68**

——— O. XLI, r. 11, *provisions of, whether controlled by those of r. 21—Appeal, summary dismissal of—Judgment.*

Where an order of a lower Appellate Court dismissing an appeal under Order XLI, rule 11 of the Civil Procedure Code ran as follows:—"Heard" Pleader. The appeal is summarily dismissed:

Held, that as the provisions of Order XLI, rule 11, were controlled by those of Order XLI, rule 31 of the Civil Procedure Code, the judgment of the lower Appellate Court was defective and should be set

Civil Procedure Code—1908—contd.

aside. **C** BIPIN BEHARI CHATTAPADHYA *v.* JOGENDRANATH BANDOPADHAYA **479**

——— **O. XLI, r. 23**—*Appeal—Remand, order of, appeal from—Findings of fact, whether can be interfered.*

An appeal from an order of remand under Order XLI, rule 23, Civil Procedure Code, stands on the footing of a second civil appeal and a High Court is bound by the findings of fact of the lower Appellate Court. **O** QAMAR JAHAN BEGAM *v.* BANSIDHAR, 8 O. L. J. 624 **376**

——— **O. XLI, rr. 23, 25**—*Letters Patent (Pat.), cl. 10—Remand order by Appellate Court, if can be challenged in final appeal by party not filing Letters Patent Appeal against remand order—Judgment, meaning of.*

It is not open to a Judge hearing an appeal from an order passed by a lower Court on remand by a High Court to call in question the earlier judgment of the High Court remanding the case to the lower Court for re-decision after setting aside the order of the Court below. A party not having filed a Letters Patent Appeal against such a judgment of a Single Judge remanding the case, cannot question the propriety of the order when the case again comes back to the High Court for final determination.

When a High Court sets aside the judgment of the lower Court and remands the case whether it orders a re-hearing or not, it is a final judgment and Letters Patent Appeal lies against such judgment but an order merely referring an issue for trial by the lower Court before the final determination of the appeal is not such a judgment. **Pat** MUNSHI LAL *v.* RAMASIS PURI, 3 P. L. T. 313 **175**

——— **O. XLI, r. 27.**

It is not proper for an Appellate Court to admit evidence after the close of arguments. If it is necessary to admit evidence at the appellate stage for the proper adjudication of a case, the Court may do so in strict observance of the provisions of Order XLI, rule 27, Civil Procedure Code. **C** ISAP ALI *v.* SATIS CHANDRA ROY **504**

——— **O. XLV, r. 7**—*Appeal to Privy Council—Security, extension of time for depositing—Cogent reason.*

Where a party, who has obtained leave to appeal to His Majesty in Council, applies for an extension of the prescribed period of six weeks for furnishing the requisite security and depositing costs, he is bound to show that during that period he exercised due diligence in endeavouring to obtain the necessary money: the mere statement that he has been trying to raise a loan and has failed will not be considered a "cogent" reason for granting an extension within the meaning of the Privy Council ruling in *Barjore* v. *Bhagana*, 10 C. 557: 11 I. A 7; 8 IND. JUR. 216; 4 SAR. P. C. J. 493; Rafique & Jackson's P. C. No 76: 5 IND DEC. (N S) 373. **L B** PONNAMMAL *v.* BANK OF RANGOON, 11 L. B. R. 108 **450**

——— **O. XLV, r. 7**—*Privy Council Appeal—Application to deposit security money made within time—Order made beyond time—Deposit, validity of.*

An application was made by the appellant within the time allowed by Order XLV, rule 7, of the Civil Procedure Code that the security amount might be received. The order made on the application was "Lay before the Bench concerned." At the next sitting of the Bench an order was made that the money be received but that order was made after the period allowed by law had expired:

Held, that as the applicant was ready with money within time and could not deposit as the proper Bench was not sitting to make an order the deposit must be deemed to have been made in time. **A** DEBI RAI *v* PRAHLAD DAS, 20 A. L. J. 51 **340**

Civil Procedure Code—1908—concld.

——— **O. XLV, r. 7**—*Privy Council Appeal—Extension of time for security and deposit for translation—High Court, power of.*

A High Court has no power to extend the time for furnishing security and making a deposit for translation and printing and other charges in Privy Council Appeals beyond those times which are now definitely and clearly set out in the amended Order XLV, rule 7 of the Civil Procedure Code. **A** RAM DHAR *v.* PRAG NARAIN, 20 A. L. J. 13 **249**

——— **O. XLVII, r. 1**—*Review, maintainability of, pending appeal—Ground for review.*

A Court has power and in fact is bound to proceed with an application for review of judgment notwithstanding the fact that an appeal has been subsequently filed. **Pat** SHAM LAL SAHU *v.* NAG KOER **125**

——— **Sch. II**—*Arbitrators appointed by parties—Pleader, power of, to cancel and appoint another.*

Where in a case a litigant has himself appointed the arbitrators, his Pleader has no power to substitute another or others in their place or to revoke the appointment of one or more of them without the knowledge of or instructions from his client. Power to make an appointment in the first instance in the absence of any instructions to the contrary is one thing and power to undo the appointment made by his client is another thing. **N** KASHIRAM *v* GUDDOO **879**

——— **Sch. II, para. 8**—*Date fixed for filing award—Case not to be disposed of that day.*

As the filing of an award is an act of the arbitrator, it is unjust to require the parties to the case to be present in Court on the date fixed for the filing of the award.

A Judge does not act within the spirit of paragraph 8 of Schedule II of the Civil Procedure Code by dismissing the suit for non-appearance of parties on the date fixed for the filing of the award, if the award is not filed on that date.

Paragraph 8 means that the Court must wait till the date fixed by the Court for the filing of the award. If the award is not filed on that date, the Court may then, and not in anticipation of the arbitrators not filing the award, make an order superseding the arbitration and fixing a date for proceeding with the suit. **Pat** MAHARAJ BHAGAT *v.* HARIHAR BHAGAT, 3 P. L. T. 346 **144**

Companies Act (VII of 1913), s. 4 (2)—*Partnership — Agreement — Use of word "partners" and "partnership"—Test of partnership—Master and servant—Admission by party to suit—Estoppel.*

The use of the words "partners" and "partnership" in an agreement does not necessarily show that there is a partnership. The parties may call themselves partners but if it appears that one of them is to do nothing more than to advance money to the other,

Companies Act—contd.

and is to be repaid by a share of the profits, they must be treated as creditor and debtor.

An admission made by a party in a previous suit, compromised at a very early stage without any decision on that point by the Court, is not conclusive, and the party is not in any way estopped from showing in a subsequent suit that his statement in the previous suit however dishonestly made, was as a matter of fact untrue.

An agreement provided:—"It is settled that I should receive as pay for my labour ten annas six pies share of the profits I shall go wherever you send me and shall do whatever you ask me to do Without your permission I shall not go to my native place. If I go to my native place without your permission, I shall not take any share of the profits of the Company. If the Company suffers any loss, which God may forbid, I shall pay the same I shall go to my native place after disposing of the goods entrusted to me and realising the price of goods advanced on credit. If there be any deficit, I shall make good the same You may appoint another man in my place. The expenses you incur, the damages in respect of the goods and the unrealized amounts will be paid by me from my private property If you find any fault with me you can dispense with my services and I shall have no right to any share in the profits."

Held, that the person entering into the agreement could not be a partner but was a mere servant though paid by a share in the profits, and that the liability to pay losses was in respect of the losses occasioned by neglect or default, and that he was concerned only with the business entrusted to him and had nothing to do with the shop itself or with the business done by other servants engaged on similar terms. **N** MOHAMAD JUSUF *v.* PIRMOHAMAD **363**

——— **s. 33**——*Rectification of register—Question of title—Jurisdiction—Appeal—Company, power of, to waive compliance with formalities for registering transfers of shares.*

When a Company refuses to recognise the right of a person to be registered as a member on account of his failure to comply with certain prescribed rules and formalities, a question arises between the Company and that person, and he may apply under section 38 of the Companies Act and compel the Company to register him.

In proceedings under section 38 of the Companies Act, a Court may, but is not bound to, decide a serious question of title. Where the Court elects to decide the question, it may either decide it itself, or, under the proviso to the section, send it to somebody else in the form of an issue, but the decision on the issue, in either case, is the decision of the Court and is appealable in the manner provided by section 100 of the Civil Procedure Code.

The formalities and rules prescribed by the articles of association of a Company for compliance by an alleged transferee, or proposing member of a Company to get his name registered, are matters which the Company may or may not insist upon. A Company has always a right to accept such evidence as satisfies its mind that an applicant is really the owner and a real transferee and entitled to be registered. **A** UNION INDIAN SUGAR MILLS CO LTD. *v* JAI DEO, 19 A. L. J. 957 **211**

Construction of decree—*Property given to two ladies for life for maintenance—Death of one—Half property, if reverts.*

A compromise decree provided that two ladies will take into possession certain lands for maintenance for life and after the death of both of them the plaintiff will take possession of the lands. On the death of one of the ladies the plaintiff sued for half the lands:

Held, on construction of the decree, that the grant was to the two ladies for life as maintenance and that they were joint tenants of the property and that the plaintiff was not entitled to recover possession until the death of both the ladies. **Pat** CHANDRA MOHAN DUTTA *v.* SASI BALA DASI, (1922) PAT 39; 4 U. P. L. R. (PAT.) 7 **277**

Construction of document—*Lease—Estate granted*—Naslan bad naslan, *meaning of.*

It is not safe to import considerations into the question of construction of a document which might have arisen or may arise with reference to the question of construction of other documents

Cases of construction of documents must be decided on their own facts and the only question in each case is, how the law is to be applied to the particular facts which are put before the Court.

A lease recited that the lessee would be in possession of the leasehold *naslan bad naslan* generation after generation and *ba qaemmuqami* (in substitution in the place of the lessor, on payment of a certain amount of annual rent, and in no circumstances and under no contingency, whether arising out of default of non-payment of rent reserved or arising out of any other breach of conditions, would the lessor have the right of re-entry in himself:

Held, that the lease conferred an absolute interest on the lessee subject to the payment of the annual rent.

Held, also, that the use of the words *naslan bad naslan* in documents had technical import in legal vocabulary and that if there was nothing else to control that import the use of the words meant an intention to convey an absolutes estate. **O** LACHHMAN DAS *v* BHAGWANT RAM, 8 O. L. J. 481 **707**

——— Patta istimrari—*Partition—Subordinate interest, whether affected—Ejectment.*

In order to construe a document the Court must ascertain its legal effect with reference to its terms. Merely calling a document by a certain name will not make it that document.

A document, styled a *patta istimrari*, granted by an under-proprietor, authorised the grantee to continue in possession of the property conveyed generation after generation on payment of the Government revenue It further provided that the grantee and his heirs shall have the same rights of ownership as the grantor had, and that the grantor and his representatives shall have no claim to and shall cause no interference in the property conveyed:

Construction of document—concld.

Held, that the document conferred complete under-proprietary title on the grantee in respect of the plots covered by it.

A partition does not necessarily invest a party with a right to actual possession of lands which are allotted to him. Persons holding interests in a village of a nature subordinate to the interest which is the subject-matter of partition cannot be held to be liable to ejectment on the ground that the land which they occupied is allotted to any particular co-sharer in the partition. A person seeking to eject them must show that their interest in the plot in question is of such a nature as was legally affected by the partition proceedings. **O** LIAQAT HUSAIN *v.* NAROTAM DAS, 8 O. L. J. 518; 4 U. P. L. R. (J. C.) 1 **780**

——— Wajib-ul-arz, *interpretation of—Custom—Daughters, exclusion of from inheritance—Step-sisters, whether excluded.*

Where a *wajib-ul-arz* ran as follows:—

"After the death of a co-sharer his sons inherit his property in equal shares. The daughters do not inherit when there are sons surviving. If any one leaves behind him only daughters and not sons, then daughters get a share in the property of the deceased; if a man leaves behind him issues (*aulad*) by his wives, then the property will be divided according to the dower, that is the issues of both the wives will receive half and half;" and was supported by a large number of instances of sons excluding daughters from inheritance:

Held, that a custom was established under which a brother excluded both his own sisters and his step-sisters. **O** MUMTAZ-UN-NISA BEGAM *v.* WAZIR ALI, 8 O. L. J. 569 **308**

Construction of grant — *Berar Inam Rules—Grant limited to male descendants—Females, whether can inherit—Civil Procedure Code (Act V of 1908), O. II, r 2—Suit for declaration of share—Suit for possession, whether barred.*

The only correct method for the judicial decision of matters affecting a Jagir is to ascertain the meaning and effect of the grant in each case from the circumstances and objects with which, and the rules under which, the Sanad for that Jagir was granted.

The terms of a Sanad are absolute. The rules are merely instructions to Revenue Officers for the original settlement of claim to Jagirs, and they lay down the conditions that shall ordinarily govern each grant. But there is nothing to prevent the authority, which says that certain conditions will be included in each grant it makes in the future, from altering any or all of the conditions in the case of a particular grant. Any such alterations are embodied in the Sanad, and every Inam estate in Berar is subject to the terms of the Sanad or Certificate in all matters mentioned in it and to the Berar Inam Rules in all matters not so mentioned. **N** SUBHAN ALI *v.* IMAMI BEGAM **194**

Contempt of Court — *Newspaper charging Muffussil Court with partiality pending proceedings—Remark, whether amounts to contempt of High Court—Bombay High Court, jurisdiction of, to deal with contempts of inferior Courts.*

Contempt of Court—concld.

Every contempt of an inferior Court will not necessarily constitute a contempt of the High Court. All such cases must be considered on their own facts.

A newspaper in commenting upon a criminal trial pending against certain volunteers of a Temperance Committee in a *Muffussil* Court said, "..... there is a thick rumour that on the day on which the volunteers were arrested, the Trying Magistrate ran up the stairs to the Collector's Office and called on Mr. Painter and that some whisper took place between them. Again, Police Sahibs sit in chairs on the Magistrate's dais and wink at each other." The paper further alleged that when the Pleader for the accused observed that it was right that co-witnesses should be examined on the same day or else there was fear of the Police tutoring them, the Court adjourned the hearing one hour earlier than the hour of closing of the Court prescribed by law. The Local Government moved the High Court to take proceedings against the Editor for contempt. An objection as to jurisdiction was raised:

Held, (1) that the remarks constituted a contempt of the Court:

(2) that the High Court had jurisdiction to deal with the matter for the remarks amounted to its own contempt, as they impeded the due administration of justice, for which the High Court was responsible not only as regards itself, but also as regards all the Courts which were inferior to it.

Per *Macleod, C. J. (Shah, J.*, contra).—The High Court of Bombay has the same powers of punishing for contempt as the Court of the King's Bench by virtue of the Common Law of England. Therefore, it has jurisdiction to deal with contempts of inferior Courts.

Any remarks reflecting on the character or impartiality of a Magistrate in the course of a trial must necessarily be contempt. **B** EMPEROR *v.* BALKRISHNA GOVIND KULKARNI, 24 BOM. L. R. 10; 23 CR. L. J. 77 **753**

Contract—*Offer—Invitation for offer—Proposal—Place of contract.*

Plaintiff, residing at *L.*, wrote to defendant at *G.* asking for quotations for salt and the terms on which it would be supplied. In reply, defendant sent a post card stating his terms and asking plaintiff to wire should he require salt. Plaintiff wired for one wagon of salt and on a breach arising out of this contract he sued the defendant for damages at *L.* Defendant objected that the contract having been entered into at *G.*, the Courts at *L.* had no jurisdiction to entertain the suit. The lower Appellate Court overruled this objection. On revision:

Held, (1) that defendant's post card was a mere invitation for offers and not a proposal;

(2) that plaintiff's wire constituted the proposal and that the contract was completed by defendant signifying his assent to the proposal at *G.*;

(3) that, therefore, the contract was entered into at *G* and the Courts at *L.* had no jurisdiction to entertain the suit;

(4) that a High Court had in revision power to set aside the order of a lower Appellate Court. **L** DURGA PRASAD-MUTSADDI LAL *v.* RULIA MAL-DOGAR-MAL **282**

Contract—contd.

——— *Sale of goods—Property in ascertained goods, when passes to buyer—Failure to pay purchase price, whether entitles seller to put an end to contract—Contract Act (IX of 1872), s. 107, when applicable—Notice of intention to re-sell—Profit upon re-sale, when cannot be recovered by buyer—Contract, construction of.*

A contract between the plaintiff and the defendants contained in a letter written by the former to the latter provided as follows :—"I take a settlement on purchase of all burnt steam and new coke in your Chaptaria Colliery at the rate of rupee one annas seven per ton at the mouth of the pit ..... I shall pay off your dues at the said rate, on account of the despatch of each successive waggon. I shall be entitled to keep in arrear the dues in respect of one waggon. I shall not be entitled to keep in arrear the dues in respect of the second waggon. If the dues on account of two waggons fall in arrear, you will be entitled to deduct the price of the two waggons out of the sum of Rs 201 (which I have this day paid you as advance ..... and further to forfeit the balance and shall be entitled to sell the coal, etc, remaining in stock on my account I shall be responsible for any profit or loss arising thereby." The plaintiff removed about 9 waggons of coke, but did not pay its price in accordance with the terms of the contract. The defendants thereupon deducted the price of the 4 waggons of coke from the advance of Rs 201, re-sold the remainder of the coke to third persons and put an end to the contract. In a suit by the plaintiff for damages for breach of contract:

Held, (1) that under the contract, the subject-matter of the contract being ascertained goods, the property in the coke passed to the plaintiff and that after the purchase the coke in stock was the plaintiff's and that when he failed to pay the purchase price of the contents of the 9 waggons in accordance with the contract, that in itself, apart from the other provisions of the contract, was not sufficient to entitle the defendants to put an end to the contract, but that the plaintiff's failure to pay for the coke taken by him would give the defendants a right to put in force the other provisions of the contract, namely, to forfeit the balance of the deposit and to sell the remainder of the coke in stock on account of the plaintiff;

(2) that although the defendants could not rely upon section 107 of the Contract Act, because the provisions of that section could only be made applicable when notice had been given by the seller to the buyer of his intention to re-sell after the lapse of a reasonable time, yet having regard to the terms of the contract itself, the plaintiff was not to have the profit upon the re-sale and in the circumstances which had happened, it must go into the pocket of the defendants and could not be recovered by the plaintiff. **C** SHIB NARAIN *v.* RAM BILASH **263**

——— Teji *transaction*—Vaida *transaction*—*Wagering Contract.*

Teji transactions are not wagering contracts unless it is positively proved that the parties agreed neither to ask for nor to give delivery

Contract—concld.

Teji contracts stand on the same footing as *Vaida* contracts. **B** MANUBHAI PREMANUND *v.* KESHAVJI RAMDAS, 24 BOM. L. R 60 **682**

Contract Act (IX of 1872), s. 16 (3)—*Contract, rescission of—Champertous bargains—Unconscionability—Undue influence.*

Champertous bargains having been held in India not to be contrary to public policy stand, as regards rescission, on the same footing as any other contract. Under section 16 (3) of the Contract Act, the fact that a champertous agreement is unconscionable is not in itself a sufficient ground for setting it aside, but simply one of two elements which, when combined, throw the burden of rebutting undue influence on the person who derives profit under the agreement **O** ABUL KASIM BEG *v.* EHSANUL GHANI, 21 O. C. 313 **129**

——— **s. 23**—*Money deposited with surety to induce him to stand bail, whether can be recovered—Public policy*

The plaintiff being an accused in a Police inquiry, was called upon to find security in Rs 1,000 for his appearance before the Magistrate. The defendant became his bail on the deposit with him by the plaintiff of Rs. 1,000 cash; at the same time the defendant gave the plaintiff a promissory note for Rs. 1,000 The bail was subsequently discharged and the plaintiff sued the defendant upon the promissory note:

Held, (1) that the contract had been carried out, at least in part, by the defendant standing surety for the plaintiff

(2) that the contract being opposed to public policy, the plaintiff could not succeed. **L** KISHAN LAL *v.* DURGA PARSHAD **137**

——— **s. 25 (3)**, *applicability of—Contract by guardian—Void or voidable—Minor, ratification by—Limitation Act (IX of 1908), s. 19—"Prescribed," meaning of.*

A contract entered into by a guardian is voidable by the minor on attaining majority but not void.

Section 25 (3) of the Contract Act applies to the case of a minor who executes a promise in writing to pay a debt entered into by his guardian.

A minor has full power to ratify a contract entered into by his guardian, whether it is for his benefit or not, with this qualification that he cannot ratify a transfer made during his minority by his guardian so as to affect the rights of an intermediate transferee for value.

The word "prescribed" in section 19 of the Limitation Act means, prescribed by the Schedule and is not subject to the provisions in section 4 of the Act. **N** NANDRAM *v* RANCHHODAS **716**

——— **s. 27**—*"Goodwill," sale of—Construction of documents.*

Agreements were entered into between two rival owners of passenger ferry-boats. Under one of these, called the *kistibandi* bond, executed by the respondent in favour of the appellant, the former purported to buy from the latter the goodwill of his trade in plying the ferry-boats, and every description of interest and ownership which the appellant had acquired in several landing places for plying the boats, as well as the settlements, obtained for the collection of tolls, at a certain

price payable by inslatments, with interest, and on default in payment of any instalment, the entirety was to become due at once An agreement or *kabala* was executed about the same date, by which the appellant in consideration of the said amount sold his rights in the landing places and settlements and in the goodwill of the business of plying the ferry-boats, and the appellant undertook to close the business of plying the particular ferry-boats and agreed that if he ever carried on the business he would return the whole amount of the consideration. On default of payment of instalments the appellant sued the respondent. It was alleged *inter alia* on the other side that the agreements were in restraint of trade and void:

Held, on construction of the agreements, that the transaction amounted to a sale of the goodwill and was valid. **F C** CHANDRA KANTA DAS *v* PARASULLAH MULLICK, 41 M. L. J 6 7; 30 M. L T. 1.5; 26 C. W. N. 345; 3 U. P. L. R. (P. C.) 90; 45 C. 1030 **271**

——— **S. 30**—*Wagering contract—Test—Agreement to pick cotton crop in exchange of certain* khandis, *whether wagering contract*

The essence of a gaming and wagering contract is that one party is to win and the other to lose upon a future event which, at the time of the contract, is of uncertain nature

An agreement by a tenant of a field to allow another to pick the cotton crop of the field in exchange for a promise to deliver certain *khandis* of cottou at the time of picking is not a wagering contract. **N** VITHOBA *v.* SITA AM **324**

——— **S. 43**—*Joint judgment-debtors—Decree discharged by one - Contribution*

The principle contained in section 43 of the Contract Act is founded upon equity and is applicable to the case of joint judgment-debtors.

Where one of several joint judgment-debtors satisfies the judgment, he can compel every other joint judgment-debtor to contribute his equal share towards the satisfaction of the judgment-debt, and if any of the latter makes default in such contribution, the remaining joint judgment-debtors must bear the loss arising from such default in equal shares. **L** SHAH MUHAMMAD *v.* MUHAMMAD ROSHAN KHAN, 4 P. W. R. 1922 **128**

——— **SS. 56, 65**—*Lessee of garden deprived of possession—Garden acquired under Land Acquisition Act—Compensation, award of.*

Where a lessee of a garden is deprived of the garden by reason of the acquisition of the garden by Government under the Land Acquisition Act, the performance of the contract entered into with him by the owner of the garden becomes impossible, and he is, therefore, entitled to be recompensed for the loss he has sustained. **A** MUHAMMAD HASHIM *v.* MISRI, 20 A. L. J. 41 **253**

——— **S. 72**—"*Coercion,*" *meaning of—Undue pressure.*

The word 'coercion' referred to in section 72 of the Contract Act is used in its general and ordinary sense of undue pressure, and its meaning is not controlled by the definition of 'coercion' in section 15 of the Act. **C** ADHOR CHANDRA DASS *v.* RAMESWAR MANNA **517**

——— **S. 73**—*Breach of contract—Damages, measure of—Assessment, how to be made*

In a suit for breach of contract to deliver goods on a certain date the market price *on that date* is the standard for the computation of compensation and not on a later date on which the goods may have been demanded and refused. **L** FIRM MANSA RAM-GORDHAN DAS *v.* FIRM MANGAL SAIN-DU I CHAND **497**

——— **S. 74**—*Instalment-bond—Principal and interest consolidated—Default, whole sum to be due on—Enhanced rate of interest on default—Penalty—Court, power of, to award reasonable compensation.*

Under section 74 of the Contract Act if in an instrument principal and interest have been consolidated the total amount is payable by instalments, and if there is a default clause that on the failure to pay an instalment the whole sum will become at once due, such a provision is a penalty.

A Court has power under section 74 of the Contract Act, as amended, even when no interest is payable until default but interest at an exorbitant rate becomes payable on default, to treat the stipulation as to the exorbitant rate payable on default as a penalty and to award reasonable compensation in lieu of such extortionate interest.

A Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. **N** BHAGWANSA *v* AMIN **963**

——— **S. 107,** when applicable—Notice of intention to re-sell—Profit upon re-sale, when cannot be recovered by buyer—Contract, construction of *See* CONTRACT **263**

——— **S. 118**—*Sale of goods—Goods not in accordance with order—Return of goods—Reasonable time—Pleadings—Evidence, admission of—Appeal—Burden of proof.*

A buyer of goods loses his right to reject the goods delivered to him under the contract by any act amounting to acceptance Mere receipt of goods, however, does not amount to acceptance. but it will become an acceptance if the goods are not rejected within a reasonable time The buyer is entitled to have the goods in his custody for a reasonable time in order that he may examine them and see whether they comply with the warranty. What is reasonable time is purely a question of fact and has to be decided on the circumstances of each case. In this case, where the goods sold were five bales of *dhoties* it was held that a period of eighteen days was not a reasonable time within the meaning of section 34 of the Contract Act.

In answer to a suit for the return of certain goods and to recover their price the defendant pleaded that the plaintiff was not entitled to return the goods At the trial the defendant sought to lead evidence to prove that the plaintiff had pledged the goods to a Bank and had thus exercised an act of ownership in respect of them, which precluded him now from returning the goods The plaintiff objected to the admission of this evidence on the ground that this specific act which the defendant sought to prove had not been pleaded by him:

Held, that the defendant having denied the right of the plaintiff to return the goods he was entitled

Contract Act—concld.

to prove any fact which would disentitle the plaintiff from returning them and that therefore, the evidence which the defendant sought to lead was admissible

It is incumbent on an appellant to show that the judgment appealed from is wrong but where the decision of the lower Court on a point is arbitrary, the Appellate Court is entitled to come to an independent decision on the point. **L** Firm of Probhu Dial Banwari Lal of Delhi *v.* Dina Nath Kapur **464**

——— **ss. 148, 160,** *scope of—Directions by pawnor's assignee not binding on pawnee - Directions to be definite and reasonable—Cause of action for pledge, where arises.*

Under section 160 of the Contract Act it is the pawnor, and not his assignee, who can give directions to the pawnee about the delivery of the pledged property

The use of the words "without demand" in section 160 of the Contract Act indicates that the directions referred to in it are directions given before the purpose for which the goods were pawned has been accomplished. Section 148, however, covers the case of directions given after the purpose is accomplished The directions, in order to be binding, must be definite and reasonable.

The place, where the cause of action in respect of a pledge arises, must be determined with reference to the terms of the original contract. **N** Tekchand *v.* Mahadeo **65**

Copyright—*Matter copied from non-copyright work—Notes—Original work—Abridgment.*

The plaintiffs, a firm of publishers, had, in 1911, brought out in England an abridged edition of North's Translation of Plutarch's Life of Alexander, edited by a Mr. Parr for the use of Secondary schools. The abridgment was not effected by giving the substance of the original work in the language of the editor, but by excising various portions of the original work which were not considered suitable for the purpose for which the book was published The portions which were retained were divided into an introduction and various Chapters, marginal notes were added and at places where original matter had been left out, transitional notes were inserted so as to link up the thread of the narrative At the end there were a few pages of notes. This book was prescribed by the University of Bombay in October 19 as a text book for the Matriculation Examination of 19 9. In January 9 9, the defendants published another abridgment of the same original work. The book was styled Plutarch's Life of Alexander, North's Translation, with notes prepared by Mr. Darby, and contained *(a)* a statement of the contents, *(b)* an introduction divided into sections as to the author, the translator, Philip of Macedon, a sketch of Alexander's career and the character of Alexander, *(c)* the text consisting of selected passages, which in fact included all the passages selected by Mr. Parr for the plaintiffs' publication and certain other passages from North's Translation, with marginal notes, *(d)* notes and additional notes, *(e)* a summary, and *(f)* a map Some of the notes in the defendants' book coincided with those in the plaintiffs' book. Those notes were very elementary

Copyright—concld.

and such as any annotator, having sufficient familiarity with the ancient history and mythology of Greece, would be able to reproduce. The plaintiffs complained that the defendants had infringed their copyright in the text and in the notes :

Held, (1) that as regards the text, North's Translation of Plutarch's Life of Alexander was available to any one who wished to re-print it and that when the plaintiffs chose for their book about half of the original translation, they were not abridging it in the legal sense of the word, and that looking at their text by itself, it could not be considered an original literary work so as to be entitled to copyright;

(2) that as regards the notes, considering them as a whole and taking into consideration the nature and the extent of the use of the plaintiffs' notes in preparing the defendants' notes, it could not be said that that use was unfair ;

(3) that, therefore, there was no infringement of the plaintiffs' copyright either in respect of the text or in respect of the notes.

Per *Macleod, C. J.*—Skill and labour by themselves will not make up for the want of originality, while there is nothing original in picking out for publication portions of a work which is not copyright.

In law a selection of passages from a non-copyright work is not entitled to protection.

Per *Shah, J.*—There can be no copyright in respect of matter which is word for word part of a non copyright work.

The word "original" in the definition of copyright should be so construed as to give to the person who has used his brain the benefit of that use as far as possible, but it cannot be held that matter which is word for word taken from a non-copyright work, though only partially, constitutes an original work.

Independent labour must be apparent, and the reduction of the size of a work by copying some of its parts and omitting others, confers no title to authorship ; and the result will not be an abridgment entitled to protection. To shorten a work by leaving out the unimportant parts is not to abridge it in a legal sense. To abridge, in the legal sense of the word is to preserve the substance, the essence of the work in language suited to such a purpose; language substantially different from that of the original. To make such an abridgment requires the exercise of the mind; labour, skill and judgment are brought into play and the result is not merely copying. To constitute a proper abridgment, the arrangement of the book abridged must be preserved, the ideas must also be taken, and expressed in language not copied, but condensed To copy certain passages and omit others, so as to reduce the volume in bulk, is not such an abridgment as the Court would recognise as sufficiently original to protect the author. **B** Cooper *v* Macmillan & Co., 23 Bom. L. R 1294 **187**

Costs, *suit for, maintainability of—Damages for being driven to litigation, suit for.*

An independent action cannot be maintained to recover the balance of costs over and above that awarded by the Court which tried the matter.

Where, under any particular proceeding, a Court is not empowered to grant costs, no costs can be granted in an independent action by any other Court.

Costs—concld.

A person cannot bring a suit to recover damages for having had to resort to litigation to protect his right Such damages are too remote, and the action is nonsensical. **A** RAM DASS *v* MOHAMMAD FAQIR, 20 A. L J. 205; 4 U. P. L. R. A) 20 **513**

Court-fees—*Partition suit—Court-fee payable, determination of—Prayer for declaration of title and possession*—Ad valorem *Court-fee payable.*

In order to determine what Court-fee is payable in a suit one must look to see what is the real nature of the claim.

Where in a suit for partition the plaintiff in the very forefront of his claim asks for a declaration of his title and possession, as a cloud is cast upon his title by reason of some of the lands being entered in the Record of Rights as in the possession of the defendants, an *ad valorem* Court-fee is payable on the value of his share not entered in his name. **A** PHULCHAND *v.* KANDHYA LAL, 19 A. L. J. 943 **295**

Court Fees Act (VII of 1870), s. 4—*Letters Patent Appeal—Court-fee, whether leviable.*

No Court-fee is leviable on a Letters Patent Appeal under the Court Fees Act. **Pat** RAGHUBAR SINGH *v.* JETHU MAHTON, 3 P. L. T. 194; (1922) PAT 58 **675**

——— s. 7 (iv) (c)—*Landlord and tenant—Suit for declaration and ejectment—Court-fee payable.*

A suit for declaration that the plaintiff is an occupancy *raiyat* of the land and that the defendants are under-*raiyats* holding under him and also claiming ejectment and recovery of arrears of rent is a suit of the class which comes under section 7 *(iv) (c)* of the Court Fees Act. **Pat** PARMESHWAR SINGH *v.* SUREBA KUER **240**

——— s. 7 (iv) (c)—*Suit for declaration—Consequential relief—Court-fee payable.*

In order to determine the amount of Court-fee payable in a suit for a declaration that a particular property is or is not liable to a mortgage or charge it is the substance of the prayer which must be looked to and not merely the form of plaint, and the plaint (or memorandum of appeal) must be stamped *ad valorem* according to the value of the charge with which the plaintiff or the appellant seeks to burden the property or of which he seeks to relieve it.

A suit praying that certain foreclosure decrees are void and ineffectual against the rights of the plaintiff and that the mortgage still subsists and is redeemable, is one involving consequential relief and an *ad valorem* Court-fee is payable under section 7 (*iv*) (*c*) of the Court Fees Act. **O** SRIPAL SINGH *v.* JAGDISH NARAYAN, 24 O C. 361 **980**

——— s. 7 (iv) (c), Sch. II, Art. 17 (iii), (vi)—*Portion of property excluded from liability under mortgage—Appeal*—Ad valorem *Court-fee—Suit to make property liable for mortgage or charge, whether declaratory suit or not capable of being valued in money.*

Where a plaintiff objects in appeal to that portion of the decree which excludes certain property from liability under his mortgage and asks to have it made liable, he must pay Court-fees on the value of the property.

A suit to make a certain property liable for the mortgage or charge is not a declaratory suit but a suit involving further relief, nor is such a suit not capable of being valued in money. **O** SAHEB ALI *v* MOHAMMED ZAHID, 24 O. C. 295 **114**

——— s. 19, cl. xvii—*Application for bail by Advocate—Fiscal Statutes—Interpretation.*

An application for bail signed only by the Advocate of a prisoner is an application made by the prisoner himself and, under section 19, clause xvii, Court Fees Act, does not require to be stamped.

The Court Fees Act deals purely with fiscal matters and like all other Statutes imposing pecuniary, burdens or encroaching upon or qualifying the rights of the subject, must be interpreted in favour of the subject **U B** JAGANATH KAHAR *v.* EMPEROR, 4 U. B. R. (1921) 72; 23 CR. L. J 121 **553**

Court of Wards—*Guardian, simple money-bond executed by—Acknowledgment of pre-existing debt—Liability of minor.*

A decree for the payment of money can be granted on a simple money-bond executed by the guardian of a defendant during his minority for an antecedent debt due by him, which could have been recovered from his estate at the time

The guardian of a minor as also the Court of Wards cannot create a personal liability in the ward, but he has a right to acknowledge a pre-existing liability on the part of the ward in respect of which a decree could be passed and for this to execute a bond on the basis of which a decree against the minor may be passed

Per *Hallifax, A. J. C.*—The powers of a Court of Wards over the property of a ward are the ordinary powers of the guardian of a minor, supplemented by certain additional powers conferred by the C. P. Court of Wards Act, and there is nothing in that Act conferring power on the Court of Wards to bind the ward's estate by a simple money-bond, so that a decree for the payment of money could be obtained on it, its powers in this respect being co-extensive with those of an ordinary guardian of a minor. **N** JIWANDAS *v.* JANKI **53**

Criminal Procedure Code (Act V of 1898), ss. 9, 531—*Appeal made over to Additional Sessions Judge for hearing—Appeal ultimately heard by Sessions Judge himself—Jurisdiction, question of*

Where a Sessions Judge makes over a criminal appeal for decision to an Additional Sessions Judge working in the same jurisdiction as himself and empowered to try cases or appeals made over to him by the Sessions Judge but subsequently, after notice to the parties, hears the appeal himself, he does not act outside his jurisdiction inasmuch as the making over of a case is not a "transfer" of the case.

The absence of any provision corresponding to section 531, Criminal Procedure Code, in respect of cases tried within the same Sessions Division by a lawfully appointed Judge of that Sessions Division whether he be the Sessions Judge or an Additional Sessions Judge shows that the Legislature did not think that any doubt as to the jurisdiction of such Judges could arise in view of the wording of section 9 of the Criminal Procedure Code. **A** BIRJU MARWARI *v.* EMPEROR, 19 A. L. J. 952; 23 CR. L. J. 107 **491**

Criminal Procedure Code—contd.

——— s. 45—*Police already informed of commission of offence—Information, same, whether to be supplied.*

The provisions of section 45, Criminal Procedure Code, are not intended to be punitive in themselves but are intended to facilitate information as to the commission of an offence and thereby to facilitate steps being taken in the investigation of the same; so that, when the Police has somehow been informed of the commission of an offence, no further duty or obligation lies upon the persons named in the section for adding their own weight to the information already supplied by furnishing fresh information on the same lines. **O** RAMPAL *v.* EMPEROR, 8 O. L. J. 590; 23 CR. L. J. 162; 4 U. P. L. R. (J. C.) 17 **626**

——— s. 107—*Security to keep peace—Accused willing to give security—Sufficient ground.*

The mere statement of a person that he is willing to give security is not sufficient ground for taking security from him for keeping the peace. **L** KARAM *v.* EMPEROR, 23 CR. L. J. 175 **639**

——— s. 110—*Jurisdiction—Accused triable where carrying on career of crime.*

In giving jurisdiction to a Magistrate to try an accused under section 110 of the Criminal Procedure Code, the question is not of permanent residence of the accused, but of where he practises his career as a thief or a house-breaker or whatever it may be.

If a resident of *A.* goes to *B.* and there carries on a career of crime for several months, the *B.* Magistrate has the power to take action against him under section 110, Criminal Procedure Code. If, on the other hand, a resident of *A.* carries on a career of crime in *A.* and then goes temporarily to *B.* for a few months, the *A.* Magistrate has a right to proceed against him. **A** BHOLA *v.* EMPEROR, 20 A. L. J. 48; 23 CR. L. J. 83 **438**

——— s. 110—*Sureties, rejection of—Magistrate, power of.*

A Mgistrate cannot reject sureties offered by the accused on a Police report without recording any evidence on the point. It is quite open to a Magistrate to ask the Police to report on the character of the sureties offered but before finally rejecting them it is his duty to have some materials on which he can act judicially. **O** EMPEROR *v.* LACHHMAN, 24 O. C. 303; 23 CR. L. J. 142 **574**

——— ss. 110, 117 (4)—*Accused persons—Joint trial—Evidence of association, necessity of—Trial, legality of—Prejudice to accused*

The legality of a joint trial does not depend on what is alleged for the prosecution, but on the facts subsequently found to be true.

In order to entitle a Magistrate to try several persons jointly for offences under section 110, Criminal Procedure Code, the circumstances mentioned in section 117 (4), namely, the association of several persons in the commission of the offences mentioned in section 110, Criminal Procedure Code, must be established.

In a case under section 110, Criminal Procedure Code, in which the evidence of bad character of the accused persons and of the individual nefarious acts committed by them form the integral parts of the offence the evidence led against one will prejudice the case of the other accused persons assembled together in the same dock, and in such a case the joint trial of accused persons is illegal. **Pat** JAI SAO *v.* EMPEROR, 23 CR. L. J. 100 **484**

Criminal Procedure Code—contd.

——— ss. 144, 145—*Dispute as to possession—Proper proceedings—Rent-decree, evidential value of.*

A rent-decree passed against a person is to some extent evidence of possession in favour of that person, but it is not conclusive against one who was not a party to it.

A Magistrate does not act without jurisdiction if, in a proceeding under section 145, Criminal Procedure Code, he passes an order on the strength of such a rent-decree when a breach of the peace is imminent. But before making the order final, however, he should convert the proceedings into one under section 145, for in all cases, unless where the possession has already been determined by a Civil Court, or is undisputed, the proper procedure for a Magistrate to adopt is to convert a proceeding under section 144 into section 145 and determine the issue of possession once for all so as not to leave occasion for further dispute. **Pat** NANDKISHORE SAO *v.* BIKAN SINGH, 23 CR. L. J. 200 **856**

——— s. 145—*Final order—No evidence on record.*

A final order in a proceeding under section 145, Criminal Procedure Code, made by the Trial Magistrate on basis of a local enquiry of which there is no note or memorandum, is an order based upon no evidence and as such cannot be sustained. **C** GOGAN HOWLADAR *v.* KARIMADDI, 34 C. L. J. 127; 25 C. W. N. 1007; 23 CR. L. J. 199 **855**

——— s. 145—*Irregular proceeding—Property attached—Proceeding dropped—Subsequent delivery of property on petition of opposite party, legality of.*

A land was attached under section 145 (4) of the Criminal Procedure Code. After several adjournments, the Magistrate holding the proceedings refused to give further time to the first party and recorded the order: "Proceedings stopped: File" On the same day a petition was put in by the second party and the Magistrate passed on it an order: "Heard the parties: examined the documents. The first party have failed to prove their possession and case, though repeated opportunity was granted. Second party will remain in possession":

Held, that the procedure was irregular and that as the land had been attached under clause (4) some further order than merely dropping the proceeding was necessary;

Held, also, that possession ought not to have been awarded to the second party merely because the first party had failed to prove its case. **C** SAMAD ALI *v.* ABDUL MAJID, 23 CR. L. J. 195 **851**

——— s. 145, *proceedings under—Documentary evidence of title, whether can be relied on, to corroborate oral evidence as to possession.*

In proceedings under section 145, Criminal Procedure Code, a Magistrate is entitled to rely on the documentary evidence as to title, to corroborate the oral evidence as to possession. **M** ADAIKKAN *v.* MALLAKARUPPAN, 15 L. W. 62; (1922) M. W. N. 12; 23 CR. L. J. 197 **853**

Criminal Procedure Code—contd.

——— s. 145—*Property in possession of tenants —Dispute—Procedure.*

Where neither party is in actual physical possession of the land in dispute and the real dispute is whether the tenants, who are in actual possession, are the tenants of one party or of the other, a Magistrate is not competent to take proceedings under section 145 of the Criminal Procedure Code in respect of the land in dispute. **L** ATMA RAM *v.* ALLAH WASAYA, 25 CR. L. J. 165 **630**

——— ss. 145, 107—*Dispute as to possession of land—Proceedings under s. 107—Court, jurisdiction of—Proper procedure.*

Where there is a dispute about land and where there is some *bona fide* claim on the part of both parties the appropriate and proper section to be operated is section 145 of the Code of Criminal Procedure.

But when a Magistrate has reason to think that an individual is likely to commit a breach of the peace, he has jurisdiction, even though the apprehended breach of the peace may relate to a dispute about land, to put into operation the provisions of section 107, Criminal Procedure Code. **Pat** ABDUS SAYEED KHAN *v* EMPEROR, 24 C. L. J. 123 **555**

——— ss. 145, 148—*Magistrate, jurisdiction of, to depute Commissioner to survey and report—Report wrongly relied—Jurisdiction—"Local inquiry," meaning of—Estoppel.*

A Magistrate who has drawn up proceedings under section 145, Criminal Procedure Code, is not empowered to delegate any of his judicial functions to any person other than a Magistrate or to direct any person to report as to who is in possession of the lands in dispute, but he has jurisdiction to direct a Pleader Commissioner to survey the disputed lands and report.

If a report is wrongly relied on by a Magistrate taking proceedings under section 145, Criminal Procedure Code, that would not amount to an error or want of jurisdiction which would warrant an interference of a High Court

A mere survey of the lands in dispute in a proceeding under section 145, Criminal Procedure Code, after inquiry from all the parties as to what land is in dispute does not amount to a "local inquiry" within the meaning of section 145 of the Act but is a mere ministerial act.

A party who throughout asserts that the lands mentioned in the proceedings under section 145, Criminal Procedure Code could be identified cannot be allowed on the judgment being against him to assert the contrary in High Court.

A plea of estoppel raises no question of jurisdiction. **Pat** CHULAI MAHTO *v.* SURENDRA NATH CHATTERJI, 3 P. L. T. 17: 23 CR. L. J. 12 **616**

——— ss. 145, 192—*Proceedings under s. 145, whether can be transferred—"Any case" in s. 192, interpretation of.*

The words "any case" in section 192 of the Criminal Procedure Code are wide enough to cover an enquiry under section 145 of the Criminal Procedure Code.

Therefore, a Sub-Divisional Magistrate who institutes proceedings under section 145, Criminal Procedure Code, has power to transfer the same to any Magistrate subordinate to him for enquiry or trial **A** MAHENDRA SINGH *v.* RAJPATTI, 20 A. L. J. 215; 23 CR. L. J. 25 **561**

——— ss. 145, 350, *applicability of—Evidence of witnesses not read over, effect of—Irregularity—Trial, if vitiated—Accused, meaning of—Defect of parties, effect of—De facto possession, meaning of*

Section 350 of the Criminal Procedure Code applies to trials under Chapter XII and the word "accused" in that section does include persons against whom an order under section 145, Criminal Procedure Code, has been drawn.

Therefore, in the case of proceedings under Chapter XII the evidence must be read over to the witnesses.

The non-reading over of depositions to the witnesses in a proceeding under section 145, Criminal Procedure Code, does not, however, invalidate the trial itself.

A tenant who is in possession of a portion of the land in dispute is not a necessary party to a proceeding under section 145, Criminal Procedure Code.

De facto possession, with which alone section 145 proceedings are concerned, means effective occupation or control **Pat** RAM NARAIN SINGH *v.* DHONRAI GOPE, 3 P. L. T. 21; 23 CR. L. J. 125 **537**

——— ss. 145, 439—*Possession, few days before preliminary order - Order silent as to possession at date of preliminary order—Revision*

Where, a preliminary order under section 145, Criminal Procedure Code, contains a finding that a party was in possession a few days before the date of the order, but contains no finding as to who was in possession on the actual date of the order, the order is illegal, but if there is nothing on the record to suggest that there was any change of possession in the interval, a High Court is not bound, in revision, to vacate the order. **M** MAHOMED HUSSAIN *v.* PACHAYAPPA CHETTY, 14 L. W. 675; (1921) M. W. N. 806; 42 M. L. J. 147; 23 CR. L. J. 92 **444**

——— ss. 164, 533—*Confession—Failure of Magistrate to ask whether confession made voluntarily—Illegality.*

Section 164 of the Criminal Procedure Code makes it imperative for the Magistrate, before recording a confession made to him in the course of a Police investigation, to question the person making it as to whether it is made voluntarily Telling an accused person that he should make his statement voluntarily and questioning him as to whether he is making it voluntarily are two very different things.

The omission to question an accused person before recording his confession as to whether he is making it voluntarily is a material omission which prejudices him and the defect is a fatal one not curable by section 533 of the Criminal Procedure Code Such a confession is not, therefore, admissible in evidence. **A** FARID *v* EMPEROR, 2 L. 422; 5 P. W. R. 952 CR.; 23 CR. L. J. 141 **613**

——— ss. 159, 110—*Substantive offence not proved—Discharge—Proceedings under s. 110—Evidence of commission of substantive offence, admissibility of.*

Criminal Procedure Code—contd.

A High Court always looks with suspicion on cases where proceedings under section 110, Criminal Procedure Code, are started against a person after the Police have failed to procure evidence against him on a charge of a substantive offence Section 110, Criminal Procedure Code, is not intended for furnishing the Police with means of detaining persons against whom a definite charge has been made but broken down.

Accused was arrested on suspicion of being concerned in a dacoity, but discharged under section 169, Criminal Procedure Code, for want of sufficient evidence. He was re-arrested under section 55 of that Code, and proceedings were started against him under section 110 of the same Code wherein the Police put in evidence of his participation in the dacoity:

Held, that the evidence was inadmissible, and that the conviction based on it must be set aside inasmuch as if the evidence was sufficient to prove the participation of the accused in the dacoity, he should have been brought to trial for that offence, and if it was not, the Court had no right to allow it to be brought in to prejudice its mind against the accused in his trial for bad livelihood **O** BHAGWAT PRASAD *v.* EMPEROR, 24 O. C. 317; 9 O. L. J. 67; 23 CR. L. J. 119 **551**

——— **ss. 169, 514**—*Surety bond, construction of—Surety to produce accused on particular date—Non-appearance on subsequent date—Surety, liability of.*

A surety bond in criminal cases must be strictly construed and a surety cannot be required to pay the amount of his bond as the result of an opinion held by a Court as to what was in his mind when he signed it. He can be required to forfeit the amount only if the terms expressed in the bond are broken.

Where, therefore, a surety binds himself to produce an accused on a particular date and he does so, his liability is discharged and he is not bound for the non-appearance of the accused on any subsequent date. **U B** NGA PO TIN *v.* EMPEROR, 4 U. B. R. (1921) 71; 23 CR. L. J. 68 **420**

——— **s. 190**—*Cognizance of offence—Charge-sheet, whether should mention what each witness is to prove.*

No provision of law requires that a Magistrate before taking cognizance of an offence should know exactly what each of the witnesses named in the charge-sheet will prove. The charge-sheet alleges that a certain offence will be established by the evidence of certain witnesses and this is sufficient to enable a Magistrate to take cognizance. **Pat** GRANT *v.* EMPEROR, 23 CR. L. J. 69 **421**

——— **s. 190**—*Order of District and Sessions Judge to subordinate Magistrate to try certain persons for robbery*—Ultra vires—*Procedure.*

An order of a District and Sessions Judge to a Magistrate subordinate to him, to try certain persons sent to him in custody, on charges of robbery and abetment of robbery is *ultra vires* and no proceedings can be taken on that order inasmuch as none of the requirements of section 190, Criminal Procedure Code, for initiation of prosecutions are fulfilled by that order. **S** POHUMAL *v.* EMPEROR, 15 S. L. R. 119; 23 CR. L. J. 97 **481**

Criminal Procedure Code—contd.

——— **s. 192**—*Transfer of case—Magistrate, power of, to retransfer.*

Where a Magistrate transfers a case for trial under the provisions of section 192, Criminal Procedure Code, he has no power to transfer it again. **A** GANGA SAHAI *v.* JASWANT, 23 CR. L. J. 89 **441**

——— **s. 195**—*Penal Code (Act XLV of 1860), ss. 193, 204, 471—Sanction to prosecute—Decree, whether bar to prosecution—Examination of witnesses on commission,*

The existence of a decree not set aside is no bar to a prosecution under sections 193, 204, 471 and cognate sections of the Penal Code.

For the purposes of an enquiry made by a Civil Court under the provisions of section 195 of the Criminal Procedure Code, the examination of witnesses on commission is permissible. **C** DULLOO SINGH *v* DEPUTY INSPECTOR-GENERAL OF POLICE, C. I. D., BENGAL, 23 CR. L. J. 138 **570**

——— **s. 195**—*Sanction to prosecute, when to be given—Chance of conviction—Penal Code (Act XLV of 1860), s. 193—Actual statements alleged to be false, mention of, in sanction order.*

Sanction to prosecute ought not to be given unless the Court giving sanction has satisfied itself that there are very favourable chances of obtaining a conviction.

When sanction is given to prosecute a witness for giving false evidence, the actual statements which are alleged to be false should be mentioned in the sanction. **B** DANAPPA NARSAPPA, *In re*, 24 BOM. L. R. 45; 23 CR. L. J. 176 **640**

——— **ss. 195, 197, 439**—*Order under s. 197—Executive order—Revision—High Court, power of.*

The granting of sanction under section 197 of the Criminal Procedure Code is an executive act, and does not become a judicial one because the sanction is granted by a Court, or because the sanctioning Court treats it as such. A High Court has no power to interfere with such an order in revision. **L** ALI HUSSAIN KHAN *v* HARCHARAN DAS, 2 L. 805; 4 P. W. R. (1922 CR.); 23 CR. L. J. 113 **545**

——— **ss. 195 to 199,** *prosecutions under—Abatement.*

The right to institute criminal proceedings, subject to certain limitations contained in sections 195 to 199 of the Criminal Procedure Code, is common to any person cognizant of the commission of the offence and does not exist merely in favour of the person injuriously affected by the offence.

Quære—Whether even in cases falling under sections 195 to 199, Criminal Procedure Code, the death of the complainant after the institution of the proceedings causes any abatement. **M** MUHAMMAD IBRAHIM *v.* SHAIK DAWOOD, 40 M. L. J. 351; 13 L. W. 378; (1921) M. W. N. 227; 44 M. 417; 23 CR. L. J. 117; 30 M. L. T. 349 **549**

——— **ss. 196, 252**—*Sanction to prosecute under alternative sections—Legality—"Hearing the complainant," meaning of—Martial Law (Supplementary) Ordinance III of 1921, cl. (6)—Trial by Special Tribunal—Prosecution under s. 121 or 121A, Penal Code—Omission, to examine complainant on oath—Illegality—Penal Code (Amendment) Act*

Criminal Procedure Code—contd.

(XVI of 1921), s. 2—Forfeiture of property under ss. 121, 122, Penal Code, abolished.

A sanction under section 196, Criminal Procedure Code, to prosecute an accused should be specifically directed to the particular sections of Chapter VI of the Code in respect of which proceedings are to be taken, and the order should be preceded by and be the result of a deliberate determination that proceedings shall be taken in respect of a particular section or sections and no other. It is opposed to the true intention of section 196, Criminal Procedure Code, to give a roving power to determine under what sections proceedings should be taken.

But a sanction under section 196, Criminal Procedure Code, to prosecute an accused in the alternative under section 121 or 121A of the Indian Penal Code is entirely specific and proper.

The expression "hearing the complainant" in section 252, Criminal Procedure Code, does not involve his examination on oath and a trial under Ordinance III of 1921 without such examination of complainant is not irregular.

The punishment of forfeiture of property for offences under sections 121, 122, Indian Penal Code, has been abolished by section 2 of the Indian Penal Code Amendment Act.

In some cases it may be hard to draw the line between rioting of a serious nature in which numerous persons take part and the offence of waging war against the King. But the offence is clear when the object of the mob is the total subversion of the British power. **M** UMAYYATHANTAGATU PUTHEN VEETIL KUNHI KADIR *v.* EMPEROR, (1922) M. W. N. 71; 15 L. W. 311; 30 M L T. 125; 42 M. L. J. 108; 23 CR. L. J. 203 **859**

——— **s. 209**—*Powers of Committing Magistrate—Committal to Sessions Court, when to be ordered.*

All that a Committing Magistrate dealing with a case has to do under section 209, Criminal Procedure Code, is to see if a *prima facie* case has been made out, but he is not precluded from drawing reasonable inferences from facts deposed to by the prosecution witnesses where more than one inference can be drawn and to discharge the accused where the evidence is unworthy of credit. He has to see whether the evidence is such as to render the case a fit one for the Jury to decide between conflicting probabilities or whether it clearly points to there being no *prima facie* case for the accused to meet. **M** PONNIAH TIRUMALI VANDAYA, *In re*, 42 M. L. J. 49; 23 CR L. J. 209 **993**

——— **ss. 238, 423**—*Penal Code (Act XLV of 1860), ss. 147, 323—Conviction under s. 147, whether can be altered to one under s. 323—Appellate Court, power of.*

Where more than five persons are charged under section 147, Indian Penal Code, and on appeal only four are found guilty and the rest are acquitted, the Appellate Court has power to alter the conviction from one under section 147, Indian Penal Code, to one under section 323, Indian Penal Code. **A** HANUMAN *v.* EMPEROR, 20 A. L. J. 213; 23 CR. L J. 198 **854**

——— **s. 257**—*Prosecution witnesses summoned as defence witnesses, whether can be cross-examined.*

Prosecution witnesses summoned as defence witnesses under section 257, Criminal Procedure Code, do not change their character and may be cross-examined by the accused. **M** VENKU REDDY *v.* EMPEROR, (1922) M. W. N. 120; 23 CR L. J. 192 **768**

——— **s. 263**—*Convictions, reason for, necessity of—Revision—Penal Code (Act XLV of 1860), s. 447—Trespass—Offence, ingredient of—Intention.*

Under section 263 a Magistrate must give the reasons, though briefly, for justifying the conviction. Convictions are revisable by the Superior Court, and the Superior Court will always insist on having materials before it so that it may be in a position to say whether the conviction is proper or not.

The main ingredient of an offence under section 447, Indian Penal Code, is that the trespass must be with the intention of annoying or insulting some one or must be with the intention of committing an offence and where there is nothing in the order of a Magistrate convicting an accused for criminal trespass which would show the intention of the accused, the conviction cannot be sustained. **Pat** DAMODAR DAS *v* EMPEROR, 23 CR L. J. 91 **446**

——— **s. 263**—*Summary trial—Record, contents of—Conviction based on appearance of accused.*

Section 263 of the Criminal Procedure Code requires that the Magistrate's record under that section shall state the offence complained of and the offence, if any, proved, the plea of the accused and his examination, if any, the finding and in case of a conviction, a brief statement of the reasons therefor. These particulars should be specified in different columns of the register and should not be lumped together in one column.

A man cannot be convicted on his appearance and manner of speech. An ugly, stammering, nervous man may be innocent, while a good looking, plausible man may be a scoundrel.

Where a Magistrate in convicting an accused remarks in the judgment, "his appearance and the manner of his speech are such that I have no doubt he committed the offence", it is quite sufficient to condemn the whole judgment **L** GHULAM MUHAMMAD *v.* EMPEROR, 23 CR. L. J. 161 **625**

——— **ss. 288, 503**—*Commission to examine witness in serious trial not desirable—Identifier of* parda-nashin *witness not put on oath—Statement, whether admissible—Statement made before Committing Magistrate, portion of, when admissible before Sessions trial.*

The issue of a Commission for the examination of an important witness, such as an eye-witness, in a serious criminal trial is not desirable and should only be adopted for the most cogent reasons.

Where an identifier of a *parda-nashin* lady witness has not been put on oath, the statement of the lady cannot be accepted in evidence, as there is no certainty that the woman examined is the same who was to be examined.

Statements of witnesses recorded by a Committing Magistrate cannot be used in evidence in a Sessions trial under section 288, Criminal Procedure Code,

without the attention of the witness being drawn to the portion which it is desired to use. **Pat** (1922) LACHHMI LAL *v.* EMPEROR, 23 CR. L. J. 218; **1002** PAT. 159

——— **s. 297**—*Jury trial—Verdict—Misdirection—Inadmissible evidence, omission to refer to, effect of.*

The verdict of a Jury cannot be set aside unless there is a clear misdirection in the charge by the Judge to the Jury.

Where a statement inadmissible in evidence is brought to the notice of a Jury, an omission by the Judge to refer to it in the charge to a Jury is a misdirection in law and vitiates the trial. **Pat** SUMESHWAR JHA *v.* EMPEROR, 3 P. L. T. 10; **443** 23 CR. L. J. 91

——— **s. 298**—*Jury trial—Murder—Confession, inadmissible in evidence, read before Jury, effect of—Re-trial.*

Where during the course of a trial by a Court of Session upon a charge of murder a confession by the accused was read to the Jury, but it subsequently transpired that the confession had not been recorded according to law and had to be ruled out as inadmissible:

Held, that that statement might reasonably be regarded as having affected in some measure the minds of the Jurymen in convicting the accused however the Judge might have endeavoured to remove that impression from their minds, and that, under the circumstances, the accused was entitled to a new trial. **Pat** MADODAR RAM *v.* EMPEROR, 3 P. **573** L. T. 52, 23 CR. L J. 141

——— **s. 342**—*Charge, alteration and addition of—Fresh examination of accused, omission, whether vitiates trial.*

The accused were examined at the proper stage as required by section 342, Criminal Procedure Code, and were then called upon to enter into their defence. On the date fixed for entering into defence the prosecution amended the charge and also added a fresh charge whereupon the accused re-called and cross-examined afresh the prosecution witnesses. There was no further examination of the accused It was contended in the High Court that there should have been a fresh examination of the accused after the prosecution witnesses were cross-examined after the addition and alteration of the new charges:

Held, that on the addition and alteration of a charge the trial did not commence *de novo* and that if the Court was of opinion that there would be no prejudice to the accused it was not necessary to examine the accused afresh under section 342, Criminal Procedure Code. **Pat** SHAMLAL KALWAR *v.* EMPEROR, 3 P. L T. 91; 23 CR. L. J. 146 **610**

——— **ss. 342, 537**—*Examination of accused—Summons-case—Irregularity—Illegality.*

The procedure prescribed by section 342 of the Criminal Procedure Code is binding on the Courts, even in summons-cases, and the omission to comply with the provisions of that section is not a mere irregularity such as can be cured under section 537 of the Code, but is an illegality vitiating the trial **L** MUHAMMAD BAKHSH *v.* EMPEROR, 23 CR. L **618** J. 154

——— **s. 345**—*Compromise by leave of Court—Duty of Magistrate—Revision.*

It is the duty of a Magistrate, in each case which is compoundable with his leave, to decide whether he will or will not allow a compromise and the responsibility rests entirely with him.

Where the offence is not of a serious nature and a compromise is arrived at at a very early stage, the Magistrate ought to allow the compromise.

In this case, a compromise that had been disallowed by the trying Court was allowed by the High Court in revision. **L** SEWA SINGH *v.* EMPEROR, **437** 23 CR. L. J. 85

——— **ss. 345 (5), (1), (d), 439**—*Composition of offence, whether can be allowed in revision.*

A Court exercising revisional jurisdiction has no power to sanction the composition of an offence when entered into after the conviction of the accused. **Pat** AUDHI RAI *v.* EMPEROR, 23 CR. L. J. **432** 80

——— **s. 355**—*Summary trial—Deposition of witnesses, reading of.*

In a case triable summarily, the deposition of the witnesses need not be read over to them. **Pat** MOHAMMAD ISHAQ *v.* EMPEROR, 23 CR. L. J. 120 **552**

——— **ss. 355 (2), 342**—*Warrant case—Summary trial—Examination of accused, necessity of—Written statement, whether sufficient—Penal Code (Act XLV of 1860), s. 238—Conviction on different charge—Prejudice—Knowledge.*

When a warrant case is tried summarily, the procedure to be followed is that prescribed for the trial of warrant-cases, and, therefore, the memorandum of the substance of the evidence of each witness must, as provided by section 355 (2), be signed by the Magistrate.

A written statement filed by an accused person cannot take the place of his examination under section 342, Criminal Procedure Code.

Non-compliance with the requirements of section 342 or 355, vitiates the trial.

An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and, unless he has this knowledge he must be seriously prejudiced in his defence. Where he is convicted on a charge different from that on which he is tried, the nature of the case made at the trial, the evidence given and the line of defence made are matters to be taken into consideration to decide whether he has been prejudiced or not in the trial. **Pat** BALKESHWAR SINGH *v.* EMPEROR, 23 CR. L. J. 114; 3 P. L. T. 32: **546**

——— **ss. 419, 420**—*Appeal from jail decided—Appeal through Counsel not maintainable.*

Where an appeal received from an appellant while in jail is dismissed, a subsequent appeal on his behalf filed through Counsel cannot be entertained because there is no warrant in the Code of Criminal Procedure for differentiating between a judgment passed on an appeal filed under section 420 of the Criminal Procedure Code by an appellant in jail and a judgment on a similar appeal filed through Counsel under section 419. **O** GAYA DIN *v.* EMPEROR, 24 O. C. 70; 9 O. L. J. 1; 23 CR. L J. 148 **612**

Criminal Procedure Code—contd.

——— ss. 423 (1) (d), 439 (4), 470, 471—*Acquittal on ground of lunacy—Order for safe custody—Delivery of lunatic prisoner to parents, legality of—Omission to pass orders under s. 471—High Court, powers of, in revision.*

When a Court acquits an accused under section 470, Criminal Procedure Code, on the ground of his lunacy, it should simultaneously pass orders under section 471.

Section 471, Criminal Procedure Code, should not be interpreted as compelling a Court to send the accused to a lunatic asylum. All that is necessary is to see that such safeguards are taken as would keep the accused from mischief and it is permissible to order the accused to be kept under the control and custody of his parents.

A Trial Court's omission to pass an order under section 471 will not preclude a High Court from passing such an order in revision. Such an order is in the nature of a consequential or an incidental order within the meaning of section 423 (1), Criminal Procedure Code, and does not amount to an alteration of the finding of acquittal into one of conviction. **M** MAHAMMAD *v.* EMPEROR, (1922) M. W. N. 10; 30 M. L. T. 74; 42 M. L. J. 72; 23 CR. L. J. 71 **423**

——— s. 437—*Further inquiry—Notice to accused, necessity of.*

An order for further inquiry against an accused person who has been discharged should not be passed without first serving a notice on him to show cause why the order should not be passed. **A** SAGAR MAL *v.* EMPEROR, 20 A. L. J. 91; 23 CR. L. J. 70 **422**

——— ss. 438, 439—*Commitment, quashing of—Law, question of—Evidence on record, sufficiency of, to establish charge.*

A commitment can only be quashed on a question of law The question whether the evidence already on the record is sufficient to establish the charge is not such a question. It is a question connected more with the propriety of a conviction rather than with the propriety of a commitment. **O** MAHABIR *v.* EMPEROR, 8 O. L. J. 627; 23 CR. L. J. 79 **431**

——— s. 439—*Summonses and warrants, execution of—Court, duty of—Conviction without hearing defence witnesses, illegality of—Revision.*

It is the business of a Court to see that its summonses and warrants are duly executed, and if an accused insists on a Court issuing process for the attendance of his witnesses, he has done all that the law requires of him. It is not his duty to take suitable steps to have his witnesses brought into Court but it is for the Court to do it.

Where, therefore, an accused is convicted without hearing his witnesses, as they fail to appear, as summonses and warrants are not executed on them, the conviction is illegal and cannot be sustained. **A** BISSAY *v.* EMPEROR, 19 A. L. J. 945; 23 CR. L. J. 124 **556**

——— s. 439, cl. (4)—*High Court, power of, in revision—Acquittal how can be converted into conviction—Murder, offence of, what is*

When death is caused by an act which has been done with the intention of causing bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, the offence is murder.

A High Court cannot in revision convert a finding of acquittal into one of conviction: the only way in which this can be done is by an appeal by the Government against the acquittal but it can enhance a sentence passed under any section of the Penal Code. **A** EMPEROR *v.* SHEO DARSHAN, 20 A. L. J. 190; 23 CR. L. J. 202 **858**

——— s. 476, *prosecution under, stay of, pending civil appeal—Finding of Criminal Court—Effect on civil appeal.*

Where a Subordinate Judge, District Judge or Sessions Judge of experience makes an order that a party or witness in a civil case shall stand his trial under section 476, Criminal Procedure Code, the prosecution should not be stayed because of an appeal pending against the civil case, if the appeal is not likely to be decided soon. At the same time the decision arrived at by the Magistrate should not have any effect upon the Court which may hear the civil appeal, rather the decision of the Magistrate in that matter is not relevant evidence to produce and bring before the Appellate Court. **A** ANRUDH KUMAR *v.* EMPEROR, 23 CR L J. 84 **436**

——— s. 488—*"Child," meaning of—Major child, whether can claim maintenance.*

The word "child" in section 488 of the Code of Criminal Procedure means a person who has not attained the age of majority.

Under section 488 of the Criminal Procedure Code a child who has attained majority is not entitled to claim maintenance from his father as he is capable of earning his own livelihood. **N** GANGARAMSA *v.* VISHNUSA, 23 CR L. J. 167 **631**

——— s. 488, *order under—Decree of Civil Court, subsequent—Previous order of Criminal Court, enforcement of.*

A subsequent decree of a Civil Court supersedes any order for maintenance that may have been previously passed by a Criminal Court under section 488 of the Criminal Procedure Code, but such a decree is no answer to an application for enforcement of an order previously obtained by the wife under section 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for custody had been duly complied with and that without any sufficient reason she has left his custody **Pat** RAMDHEYAN RAM *v.* RAM DULARIA, 3 P. L. T. 51; 23 CR. L. J. 144 **576**

——— s. 517—*Property in custody of Police—Delivery to one party—Return to another party.*

Section 517 of the Criminal Procedure Code is not applicable to a case where the property has already passed out of the custody of a Court.

Therefore, a party who has taken delivery from the Police of crops attached cannot be ordered to return the same to the opposite party. **Pat** JHUMAK SINGH *v.* TOTA MAHTO, (1921) PAT. 128; 3 P. L. T. 228; 23 CR L. J. 110 **494**

——— s. 526—*Transfer of case—Opinion expressed by Magistrate.*

Where in framing charges against the accused the Magistrate uses the expression "*Jurm sabit hai*" (the offence is established), it is sufficient to entitle

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the accused to get the case transferred to some other Magistrate. **L** SIRI KISHEN *v* GOKAL CHAND, 23 CR. L. J. 168 **632**

——— **s. 526**—*Transfer of criminal case—Unreasonable ground.*

Where certain strikers against a Navigation Company are placed on their trial under sections 503 and 143, Penal Code, before the District Magistrate, it is no ground for the transfer of the case that the District Magistrate has been taking precautions against the intimidation and illegal picketing indulged in by the strikers likely to result in a breach of the peace. **C** NOGENDRA CHANDRA DAS *v.* REHAN ALI, 23 CR. L. J. 88 **440**

——— **s. 523**—*Transfer of case—Discussion of case at Club before Sessions Judge likely to try case, whether ground for transfer.*

Discussion of a criminal case at a Club by a Civil Surgeon or any of the other officers who are likely to be concerned in the disposal of it before a Sessions Judge who is to try the case, is a sufficient ground for transfer of the case from the Court of that Sessions Judge. **A** MUHAMMAD DARAZ KHAN *v.* EMPEROR, 19 A. L. J. 916; 23 Cr. L. J. 123 **558**

——— **s. 547,** *whether applicable to livestock.*

Section 547, Criminal Procedure Code, only provides a summary method for realising "money payable" and these words cannot be stretched so as to include livestock or other goods. **L** EMPEROR *v* PHUMMAN RAM, 23 CR. L. J. 157 **621**

Custom—*Alienation—Sale in execution of decree—Collateral, right of, to challenge alienation.*

The right of a collateral to challenge an alienation under the Customary Law of the Punjab extends to the case of a sale held in execution of a decree. **L** GHANAYA *v.* HAZARA SINGH **992**

——— *Gift to* khanadamad—*Musalman Gujars of Kharar Tahsil, Ambala District.*

Among Musalman Gujars of Kharar Tahsil in the Ambala District, a proprietor is not empowered by custom to make a gift of ancestral land in favour of a *khanadamad* in the presence of collaterals. **L** CHANAN *v.* NUR DIN **98**

——— *Inheritance — Daughters excluded — Presumption as to sisters and their sons.*

When it is proved that by custom daughters are excluded from inheritance in a certain family, it may be safely assumed that sisters and their sons are also excluded.

In the family of Chain Shah of Saraura sisters and sisters' sons are excluded from inheritance. **O** DILDAR HUSAIN *v.* FATEH BAHADUR, 8 O. L. J. 554 **287**

——— Murao *caste—Widow—Re-marriage—Right in deceased husband's property, forfeiture of—Reversioners—Declaration of reversionary right, when granted—Hindu Widows' Re-marriage Act (XV of 1856), s. 2, applicability of.*

A Hindu widow of the *Murao* caste does not forfeit her right to her deceased husband's property by re-marriage, inasmuch as re-marriage is permitted by custom among that caste.

Section 2 of the Hindu Widows' Re-marriage Act is inapplicable to the case of a widow who is permitted by the custom of her caste to re-marry.

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Where a cloud on the entire reversionary interest is thrown by a stranger, the next reversioners are entitled to obtain a declaration that the stranger has no rights to deprive the reversionary body of their rights on the death of the widow.

There is no immemorial custom among the *Muraos* entitling a son by a second husband to succeed to the property of the first husband. **O** BHAGWAN DIN *v.* INDRANI, 24 O. C. 297; 8 O. L. J. 563 **117**

——— *Non-proprietors—Ownership of sites—Alienation of sites—Mauza Khan Khanan, Jullundur District—Town or village*

There is a general custom in the Punjab against the power of alienation of sites in villages by non-proprietors

The non-proprietors of Mauza Khan Khanan in the Jullundur District are not entitled, by custom, to alienate the sites of their houses.

The fact that proprietors have acquiesced in previous sales of sites of houses does not necessarily imply a renunciation of their discretionary right to object to a subsequent sale.

Evidence to the effect that there are a number of *pakka* built shops, houses and wells in a village, a private school outside the *abadi*, a population of 3,000, that artisans for whom the place is famous sell their wares in neighbouring towns, and that land is owned in the village by Khatris, Brahmans and other non-agricultural tribes, is not sufficient to convert the village into a town.

Mauza Khan Khanan, in the Jullundur District, is not a town. **L** RAM LOK *v.* BHAGWAN SINGH **154**

——— *Religious endowment*—Dohli *tenure—Alienation—Suit to challenge alienation*

The *dohli* tenure is a peculiar kind of tenure to be found in the south-eastern districts of the Punjab. It is a rent-free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine, or to a person for a religious purpose. In the Revenue Records the proprietary body are recorded as the owners of the property, and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose, for which the grant is made, is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office, the proprietors can eject him and put in some one else under a like tenure.

A tenure of this kind cannot be alienated by sale, or mortgage and any alienation of that character, if made by the *dohlidar*, is absolutely void and can be challenged by his successor. **L** SEWA RAM *v.* UDEGIR, 2 L. 313 **252**

Decree, *fraudulent, suit to set aside—Jurisdiction—Decree obtained in one District—Execution sought in another District—Executing Court, when competent to entertain suit.*

Save under special circumstances, a suit to set aside a decree on the ground of fraud, in which no other relief whatsoever is claimed, cannot be maintained in any District outside the District in which the fraud was committed and the fraudulent decree obtained.

Where an *ex parte* decree is obtained in one District and an application for its execution is made

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in another, a suit against the threatened execution with a prayer for an injunction, is entertainable by the Executing Court which has the power to go into the question whether the *ex parte* decree was obtained by fraud.

Where an *ex parte* decree is obtained by suppression of summons and suppression of real facts from the Court, it is a case of a fraudulent decree and not of one obtained by perjury. **C** THE INDIA PROVIDENT COMPANY, LTD. *v.* GOBINDA CHANDRA DAS **318**

Deed, construction of. *See* TRANSFER OF PROPERTY ACT, s. 59 **673**

———, *construction of*—"Kar," *meaning of*—Kar, *if includes cesses.*

The word "*kar*" is wide enough in its ordinary meaning to include the word cess.

A clause in a deed of partition and exchange provided as follows:—"The second party will not have to pay to any one any *kar* whatsoever; should any body ever recover any *kar* from them, then the first party should re-imburse them":

Held, on the interpretation of the document, that the second party would not have to pay either revenue or rent or any kind of taxes including road-cess **C** ANNADA CHARAN *v.* HABIBULLA **598**

Defamation—*Statements made in pleadings—Privilege.*

Defamatory statements made by parties to a suit in pleadings are not absolutely privileged.

Having regard to the fact that statements are made in pleadings in this country in a reckless manner in many cases, the salutary rules embodied in section 499 of the Indian Penal Code should not be departed from in this country in actions for damages for defamation. **C** DHIRO KOCH *v.* GOBINDA DEV **204**

Definitions:—

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Actual possession of interest. *See* ASSAM LAND AND REVENUE REGULATION, s. 97 **83**

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Any case. *See* CRIMINAL PROCEDURE CODE, s. 145 **861**

Any matter in difference between the parties. *See* CIVIL PROCEDURE CODE, s 89 **92**

As set forth in such instrument. *See* STAMP ACT, s. 64 **811**

Bahamah wajah. *See* HINDU LAW—GIFT **653**

Being otherwise invalid. *See* CIVIL PROCEDURE CODE, O XXXII, R 7 **50**

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Carrying on business. *See* CIVIL PROCEDURE CODE, s. 20 **93, 865**

Child. *See* CRIMINAL PROCEDURE CODE, s 488 **631**

Coercion. *See* CONTRACT ACT, s. 72 **517**

Court, *See* CIVIL PROCEDURE CODE, O XXII, R. 5 **131**

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Court of first instance. *See* AGRA TENANCY ACT, s. 177 **798**

Decree must involve, directly or indirectly, some claim or question to, or question respecting property of like amount or value. *See* CIVIL PROCEDURE CODE, s. 110 **239**

De facto possession. *See* CRIMINAL PROCEDURE CODE, s 145 **557**

Durbar. *See* LANDLORD AND TENANT **115**

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Feeding the grant by estoppel. *See* ESTOPPEL **27**

Fraud. *See* CIVIL PROCEDURE CODE, s. 48 **877**

Hearing the complainant. *See* CRIMINAL PROCEDURE CODE, s. 196 **859**

In accordance with law. *See* LIMITATION ACT, SCH. I, ART. 182 **14**

Institution. *See* PENAL CODE, s. 211 **434**

Instruments of gaming. *See* PUBLIC GAMBLING ACT, s. 1 **852**

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Karar. *See* PENAL CODE, s 504 **625**

Kirpan. *See* ARMS ACT, s. 19 **430**

Legal representative. *See* CIVIL PROCEDURE CODE, O. XXII, R. 3 **542**

Local inquiry. *See* CRIMINAL PROCEDURE CODE, s. 145 **616**

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Naslan bad naslan. *See* CONSTRUCTION OF DOCUMENT **707**

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Person claiming through another. *See* CIVIL PROCEDURE CODE, s 11 **266**

Prescribed. *See* CONTRACT ACT, s. 25 **81 716**

Reside. *See* CIVIL PROCEDURE CODE, s 20 **57**

Shall be done—Shall not be done. *See* CIVIL PROCEDURE CODE, O XXI, R 66 **988**

Shawls. *See* RAILWAYS ACT, SCH. II, CL. (M) **99**

Special value. *See* RAILWAYS ACT, SCH. II, CL. (M) **99**

Successor to original grantee. *See* AGRA TENANCY ACT, s. 158 **371**

Walda **308**

Without demand. *See* CONTRACT ACT, s. 148 **65**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 10A—*Sale-deed—Oral agreement to prove transaction to be mortgage, admissibility of*—Kabuliyat *and lease, unregistered, effect of.*

Where at the time of execution of a sale-deed there was an oral agreement that the nominal purchaser should re-convey on payment and that payment should be by instalments, and in consequence of that agreement *kabuliyats*, and afterwards a lease,

Dekkhan Agriculturists' Relief Act concld.

were passed providing for the payment of interest and capital but were not registered:

Held, that the *kabuliyats* did not constitute the agreement but were ancillary to it, and that the fact that they could not be proved as they were not registered did not stand in the way of the vendor proving that the transaction was only a mortgage, as under section 10A, Dekkhan Agriculturists' Relief Act, a contemporaneous oral agreement could be proved even though it had subsequently been embodied in a document which was inadmissible in evidence. **S** HAMBIRKHAN *v.* MURIJMAL, 15 S. L. R. 160 **356**

Document, *reading of—Question of fact.*

In a case where it is possible to read the words of a document in two ways, it is open to the first Appellate Court to adopt whichever reading appears to it to be more reasonable after considering all the connected circumstances. A finding as to what the words in dispute really are is a finding of fact and cannot be questioned in second appeal. **L** NIGAHIA RAM *v.* BHAGU MAL **560**

Easement *of necessity—Transfer of portion of land—Discharge of burden imposed upon portion transferred—Implied reservation of easement of necessity—Easements Act (V of 188?), s. 13 cl.* **(a).**

Where the owner of two tenements or of one tenement divided into two parts transfers one part, he puts an end by contract to any relation which he might have himself created between the land sold and the land retained. He discharges the land so sold from any burden imposed upon it during his joint occupation; the condition of such land is thenceforth determined by the contract of alienation, and not by the previous user of the former common owner during his common ownership.

But where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will upon severance ripen into an easement, if it be such as to be absolutely necessary to the enjoyment of the part retained, and capable of constituting the subject-matter of an easement.

Where an owner grants part of his land and retains other parts himself, although the grantee may be in a more favourable position than the grantor in so far as the grantee may claim all easements necessary for reasonable enjoyment of the part so granted, the grantor may claim that all "easements of necessity," without which no enjoyment at all would be possible, should be raised by implication in favour of the part retained

Plaintiff took settlement of western portion of a plot abutting on a road from the landlord and subsequently defendant took settlement of the eastern portion of the same plot. In a suit by the plaintiff for declaration that the defendant had no right of way over the western portion of land:

Held, that the defendant was entitled to the right of way if it was established that at the time of the grant to the plaintiff there was a way of necessity in respect of the eastern plot which was retained by the landlord. **C** TUSTU MONDAL *v.* KENARAM MONDAL, 34 C. L. J. 518 **24**

Easement—*Right of way—Servient tenement not to be saddled with heavier burden than proved—Mode of user.*

In a claim of an easement over another's property the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving.

But when a particular mode of user is not heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, *e. g.*, the user of a way for horses may include the right to lead smaller animals as well but not larger animals or loads.

Where the user of a path is restricted to the passage of men, carts and palanquins the carrying of corpse through it does not add a heavier burden on it. **C** RAM KUMAR MAZUMDAR *v.* MOHIM CHANDRA DUTTA **579**

——— *Riparian right—Servient tenement, whether can acquire easement as against dominant tenement.*

Easement exsits for the benefit of the dominant tenement alone and the servient owner acquires no right to insist on its continuance or to ask for damages for its abandonment.

But where a land has been receiving water through an artificial water-course constructed on a neighbour's land for a long time, he may rest his claim to continue to receive such water on some lost grant or old arrangement. **Pat** FUDU SAHU *v.* SARBAN **84**

——— *Waste land, right of easement on, whether can be acquired—Question of right, determination of—Court, duty of.*

The mere fact that land is waste does not necessarily show that no right of easement can be acquired over it.

In determining the question whether an user of way over waste land was as of right or not, a Court has to consider the character of the land, the relation between the parties and the circumstances under which the user took place. **C** MOHAMMAD NURAL HUQ *v.* BAKSU MANDAL **509**

Easements Act (V of 1882), s. 13 cl. (a). *See* EASEMENT OF NECESSITY **22**

——— **s. 43**—*Permanent change—Additional burden on servient tenement—Easement, extinction of.*

A owned two houses, one a bigger one and the other a smaller one. He had the prescriptive right to flow the dirty water of the drain of the smaller house on to the house of the defendant. He, however, constructed a privy on his bigger house and connected its drain with the older drain of the smaller house and began to flow the water of both on to the defendant's house. The defendant blocked up the drain completely, thus stopping the flow of water of both houses. *A* sued to have the drain opened:

Held, that the plaintiff did not lose his entire right under section 43 of the Easements Act, as the additional burden could easily be reduced to its original limits by cutting up or blocking the connection between the new privy and the earlier drain, and that, therefore, he was entitled to a decree conditional on his severing the connection between them. **A** RAMESHWAR DAYAL *v.* MAHARAJ CHARAN, 20 A. L. J. 202 **643**

Estates Partition Act (V B. C. of 1897), ss. 49, 119—*Civil suit, bar of.*

If a defendant seek to bar a plaintiff's suit under section 119 of the Estates Partition Act, he must clearly show in what respect the order of the Revenue Authorities is affected or sought to be set aside. **Pat** NANDKISHORE SINGH *v.* MATHURA SAHU, 3 P. L. T. 13 **586**

Estoppel—Benami—*Successor-in-interest of real owner, if can defeat right of mortgagee from ostensible owner—Notice.*

Certain lands, which had been purchased by *K.* in the *benami* of his wife *A.*, were mortgaged by *A.* to the plaintiffs, who in execution of the mortgage-decree purchased them in 1915. In 1905 these lands had been purchased and taken possession of by the defendants in execution of a money-decree obtained by a creditor against *K.* To this execution proceeding *A* had preferred a claim on the ground that the lands were her *stridhan* property, but this claim had been disallowed by the Court In a suit by the plaintiffs for a declaration that the lands belonged to *A.* and for possession thereof by right of their execution purchase:

Held, that the defendants, who were the successors-in-interest of *K*, should not be allowed to defeat the right of the plaintiffs, who were transferees in good faith from the ostensible owner *A* without notice (actual or constructive) of *K.*'s title. **C** ANNADA MOHAN ROY CHOUDHURY *v* NILPHAMARI LOAN OFFICE, LIMITED, 26 C. W. N. 436 **215**

——— *"Feeding the grant by estoppel," principle of, applicability of.*

The principle of law referred to as "feeding the grant by estoppel," *viz.*, if a man who has no title whatever to property, grants it by conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes, has no application where the contract of assignment refers to property which has been expressly rendered inalienable by the Legislature. **C** ANNADA MOHAN ROY *v.* GOUR MOHAN MALLIK, 25 C. W. N. 496; 33 C. L. J. 457; 48 C. 536 **27**

Estoppel against Statute. *See* LANDLORD AND TENANT **531**

Evidence—*Findings in judgment not* inter partes, *admissibility of—Appellate Court, duty of, to consider whole evidence.*

Findings in a judgment cannot be used in evidence against a person who was no party to the suit in which that judgment was pronounced.

An Appellate Court should not reverse the decision of the Trial Court without considering the whole evidence on which the Trial Court's decision is based. **C** SATISH CHANDRA MUKHERJEE *v.* JOYRAM ROY **525**

——— *Judgment not* inter partes, *admissibility of.*

In a suit for recovery of possession of land a judgment in a previous suit for ejectment from the same land brought by the plaintiff against a third person in which the defendant's title was set up is admissible in evidence for the purpose of showing that that was a suit in which the title of the defendant was set up by a third person and the suit was decreed, **C** MOHAR ALI *v.* MAFIZUDDIN SARKAR **699**

Evidence—concld.

——— *Judgment vacated by subsequent order, whether can be used in evidence.*

A judgment passed in a suit in which the plaintiff was found to have a certain share in a *jama* ordered the plaintiff to pay deficit Court-fee before the decree was drawn up, and directed that in default of plaintiff's payment the suit was to stand dismissed. The requisite Court-fee not having been put in, the Court made the following order: "Deficit Court-fee not paid as directed by the Court's order. The suit will accordingly stand dismissed. No decree need be drawn up":

Held, that the judgment should not be used as evidence in a subsequent suit as the order dismissing the suit vacated the judgment in the case, which should be treated as non-existing.

In a suit for rent in respect of a *jama* a judgment in a previous suit between the parties relating to a different *jama*, is admissible in evidence, though it may or may not operate as *res judicata*. **C** SASIMUKHI CHOWDHURANI *v.* SARASWATI SEN GUPTA **522**

Evidence Act (I of 1872), s. 13—*Judgment not* inter partes, *whether admissible in evidence.*

The judgment passed in a previous suit, although not relating to the parties to the subsequent suit, is nevertheless admissible in evidence under section 13 of the Evidence Act to show the fact that the judgment was passed, and, therefore, it is necessarily evidence of the following facts: who the parties to the previous suit were; what the land in dispute was; and who was declared entitled to retain possession. For this purpose, and to this extent, it is admissible in evidence for and against every one when the fact of possession at its date has to be ascertained. **O** GHULAM SARWAR KHAN *v.* MUHAMMAD ALI KHAN, 8 O. L. J. 301 **398**

——— **s. 17**—*Admissions, evidential value of—Joint family, member of, suit for possession by, against another member—Decree, proper form of—Mesne profits—Plea not raised—Consent.*

Admissions are always evidence against the party who makes them but they are evidence which varies very much in value according to the circumstances and a Court is quite at liberty to reject them if it is satisfied from other circumstances that they were untrue.

Where the plaintiff sues as a member of a joint family to recover joint family property from the defendant, another member of the joint family, who claims to hold it adversely, the proper decree to pass is a decree for joint possession of an undivided share in the property, without mesne profits.

Failure to raise a plea is not equivalent to consent, **O** GOKUL PRASAD *v* KAILASH NATH, 8 O L. J 596; 4 U. P. L. R. (J. C.) 19 **345**

——— **ss. 25, 27, 30**—*Statement of accused to Police Officer, value of—Confession—Property in possession of accused long after dacoity and openly—Inference—Burden of proof—Accused making false statement—Inference of guilt.*

In a case of dacoity a statement made by an accused to a Police Officer, at the time of the search of his house, that property would be found in the possession of his co-accused, is not

Evidence Act—contd.

admissible in evidence against the accused making the statement nor is it admissible against his co-accused as proving their participation in the dacoity.

A statement made by an accused to a Police Officer if it does not amount to a confession may, nevertheless, be used against him and more particularly if the statement turns out to be false in the light of the other evidence in the case If it amounts to a confession, then it must be excluded from evidence altogether under section 25, but in either event it can only be used against the accused making the statement.

A statement made by one accused person can only be used against another co-accused person if the provisions of section 30 are applicable.

The fact that a *dupatta* stolen in a dacoity was found some 40 days after the dacoity in the possession of a person, not hidden away but openly worn, does not lead to the necessary inference that that person took part in the dacoity.

It is for the prosecution to establish their case and because an accused person loses his head or gets frightened and does not tell the truth, he cannot, on that account, be convicted. **A** RAMHIT *v.* EMPEROR, 20 A. L J. 178; 23 CR. L. J, 193 **849**

——— **s. 30**—*Confession of co-accused, admissibility of—Conviction, whether can be based on it alone.*

A confession of an accused not being declared relevant by the Evidence Act as against a co-accused cannot be treated as substantive evidence and a judgment cannot be based upon it so far as the co-accused is concerned. A Court may, under section 30 of the Evidence Act, take it into consideration with or supplementarily to relevant facts which may form the basis of a judgment

A confession of a co-accused must be regarded with suspicion. **N** SAPKU *v.* EMPEROR, 23 CR. L. J 129 **531**

——— **ss. 32, 33**—*Mutation case, witnesses examined in—Statements, admissibility of, in civil suit.*

Statements of deceased witnesses as to the legitimacy of a claimant to a property made in a mutation case before a Tahsildar Assistant Collector authorised by law to record the statements of witnesses on oath are not admissible under sections 32 and 33 of the Evidence Act in a subsequent civil suit for the property by a person who was no party to the mutation case but are admissible in a suit by one who was a party to the mutation case.

But where two such civil suits, one by a person who was no party and the other by a person, who was a party to the mutation case, are tried together it would be more consonant with justice not to take into consideration in either suit the statements of witnesses recorded in the mutation proceedings. **O** MUMTAZ-UN-NISA BEGAM *v.* WAZIR ALI, 8 O. L. J. 569 **308**

——— **ss. 92, 93, 94**—*Contract of sale in favour of one named person and others—"Others", who are—Evidence, admissibility of.*

Where a vendor agrees to sell land to several named persons and in drawing up the agreement of sale the name of one person is mentioned and, without naming the rest, the word "others" is used,

Evidence Act—concld.

evidence can be let in in a suit for specific performance of the contract as to the persons in whose favour the conveyance is to be executed. **M** VEDAMURTHI MUDALIAR *v* JWALAPURAM RAGHAVACHARLU, 15 L. W. 371; 30 M. L. T. 177; (1922) M. W. N. 185; 42 M. L. J. 475 **973**

——— **s. 114 (c)**—Presumption—Onus. *See* CESS ACT, 1880, s 5 **138**

——— **ss. 146, 148 to 152**—*Scandalous and insulting question, relevancy of.*

Where in a dispute as to property the defendant alleges that he derived title thereto from a certain lady and she is examined as a witness on his behalf, a question put to her by the plaintiff as to whether she had become pregnant by a certain person is relevant, if the plaintiff's case is that she did not inherit the property of her husband by reason of her unchastity during her husband's lifetime, but if it is asked for impeaching her credit as a witness the Court has to consider the provisions of sections 146 and 148 to 152 of the Evidence Act before allowing it. **C** SUBALA DASI *v.* INDRA KUMAR HAZRA **692**

——— **s. 159**—*Witness, duty of—Refreshing memory.*

A witness before a Court of Justice is under an obligation to tell the truth and the whole truth, to the very best of his power. If upon any question he suffers from a *bona fide* lapse of memory, and that failure of memory can be remedied by reference to any memorandum or other writing prepared by the witness at the time, and the Court invites the witness to refresh his memory with reference to the writing the witness is under an obvious obligation to do so. It is part of the duty under which he lies to lay the whole truth before the Court to the best of his ability. **A** HARKHOO *v* EMPEROR, 19 A. L. J. 76; 23 CR. L J. 143 **575**

Execution—*Re-sale—Separate mortgage-bonds—Properties sold together—Re-sale.*

In the execution of a decree on three mortgage-bonds where a sale of all the properties together had already taken place, the High Court held, on an objection by one of the transferees of the judgment-debtor, that one sale was objectionable and that each property separately mortgaged ought to have been separately sold. The decree-holder, who was also the auction-purchaser, applied as auction-purchaser and absolute owner for possession, ignoring the direction of the High Court. An objection was taken to the possession being given and it was urged that a separate sale should take place in accordance with the directions of the High Court:

Held, that the decree-holder was not entitled to possession but he ought to be allowed to pursue his alternative remedy in accordance with the judgment of the High Court or, in other words, to apply alternatively, by way of amendment of his application, for an order for re-sale of the properties separately in accordance with the High Court's direction. **A** HARBANS NATH *v.* ACHRAJ NATH, 8 U. P. L. R. (A.) 52 **16**

Execution of decree—*Application consigned to record room—First application, nature of—Limitation.*

Where execution proceedings are consigned to the record room behind the back of the decree-holder

and without any default on his part, a further application, though in the form of a new application for execution, is really a continuance of the older application. **A** RAM LAKHAN SINGH *v.* MEWA LAL, 3 U. P. L. R. (A.) 13 **78**

——— *Executing Court, power of—Decree-holder cannot go beyond decree.*

An Executing Court cannot go behind the decree of which execution is sought.

An Execution Court has no power to direct something to be done in execution of a decree which is not directed to be done by the decree itself, on the ground that literal compliance with the decree has become impossible.

A decree directed the closing of an outlet made by the defendants in a certain hill stream and the building of a *bund* at a certain point. A *bund* was built in accordance with the decree, but was subsequently washed away by a flood. Another *bund* was subsequently made by the decree-holders at another point:

Held, that the decree-holder had no right to build a *bund* at any point other than that specified in the decree. **L** ALI MUHAMMAD *v.* JAHAN KHAN **126**

——— *Objection by judgment-debtor that decree cannot be executed as rent-decree, competency of—Bengal Tenancy Act (VIII of 1885), Ch. XIV.*

A tenant judgment-debtor can raise an objection in execution proceedings that a decree obtained against him for arrears of rent cannot be executed under the special procedure prescribed by Chapter XIV of the Bengal Tenancy Act, but he cannot object to the decree being executed against him as a decree for money under the Code of Civil Procedure. **C** ATUL CHANDRA BASU *v.* ARIP SHAIKH **810**

Execution of rent-decree, effect of.
See LANDLORD AND TENANT **581**

Execution proceedings—Res judicata—*Decree, amendment of—Execution Court, powers of.*

A obtained a decree for sale against *B* which was set aside on first appeal but restored on second appeal with the addition of the costs of both the Appellate Courts In his application for a final decree for sale, *A* omitted to include the costs of the Appellate Courts with the result that the final decree as prepared was not the final decree in the cause, but the decree as passed by the first Court. *A* applied for execution. No objection to execution was taken by *B* who rather paid up a portion of the amount under the decree and obtained further time to pay the balance. On *B's* default, *A* made another application for execution for the balance, adding this time the sum awarded as costs of the Appellate Courts *B* objected to this inclusion, and, on matter going to High Court on appeal, raised the further point for the first time that the decree not being the final decree in the cause was not capable of execution:

Held, (1) that the Executing Court had no power to include the sum as it was not entered in the final decree;

(2) that the objection to the execution of the decree was one which *B* might and ought to have raised when the first application for execution was made, and having not done so, could not be

allowed to raise it in the *later* execution proceedings.

An Execution Court can only add execution costs to a decree in the course of execution proceedings; it cannot add to or amend the decree under execution by including sums left out by the Court which passed the decree. **A** DAMBAR SINGH *v.* KALLYAN SINGH 20 A. L. J. 170 **799**

Ex parte decree—*Defendants, several—Decree not joint or indivisible—Decree, whether can be set aside against all defendants on application by some—Civil Procedure Code (Act V of 1908), O. IX, r. 13, proviso, applicability of*

Where in a suit to obtain possession of separate items of property from separate sets of defendants, an *ex parte* decree is passed which is not joint and indivisible, a Court is not justified in setting aside the decree against all the defendants merely upon an application by some of them.

In order to render the proviso to rule 13 of Order IX of the Civil Procedure Code applicable, the guiding factor is the nature of the decree passed, and not the fact that there were one or more issues in the suit common to all defendants. **M** NARAYANASWAMY IYER *v.* DORAISAWMY PATHAR, (1921) M. W. N. 795 **343**

Fraud—*Party when may plead his own fraud—Fraud effectuated—Rule to be followed—Minor, whether can take advantage of guardian's fraud.*

Where a fraud has been effectuated, the sound rule is to leave the parties exactly as they are, that is to say, to leave the property in the possession of whichever of the two parties it happens to rest with.

The Courts will not assist a party to a fraud to obtain possession of the subject of the fraud. Therefore, although a plaintiff will not be allowed to plead his fraud in order to obtain possession of the subject of the fraud, a defendant, who in spite of the fraud having been effectuated is still in possession, will be allowed to defend his possession by pleading the true nature of the transaction.

Although a minor may not be answerable for the fraud of his guardian, he cannot take advantage of it. **L B** MAUNG TIN *v.* MA MAI MYINT, 11 L. B R. 83 **459**

Fraudulent transaction — *Fraud — Burden of proof—Fraud effectuated—Court, duty of.*

In a suit for a declaration that a registered-deed of sale is a mere colourable transaction, and that no consideration passed, it is for the plaintiff to prove the fraud alleged and the want of consideration: if he establishes circumstances pointing to the truth of the facts he alleges, the onus is shifted, and it is for the defendant to prove consideration.

If in any transaction there has been a fraud and that fraud has been carried into effect to any material extent, a Court will not aid either party to take advantage of his fraud but will let the estate lie where it falls. But where the fraud has not been carried out, where nothing has been done under it, then the Court will aid the vendor to retain possession of his property and will not allow the vendee to take it, that is, to effectuate the fraud to which he was a party. **L B** MAUNG PO ZU *v.* MAUNG PO KWA, 11 L. B. R. 89 **322**

Godavari Agency Rules, Rule III, cls. (2), (3), *Agent acting under, decree of—Suit to set aside whether maintainable.*

An Agent when acting under clauses 2 and 3 of rule III of the Godavari Agency Rules acts as a Court, and no suit lies against him for what he does as such Court. **M** MALLADI VENCATARAMYYA *v.* SECRETARY OF STATE FOR INDIA, (1921) M. W. N. 830; 30 M. L T 76; 15 L. W. 236 42 M. L. J. 148 **345**

Guardians and Wards Act (VIII of 1890), s. 31, scope of *– Sanction to sell minor's property- Necessity, recital of — Suit by minor to set aside alienation—Burden of proof—Fraud—Procedure.*

An order of a District Judge giving sanction to a guardian of a minor to sell the minor's property must recite the necessity for the sale as required by section 31 (2) of the Guardians and Wards Act.

An order of sanction by a District Judge authorising the guardian of a minor to sell his property does not cure inherent defects that may exist in the sale. Sanction is *prima facie* evidence that the transaction is a good one but the minor may at any future time show that it was fraudulent or improper.

Where in a suit to set aside an alienation made by a guardian of a minor the evidence on both sides is before the Court, there is nothing to prevent the Court from coming to the conclusion that the sale is an improper one and not for the benefit of the minor, though the burden of proof in the first instance lies upon the person seeking to set aside the alienation.

Per *Ramesam, J.*—The effect of sanction under section 31 of the Guardians and Wards Act is that the burden of proof is shifted to the plaintiff and it is not necessary that fraud has to be made out on the part of the purchaser to impeach the transaction. **M** NALLAKA VENKATASWAMI *v.* RUGUM VIRANNA, 15 L. W. 373; 42 M. L J. 333 **964**

Hindu Law—Adoption — *Estate received before adoption, whether divested—Wife of person adopted, whether can claim her husband's estate in natural family—Adoption, principle of.*

When a male owner takes a full and distinct interest in property and the property vests in him absolutely, it cannot be divested by his subsequent adoption into another family.

The theory of adoption involves the principle of a complete severance of the boy from the family in which he is born and his substitution into the adopter's family as if he was born in it. The adoption operates as birth of the boy in the family of adoption and as civil death in the family of birth, with all the legal consequences incidental thereto.

A wife of a person adopted ceases along with her husband to belong to the natural family of the husband. She cannot, therefore, succeed to the estate of her husband which belonged to him while he continued to be in his natural family and which became divested because of his adoption. **N** MAROTI *v.* LAXMAN **362**

——— **Alienation** *by father—Son's pious obligation—Alienation invalid—Sons, whether bound—Mortgage by father—Legal necessity, proof of, to bind sons—Simple obligation against sons—Limitation, starting point of.*

Hindu Law – contd.

A transfer by a Hindu father which is admittedly invalid in its inception, cannot become valid on the death of the father and be enforced against the sons merely on the ground of their pious duty under the Hindu Law to discharge their father's debt.

In the case of a mortgage made by a Hindu father, the son is not liable for the debt on the death of the father in the absence of proof of necessity. The remedy of the creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security.

A suit against the sons on the simple obligation created by a bond executed by their father must be brought within six years from the date of the bond and limitation against the sons does not begin to run from the date of the father's death.

The pious obligation resting upon the sons to discharge their father's debt does not extend to the payment of time-barred debts. **O** RAM CHHATTAR *v.* RAM LAL, 24 O. C. 295 **950**

——— **Alienation** *by manager — Right to challenge—Heritability by surviving members—Subsequent born son, right of—Creditor—Legal necessity—Burden of proof.*

Those who deal with a person who has only a limited interest in property and who professes to dispose of a larger interest, are *prima facie* bound to make out the facts which authorise such an alienation.

The right of challenging an alienation made by the family manager of a joint Hindu family is personal and is not inherited by the surviving members.

A son born subsequent to an alienation by a Hindu father cannot impeach that alienation, as he takes the family property as it exists at his birh, nor. can he inherit the right of his brother in existence at the time of the alienation but subsequently dead to challenge the said alienation.

A plaintiff is entitled to the amount paid by him for conducting the case on behalf of a minor defendant when the defence of the minor fails. **N** JAIRAM *v.* VENKATRAO **658**

——— ——— *by widow—Necessity—Burden of proof—Purchase by widow out of income of husband's estate—Accretion.*

A person who deals with a Hindu widow having a limited estate is bound to establish the facts which justify the transactions under which he claims.

It is competent for a Hindu widow to so deal with the income of her deceased husband's estate, as to make it her own separate property, but the fact of her having so dealt with it must always be traced and proved.

Where a Hindu widow acquires the rights of the tenants of her deceased husband's estate, in part by release of arrears of rent, and in part by payment of cash derived from income of her husband's estate, the tenant rights so acquired are an accretion to the husband's estate, which, if it be possible for the widow to segregate, would require some unequivocal act on her part to lead

Hindu Law- contd.

to the inference of such segregation. **P C** NABAKISHORE *v.* UPENDRAKISHORE, 20 A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 253; 24 BOM. L. R. 346; 15 L. W. 417; 50 M. L. T. 234; 3 P. L. T. 311 **305**

——— **Alienation** *by widow—Reversioner's suit—Portion of purchase-money paid towards mortgages binding on estate—Purchaser's right to interest—Interest to run concurrently with mesne profits—Permanent improvements—Reasonable sum to be paid to person dispossessed—Law's delays.*

Where a sale by a Hindu widow is set aside, the person dispossessed is entitled to sums paid towards mortgages binding on the estate with interest, such interest to run concurrently with the mesne profits. He is also entitled to reasonable compensation for improvements effected so as to increase the value of the property, even though he was not the person who actually effected those improvements. The increased rent that is properly attributable to improvements can be properly set off against the mesne profits, even although the improvements were not actually executed by the person in possession at the moment when the decree for possession was made.

Delay in administration of justice commented upon. **P C** BHAGWAT DAYAL SINGH *v.* RAM RATTAN SAHU, 20 A. L. J. 16; 26 C. W. N. 257; (1922) M. W. N. 102; 35 C. L. J. 121; 42 M. L. J. 243; 4 U. P. L. R. (P C.) 7; 24 BOM. L. R. 326; 3 P. L. T. 229; 15 L. W. 481 **69**

——— **Bombay school**—*Exclusion from inheritance—Congenital and incurable dumbness—Obsolescence of disqualifications—Adoption—Person having dumb son or grandson, whether can adopt.*

According to the Hindu Law prevailing in Bombay, a person suffering from congenital and incurable dumbness is incapable of inheriting.

It may be, as was pointed out in *Surayya v. Subbamma*, 53 IND. CAS. 498; 43 M. 4; 26 M. L. T. 154; (1919) M. W. N. 580; 37 M. L J. 405, that some of the grounds of exclusion as mentioned in the texts are obsolete. All the disqualifications, however, cannot be treated on the same footing. Each defect must be considered on its merits, and if it could be fairly and safely stated that it is obsolete, it may be treated in that manner.

In the lifetime of a natural son or grandson or a great grandson no valid adoption can be made.

A person having a grandson who is subject to the defect of dumbness from his birth cannot be described as sonless so as to make an adoption by him during the lifetime of the grandson valid. **B** BHARMAPPA *v.* UJJANGAUDA, 23 BOM. L. R. 1320 **216**

——— **Charitable endowments**—

—Mutts, *incidents of*—Matathipathe, *legal character of—Permanent lease of ordinary* mutt *property by* matathipathe—*No justifying necessity or special custom proved—Lessee in possession for more than* 12 *years under successor to* matathipathe—*Lessee does not acquire title by adverse possession—Limitation Act (IX of* 1908*), s.* 10, *Sch. I, Arts.* 134, 144, *applicability of.*

There are two systems of law in force in India, Hindu and Muhammadan Laws, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions In each there are well-recognised rules relating to their religious and charitable institutions. It would be a serious inroad into the rights of Hindus and Muhammadans if the rules of the Hindu and Muhammadan Laws are to be construed in the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in *pari materia*.

A "trust" in the sense in which the expression is used in English Law is unknown in the Hindu system, pure and simple.

Under Hindu Law the image of a deity of the Hindu pantheon is a "juristic entity" vested with the capacity of receiving gifts and holding property. Hindu religious institutions, such as Mutts, and various others known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them *eo nomine*. The heads of these institutions have ample discretion in the application of their funds, but always subject to certain obligations governed by custom and usage. Called by whatever names, they are only the managers or custodians of the institutions. In no case is any property "conveyed" to or "vested" in them, nor are they "trustees" in the English sense of the word, although they are answerable as trustees in the general sense for maladministration.

A Matathipathe cannot, in the absence of justifying necessity or special custom, grant a lease of Mutt property to endure beyond his lifetime

In 1891 the Matathipathe of a Hindu religious institution in the town of Madura granted a permanent lease of certain lands which were "ordinary" Mutt property, not appropriated to any specific purposes. The Matathipathe died shortly afterwards, but his successor who held office till 1906 continued to receive rent from the lessee. The present head of the Mutt, who succeeded next, became aware of the transaction of 1891 in 1908. Meanwhile the lessee had granted a sub-lease of the lands which was to expire in 1912. Before its expiry, however, the sub-lessee took a direct fresh lease from the present Matathipathe. The lessee in 1913 sued his sub-lessee and the Matathipathe for declaration of title, for ejectment and for possession, alleging that he had acquired a good title against the Mutt under Articles 134 and 144 of the Limitation Act:

Held, that as Article 134 of the Limitation Act related to cases of specific trust and property "conveyed in trust," and was controlled by section 10 of the Act, it had no application to the present case; nor had the lessee acquired any title by adverse possession under Article 144 of the Limitation Act, for, in the absence of justifying necessity or special custom, the permanent lease granted by the Matathipathe expired at his death, after which the receipt of rent by the next Matathipathe must be considered to have been with the knowledge, which must be imputed to him, that the tenancy created by his predecessor ended with the predecessor's life and could, therefore, only be properly referable to a new tenancy created by himself and that under

these circumstances the proper inference was that the tenancy of the lessee did not become adverse till the death of the second Matathipathe in 1906, **P C** VIDYA VARUTHI THIRTHA SWAMIGAL v. BALUSAMI AYYAR, (1921) M. W N. 449; 41 M. L. J. 345; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 527; 24 BOM. L. R. 629; 20 A. L. J 497 **161**

——— **Debt of father**—*Son sued in representative capacity—Decree, personal—Separate property of son not liable—Civil Procedure Code (Act V of 1908), s. 52.*

A son sued for the debt of his deceased father in his representative capacity is liable only to the extent of the assets of the co-parcenary property held by him, and a decree, though passed as a personal decree against the son must be construed in the light of section 52 of the Civil Procedure Code and the decree-holder is not entitled to proceed against the separate property of the son. **Pat** BHUJAWAN PRASAD SINGH v. RAM NARAYAN, 2 P. L T. 386 **224**

——— **Father,** *alienation by sons, position of—Pious obligation, how far enforceable—Legal necessity—Antecedent debt—Consideration, major portion of, borrowed for legal necessity, effect of—Transfer, whether void.*

A Hindu son is not bound to pay the amount of a mortgage executed by his deceased father, which was not borrowed for any valid necessity or for the payment of an antecedent debt simply on the ground of a pious duty to pay the debt of a deceased father.

Where a large portion of the consideration amount is borrowed for legal necessity, the transfer by the manager of a joint Hindu family is not void. **O** GAJADHAR BAKHSH SINGH v. BAIJNATH, 8 O. L. J. 605 **967**

——— **Gift**—"Bahamah wajah," *meaning of—Absolute estate.*

A Hindu, who had only a widowed daughter-in-law and a widow of his deceased grandson, gifted his whole property to two persons *A.* and *H.* On his death *A.* and *H.* gifted a portion of the gifted property in favour of the daughter-in-law saying that they gave her the property *"bahamah wajah"*:

Held, that the gift to the daughter-in-law was a gift of full proprietary rights and that the words *"bahamah wajah"* meant with all rights. **A** ABHEY SINGH v. HIMTA, 4 U. P. L. R. (A.) 36 **653**

——— **Joint family**—*Antecedent debt—Mortgage-debt—After-born son bound.*

The consideration of a mortgage executed by a Hindu when he was the sole living co-parcener is an antecedent debt for which the share of an after-born son is liable. **N** SHEONARAIN v. NATHU **756**

——— ——— *Mortgage of joint family property by co-parcener invalid—Marriage of male members of joint family—Legal necessity.*

Where a mortgage is granted by one co-parcener on his own account over the joint family properties, it is invalid. The estate is wholly unaffected by it and its entirety stands free of it

The marriage of a male member of a joint Hindu family is a legal necessity and a debt created to meet the expenses of such marriage is binding on the joint family property. **Pat** DEBI LAL SAH v. NAND KISHORE GIR **315**

——— **Joint family**—*Partition—Formal separation need not be proved—Specification in sale-deed of shares of members, whether proof of separation.*

In order to establish separation by members of a joint family, a plaintiff is not bound to prove formal separation accompanied by an apportionment of the family property It is sufficient if he can produce evidence to satisfy the Court that the position of the various members was such that they could not have been living as members of a joint family.

It is by no means an unusual thing for members of a joint family, when acquiring landed property by purchase, to cause to be specified in their document of title the shares which they would respectively take upon a partition. No clear inference in favour of separation or break up of the joint family can be drawn from a transaction of this sort. **A** JAIRAJI v. BHAGWAT PRASAD PANDE **84**

——— ——— *Presumption—Separation—Actual partition not proved—Separation inferred from circumstances.*

In the case of a Hindu Mitakshara family there is a presumption of jointness and any one who pleads disruption must prove it.

Where there is no direct evidence of disruption separation may be inferred from other circumstances

Separation may be proved by acts or declarations which show an agreement and intention to separate, such as cesser of commensality, separate occupation of portions of the property, separate enjoyment of distinct shares of the profits, separate definement of shares in the Revenue Records, agreement to divide the proceeds in definite shares or other acts which are inconsistent with the family remaining joint, such as separate transactions between themselves or with others Mere cesser of commensality or of co-worship, division of the income, definement of shares in the revenue or land registration records, separate occupation of portions of the property or separate collections of rents, or separate dealings, are not conclusive, unless there is an intention to separate. They are all evidence of separation, and may lead to the inference that there was a separation. **Pat** TARA PRASAD JHA v. MAYA DEBYA, (1922) Pat. 91; 4 U. P. L. R. (PAT.) 18 **687**

——— ——— *Sale by some members—Transferee from all members, right of, to recover possession—Sale price.*

A transferee from all the members of a joint Hindu family can set up the invalidity of a sale by some of the members of the family and can recover possession of the joint property without payment of the sale price to the vendee from some members of the family. **O** RAGHUBAR PANDE v. GOKUL PRASAD, 24 O C. 107 **107**

——— ——— *Separation—Separating member specially trained at family expense—Liability to satisfy decree against family property.*

Where a decree is granted against the property of a joint Hindu family including the separate property of a particular member of the family which,

Hindu Law—contd.

being the result of some special training acquired at the expense of the joint family, is also declared family property, and that member subsequently quits the family, the only property of his that is liable for the satisfaction of the decree is his share in the joint family property and his separate property such as it was on the date on which he quitted the family. His property acquired after he quitted the family is not liable for the satisfaction of the decree. **L** GOKAL CHAND *v.* FIRM OF HUKAM CHAND-NATHU MAL **731**

——— **Joint family** *property — Alienation—Cause of action to challenge alienation—Members, subsequently born, position of.*

Once a cause of action to bring a suit to challenge the alienation of a joint Hindu family property comes into existence, no fresh cause of action accrues to members who are subsequently born in the family after the making of the alienation at such birth **O** SHEOAMBAR KHAN *v.* RATIPAL SINGH, 8 O. L. J 679 **404**

——— **Legal necessity**—*Simple money-bond executed by female owner—Decree—Execution—Life-interest liable to sale—No question of legal necessity arises.*

In execution of a decree obtained on a simple bond executed by a female owner having a limited interest, her life-interest only is liable to be sold and in such a case no question of legal necessity arises as the bond being a simple one there is no charge on the property. **A** BHUP SINGH *v.* JHAMMAN SINGH, 4 U. P. L. R. (A.) 21 **724**

——— **Manager**—*Debts incurred by manager in defending himself against criminal charge—Wealthy and important family—Amount of debts—Lender's duty.*

Debts incurred by the manager of a joint Hindu family in defending himself against a criminal charge are payable by the family.

It is not the business of the lender to determine the amount which the manager should expend in his defence. If the family is a wealthy and important one, it is not too much for the manager to raise a loan of Rs. 32,000 in order to defend himself. **N** NIMBAJI *v* KISANLAL **668**

——— **Marriage** — Anuloma *marriage—Marriage between* Vaishya *and illegitimate daughter of* Vaishya *born of* Sudra *woman, validity of—Evidence—Custom of caste—Attitude of caste people, relevancy of — Presumption — Marriage in fact marriage in law.*

According to the Hindu Law, the marriage between a *Vaishya* and the illegitimate daughter of a *Vaishya* born of a '*Sudra*' woman is valid.

In Smritis there is no prohibition as distinguished from disapproval of *anuloma* marriages.

Where there is any plea of special custom or usage of a caste, the attitude of the caste people is relevant as bearing on the existence of such a custom.

Where there is a marriage in fact, there is a presumption in favour of there being a marriage in law. **B** BAI GULAB *v.* JIVANLAL HARILAL, 24 Bom. L. R. 5 **602**

——— **Mitakshara**—*Berar — Inheritance — Non-technical* stridhan—*Preferential heir between son and daughter.*

Hindu Law—contd.

The *lex loci* of Berar is the Mitakshara as interpreted by the Mayukha.

In Maharashtra and Berar, where the Mitakshara is a paramount authority and the Mayukha a secondary one, the property taken by a daughter from her father is her *stridhan* and devolves on her own heirs in the following order:—(1) unmarried daughter, 2. married daughter who is unprovided for, (3) married daughter who is provided for, (4) daughter's daughter, (5) daughter's son, (6) son, (7) son's son. **N** GOVINDA *v.* DOOMI **671**

——— **Mitakshara**—*Debt due to deceased father—Suit by son—Succession Certificate, whether necessary—Co-parceners added as plaintiffs after limitation, effect of—Limitation Act (IX of 1908), s. 22.*

In the case of a family governed by the Mitakshara Law a Succession Certificate is not necessary for a son to bring a suit for a debt due to his deceased father.

A suit by a Hindu son for a debt due to his deceased father is not necessarily barred if some of the co-parceners are made plaintiffs after the expiry of period of limitation, as in such a case it has to be seen if the added plaintiffs are necessary parties to the suit and if not whether the suit can proceed without them. **C** SITAL PROSAD PODDAR *v.* KAIFUT SHEIKH, 26 C. W. N. 485 **367**

——— ——— *Succession—Step-sister's step-son no heir*—Sapindaship, *what is—Female heirs.*

The step-son of a step-sister is not an heir under the Hindu Law (according to Mitakshara) as administered in the Madras Presidency.

Obiter dicta.—Per *Rimesam, J.*—In general, *spindaship* involves descent from a common ancestor, the only exception to this principle being in the case of wives of male *sapindas* If *A.* and *B* (males) are *sapindas* of each, the wives of *A* and *B.* are *sapindas.*

If *A.* and *B*, not descended from a common ancestor, are each a *sapinda* of *C.*, *A.* and *B.* are not generally *sapindas* of each other.

Female *bandhus* are postponed to all male *bandhus.* They come in as heirs only as relations after the *bandhus.*

Per *Spencer, J.*—There is no class of relations coming in after the lines of *gotraja sapindas* and *bandhus* are exhausted. **M** SAMINATHA CHETTY *v.* ANGAMMAL, 15 L. W. 18; 42 M. L. J. 4; 30 M. L. T 4 **736**

——— **Prostitutes**—*Succession.*

The property of a deceased Hindu prostitute, whether she was married or not, devolves upon her heirs, and is not inherited by the Crown in preference to them. **A** BHANGA *v.* DIN MOHAMMAD, 4 U. P. L. R. (A.) 8 **593**

——— **Religious endowment**—Mahant, *power of, to lease* math *lands*—Karta *of joint Hindu family and* mahant, *position of.*

A *mahant* is entitled to let the *math* lands if he does that in the ordinary course of business.

There is no difference at all between the case of a *mahant* and the case of the manager of a joint family.

Obiter.—A *karta* of a joint family must have a large discretion in granting leases of joint family property and his discretion ought not to be fettered;

unduly. The only thing to be seen is that he does it in the ordinary course of business. **Pat** JAI KRISHNA *v.* BHUKHAL GOPE, 6 P. L. J. 638; (1922) PAT. 113 **290**

——— Reversioner's Interest—*Alienation*—Spes successionis.

The interest of a Hindu reversioner is an interest expectant on the death of a qualified owner; it is not a vested interest, it is a *spes successionis* or a mere chance of succession: it cannot be sold, mortgaged, assigned or relinquished, for, a transfer of a *spes successionis* is a nullity and has no effect in law. But though a transfer of his interest by a reversioner is void, he may, by becoming a party to a compromise and by taking the benefit of the compromise, be estopped from claiming as a reversioner.

So long as the estate is vested in the female heiress, the interest of the reversioner is a mere chance of succession which cannot form the subject of any contract, surrender or disposal.

No one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir-at-law or next-of-kin of such living person; during the life of such person no one can have more than a *spes suceessionis*, an expectation or hope of succeeding to his properties *nemo est hæres viventis*; there is no such character in law as the heir of a living person or as his statutory next-of-kin.

Under the principles of Hindu Law, even apart from the provisions of section 6 of the Transfer of Property Act the interest of a reversioner is not alienable. **C** ANNADA MOHAN ROY *v.* GOUR MOHAN MALLIK, 25 C. W. N. 496; 33 C. L. J. 457; 48 C. 536 **27**

——— Succession—*Custom*—Jats—*Collaterals take* per stirpes.

The custom prevailing among *Jats*, who have migrated to Meerut from the Punjab, as to the succession of collaterals, is that reversioners, irrespective of degree, that is, whether near or remote, inherit equally, *i.e.*, each branch takes its share *per stirpes*. **A** DHARAM SINGH *v.* HIRA, 20 A. L. J. 221 **828**

——— Suit *by reversioners*—*Proof of relationship, necessity of*—*Right of succession*—Shradh, *effect of*.

It is incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward and he is also bound to satisfy the Court that, to the best of his knowledge, there are no nearer heirs, but he cannot be expected to do anything more, and it is for those who claim that their kinship is nearer to prove that relationship.

The preferable right to perform the *shradh*, funeral oblation, to the last owner is a primary fact to be taken into consideration in determining the rule which is to govern the right of succession **N** PANDU *v.* ABDUL KADAR **693**

——— Widow—*Absolute estate*—*Gift*—*Coercion*—*Fraud*—*Undue influence*—*Knowledge of donor, effect of*—*Direct knowledge of one party, effect of*—*Parties, position of*—*Evidence, secondary and inferior, effect of*—*Court, position of*—*Burden of proof*—*Proof, nature of*.

Coercion or fraud is generally a necessary substratum over which a case of undue influence rests. Therefore, in a case of undue influence allegations of fraud may simply be made with a view to emphasize it.

Though it be found that a donor was well aware of what he did, yet if it be further found that his disposition to do it was produced by undue influence, the transaction would be set aside.

Where most of the facts deposed to by the witnesses of one party are matters of which the opposite party would have in the natural course of the circumstances of any particular case direct knowledge, it is an act of impertinence on the part of the latter party to ask a Court to disbelieve the evidence led by the former party when he himself is not prepared to take the responsibility of an oath and give to the Court his own version of those facts.

It is quite unsafe to accept the evidence more or less secondary in its character and certainly of inferior quality to the evidence which would have been produced but has been withheld.

Where in a matter of a deed of gift alleged to be executed through undue influence the relation of influence has been established, and it is also made clear that the bargain is with the influencer and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent.

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ and as a general rule the same questions arise. **O** CHAURAS KUAR *v.* ABHAIRAJ KUMAR, 8 O. L. J. 631 **380**

——— Widow—*Sale*—*Reversioner party to sale*—*Legal necessity*—*Presumption*—*Vendee, position of*.

The fact that a reversioner was one of the parties to a sale transaction effected by a Hindu widow and was present at the time the consideration-money was paid to her, does not give rise to a presumption that the payment was made for legal necessity. The vendee must prove that the presence of the reversioner at the time of the payment made him believe that this money was required by the widow for legal necessity and that for this reason he did not trouble to make any further enquiry. **O** SHEOAMBAR KHAN *v.* BALKARAN SINGH, 8 O. L. J. 619 **360**

——— ——— *Surrender*—*Acceleration of succession*—*Agreement*—*Resumption*.

There is nothing in the Central Provinces Tenancy Act to limit a Hindu widow's power to accelerate the succession to her late husband's estate by retiring from the ownership of it.

When a Hindu widow voluntarily surrenders her late husband's estate to his next heir, she is regarded as having died so far as her late husband's property is concerned, and even an ordinary tenancy holding included in the estate passes to his heir, not by transfer but by inheritance. If the next

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heir in such a case is a daughter, in the Central Provinces she holds only a limited woman's estate in the tenancy, which on her death reverts to her father's heirs, and in default of any such heir the *malguzar* is entitled to resume possession

In the contract creating a tenancy the parties may agree that it shall be subject to any conditions that are not forbidden by the law, *e g.*, that on the death of a female tenant the tenancy should revert to her father's other heirs, and in default of any such heirs to the landlord **N** SUNDARLAL *v.* BAISAMBHAR **180**

——— **Widow**—*Surrender — Alienation—Legal necessity—Consent of reversioner—Presumption—Appeal, second—Finding of fact.*

The doctrine of surrender or renunciation has no application to a case where a Hindu female does not transfer the whole of the estate which descends to her from the male *propositus*

The consent of the nearest reversioner is always presumptive proof of legal necessity which justifies an alienation on the part of a Hindu female The question, however, whether the evidence adduced in any particular case amounts to "a presumptive proof" or not, is a question of the sufficiency or insufficiency of evidence, and, as such, a pure question of fact.

The finding that consent obtained in the particular circumstances of a case is not sufficient to justify a presumption of legal necessity in favour of the vendee, is one of fact and cannot be assailed in second appeal. **O** RAM BODH SINGH *v.* RAM NARAYAN SINGH, 8 O L J. 512; 4 U. P. L. R. (J. C.) 3 **776**

——— **Will,** *construction of—Bequest in favour of female.*

A bequest in favour of a Hindu female must be construed in the same way as any other disposition of property.

A Hindu testator after reciting in his Will that he was the *malik* of his property made the following bequest:—"After my death *Musammat* Khushali will be the *malik* of the property and after her death *Musammat* Parwati will be the *malik* of the property:

Held, that the testator intended to give an absolute estate to *Musammat* Khushali and *Musammat* Parwati.

Obiter.—If the ideas of a Hindu are naturally repugnant to giving an absolute title to females, there is nothing easier for him than to limit the title of a female donee. **L** DHANPAT RAI *v.* BADRI DAS, 3 L. L.J. 1 **455**

——— ———, *construction of—Devise in favour of widow—Estate taken, nature of.*

A Hindu testator after reciting in his Will that the whole of his property was self-acquired, proceeded to devise the same in favour of his wife, saying that she would be his *waris* and *qabiz* with power to alienate in case of need. He went on to state that his wife would have the same power over the property as he himself had:

Held, that the wife obtained an absolute estate in the property devised. **L** GOPI RAM *v.* ACHHRU RAM **462**

——— ———, *construction of—Uncertainty—Charitable bequest—Cy-pres, doctrine of, applicability of—Reversioner, remote—Right to challenge—Will.*

In construing a Will the Court must bear in mind who the testator is and the language used by him for expressing his wishes which may or may not be adapted for legal precision, and the primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new Will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view, that object must be given effect to.

If the Court can ascertain that there is a general charitable intention expressed in a Will, the fact that the particular object for which the charity is intended does not exist or that the fund intended for that charity cannot exhaust the whole income will not be any reason for holding that the bequest fails either wholly or in part.

The doctrine of *cy-pres* should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance, and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated.

A Hindu testator made a Will in which he said, "I want the entire residue of my estate to be applied by my executors in some manner from which my brotherhood will derive benefit. My executors should sell my house property and add the sale-proceeds to the cash balance and in this manner apply the total in work of public good, but whatever is done the benefit of my brotherhood is to be kept in view. What I mean is this. They are to give assistance in the construction by the brotherhood of any temple, etc., at any holy place, etc., or they are to give scholarships in any school to students belonging to the brotherhood":

Held, that the clause was not void for uncertainty.

A suit to contest a Will must be brought by the immediate reversionary heir of the testator, but if the nearest reversionary heir refuses without sufficient cause to institute proceedings or has precluded himself by his own act or conduct from suing or has colluded with the opposite party or has accepted the Will, and the next presumable heir states in the plaint the circumstances under which he claims to sue, a Court would exercise a judicial discretion in determining whether he is or is not competent to sue. **L** SUNDAR LAL *v.* KULLU RAM **820**

——— **Will,** *construction of—Widow, rights of—Absolute owner—"Malik"—Trust—Uncertainty of subject-matter.*

If words are used in a Will executed by a Hindu husband in favour of his wife conferring absolute ownership upon the wife, the wife enjoys the rights of ownership without their being conferred by express and additional terms unless the circumstances or the context are sufficient to show that such absolute ownership was not intended.

The word "*malik*" is not a "term of art" and does not necessarily define the quality of the estate

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taken but the ownership of whatever that estate may be.

A Hindu, governed by Mayukha Law, executed a Will by which he constituted his wife as owner *(malik)* and directed that whatever property remains after her death, the wife shall leave the said property to his two daughters in such manner as she may like :

Held, that the use of the word "*malik*" taken with the context of the Will indicated a clear intention to pass an absolute estate.

Held, also, that there was no trust created in favour of the daughters as the subject-matter on which the trust was to operate was too uncertain to enable the Court to give it administration. **P C** BHAIDAS SHIVDAS *v.* BAI GULAB, 26 C. W. N. 12?; 15 L. W. 412; 20 A. L. J. 289; 42 M L. J. 365; 49 I. A. 1; 35 C. L. J. 314; 24 BOM. L. R. 551 **974**

Hindu Widows' Re-marriage Act (XV of 1856), s. 2, applicability of. *See* CUSTOM—MURAO CASTE **117**

Interest—Damdupat, *rule of—Puisne mortgagee paying off prior mortgagee's decree, rights of—Transfer of Property Act (IV of 1882), s. 74.*

The rule of *damdupat* applies only so long as the relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree.

The rights, which a puisne mortgagee acquires on payment of the amount of the decree of the prior mortgagee to which he was also a party, must be deemed to be the rights that are brought into existence by the decree in his suit, and not the contractual rights which have merged in the decree.

Therefore, a puisne mortgagee who thus steps into the shoes of the prior mortgagee is not debarred from getting interest in excess of *damdupat*. **N** NARAYAN *v.* NATHMAL, 17 N. L. R. 200 **275**

Jurisdiction, *determination of—Plaint allegations to be looked at—Compensation, suit for—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii).*

The jurisdiction to try a suit must *prima facie* be determined with reference to the allegations contained in the plaint.

Where a suit is brought for compensation on account of such alleged unlawful acts of the defendants as would constitute an offence punishable under Chapter XVII, Indian Penal Code, the case falls within Article 35 *(ii)*, Schedule II of the Provincial Small Cause Courts Act, and is not cognizable by a Small Cause Court. **O** SHAHIDAN *v.* JAGAN NATH, 8 . L. J. 594; 4 U. P L. R. (J. C.) 23 **344**

——— *Magistrate—Order against bad character to leave any place—Executive order.*

A Magistrate has no authority to order a man to leave any place under threat of being prosecuted as a bad character.

Magistrates have no business to issue executive orders for which they can produce no statutory authority. **A** RAM PRASAD *v* EMPEROR, 19 A. L. J. 951; 23 Cr. L. J. 122 **554**

Juvenile offender—*Sentence.*

In inflicting a sentence a Magistrate must consider in the first instance the offence committed. A Magistrate is not entitled to sentence a juvenile offender to a longer term of imprisonment than he would be otherwise entitled to, merely because it would be to his benefit to be detained in a Juvenile Prison. **B** ABDUL RAHMAN ISMAIL *v.* EMPEROR, 23 BOM. L. R. 1199; 23 CR. L. J. 93 **445**

Khewat, *entry in—Presumption—Heirs, position of.*

The entry in a *khewat* is at least *prima facie* evidence of possession, and if there is nothing to show any alteration in the entry, the legitimate presumption arises that the state of things indicated by the entry continued at least up to the date of the death of the person, whose name appears in the *khewat*, if not beyond it, when possession may devolve on his heirs. **O** GHULAM SARWAR KHAN *v.* MUHAMMAD ALI KHAN, 8 O L. J. 609 **398**

Lambardar, *duty of, to collect rent—Failure to perform duty—Liability of heirs—Meagre collections—Presumption.*

It is the duty of a *lambardar* to take reasonable care in collecting the rents, and the liability incurred by his failure to perform that duty survives after his death.

The heirs of a deceased *lambardar* are liable to the extent of the assets of the deceased which have come into their hands for a co-sharer's share of the profits which might with reasonable care have been collected.

Where there is an extraordinary difference between the amount of the profits to which a co-sharer would be entitled on the basis of the gross rental, and the amount to which he is entitled on the basis of the actual collections, a presumption of dishonesty or gross negligence arises, which it is for the heirs of the deceased *lambardar* to rebut. **O** SURAJ PRASAD *v.* DEBI DAYAL, 8 O. L J. 485 **739**

Land Acquisition Act (I of 1894), s. 31, cl. (2), *scope of—Award—Suit to contest award not maintainable—Jurisdiction, exclusive—Civil Court, jurisdiction of—Proper remedy—Person not having notice not bound.*

Where on acquisition of land under the Land Acquisition Act a party to it is served with notice under section 9 of the Land Acquisition Act, he is bound to apply for reference under section 18 of the same Act when he is dissatisfied with the Collector's award, and he cannot maintain a suit in the ordinary Civil Court.

The Land Acquisition Act creates a special jurisdiction and provides a special remedy and, ordinarily, when jurisdiction has been conferred upon a Special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive.

Where by an Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of the Civil Court is ousted and in the case of injury the party cannot proceed by action.

The proviso to section 31, clause (2) of the Land Acquisition Act is of limited application and applies only to cases where the person is under a dis-

ability or is not served with notice of the proceedings before the Collector.

Where a person has no notice of the apportionment proceedings under the Land Acquisition Act, he cannot be bound by the award or by the decision. **C** SAIBESH CHANDRA SARKAR *v.* BEJOY CHAND MOHTAP, 26 C. W N. 506 **711**

——— **s. 32 (1)**—*Compensation awarded to lady having limited power of alienation—Land Acquisition Court, whether can apply portion of compensation money to meeting costs of proceedings—Solicitor, costs of—Costs, whether can be paid from deposit in Court.*

Under the provisions of section 32 (1) of the Land Acquisition Act, a Land Acquisition Court can apply a portion of the compensation money to meet the costs of the proceedings by which the money came to be awarded to an administratrix having a limited power of alienation.

A Solicitor, who appears on behalf of an administratrix having limited powers, in a long acquisition proceeding before the Calcutta Improvement Tribunal, is entitled to his costs in connection with that matter and can also move the Court to make the payment out of the sum in deposit in Court for the administratrix, as the person from whom the sum is due. **C** LALIT MOHAN DEY *v.* H. N. DUTTA & Co. **209**

Land Registration Act (VII B. C. of 1876), ss. 42, 52, 55, 63—*Jurisdiction—Land Revenue Deputy Collector, when to make reference to Civil Court—Registration of name in Land Registration Record—Revision—Discretion.*

Where an applicant for registration of his name in the Land Registration Record claims to have succeeded to any proprietary right, whether by purchase, inheritance, gift or otherwise, it is necessary for him to establish not only that the succession or transfer has taken place but that he has acquired possession in accordance with such succession or transfer. But where he claims to have assumed charge of the estate or property either as joint proprietor or as manager, it is sufficient for him to establish that his possession exists.

Hence where each of the two applicants claims to have assumed charge of an endowment, the Collector has simply to see with whom possession exists. If he finds, as a matter of fact, that possession exists with one of the applicants, he has no jurisdiction to refer the matter to the Civil Court, but should order the name of the person in possession to be recorded in the Land Registration Record.

The jurisdiction either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute.

The exercise of revisional powers is always discretionary, and where an aggrieved party has other remedy available, a High Court is unwilling to interfere.

Per *Bucknill, J.*—When a right thing has been done in a wrong way, for example, when a Civil Court has entertained a reference made by a Land Registration Deputy Collector, which the latter had

no jurisdiction to make and the former no jurisdiction to entertain, but the conclusion arrived at by the Civil Court is correct, the High Court would not quash the order in revision. **Pat** ALI ZAMIN *v.* MUHAMMAD AKBAR ALI **135**

Landlord and tenant—Bemiadi patta, *nature of—Permanent tenure*—Bemiadi pattas *in Patkum Perganah*—Ghatwal, *grant of permanent tenure by.*

A *bemiadi patta* or lease without a term can create a permanent right.

In Pa kum Perganah *bemiadi ijaradars* hold permanent tenures with rent liable to enhancement.

A *ghatwal* is incompetent to create a permanent tenure. **Pat** KANGALI CHARAN *v.* SURJA NARAIN, 6 P. L. J. 687; (1922) PAT 90 **303**

——— *Bengal Tenancy Act (VIII of 1885), ss. 52, 154, 188—Enhancement of rent, suit for—One of several landlords, whether can sue—Merger—Transfer of Property Act (IV of 1882), s. 111, cl. (d)—Separate tenancy, creation of—Enhanced rate, from when payable*

One of several joint landlords of a *jote* cannot maintain a suit for enhancement of rent in respect of the *jote* or for additional rent for additional area comprised in the *jote*.

Apart from Statute, a tenure does not necessarily merge in the proprietary right upon the union of the two interests. Even under section 111, clause *(d)*, of the Transfer of Property Act, there must be an union of the entire interest of the lessor and the lessee in order that merger may take place. So, under that Act, there would be no merger by the purchase by a proprietor of the interest of a tenure-holder unless the proprietary interest and the interest as tenure-holder are co-extensive.

The mere fact that a tenant agrees to pay rent separately to one of the co-sharer landlords would not constitute a separate tenancy. Where, however, there is a separate *kabuliyat* in favour of one of the co-sharer landlords, it may be held that there is a separate tenancy. The question whether a separate tenancy is created depends upon the circumstances of each case.

The plaintiffs brought a suit for enhancement of rent for the lands of an original *jote* and for recovery of such rent for Pous *kist* of 1318 B. S. They also alleged that there had been accretion to the *jote* and that the defendants were liable to pay reasonable rent for the excess lands, which might be assessed for 1315—13 8 B. S.:

Held, (1) that having regard to the provisions of section 154 of the Bengal Tenancy Act the plaintiffs were not entitled to rent of the original lands of the *jote* at the enhanced rate for the Pous *kist* of 1318;

2) that there being no provision in section 52 such as is contained in section 154 the defendants were liable to pay rent for the additional lands at the enhanced rate for the past period also. **C** MONMOTHA PAUL CHAUDHURY *v.* MOHENDRA NATH BOSE **469**

——— Ex parte *rent-decree does not operate as* res judicata *as to rate of rent—Execution of decree, effect of—Estoppel against Statute—Bengal Tenancy Act (VIII of 1885), ss. 29, 147A.*

Landlord and tenant—contd.

An *ex parte* decree for rent at the rate claimed by the plaintiff in a suit in which no issue was raised as to the rate at which the rent was payable nor was there any decision with regard to such rate cannot operate as *res judicata* in favour of the landlord as to the rate of rent.

An *ex parte* decree for arrears of rent which has been duly executed is of some evidence as to the rate of rent.

There cannot be any estoppel against Statutes.

A defendant in a suit for rent at a certain rate is not incompetent to raise a defence under section 29 of the Bengal Tenancy Act by reason of the fact that that defence was not taken in a previous suit for rent which resulted in a decree at the rate claimed by the plaintiff.

The whole scheme of the Bengal Tenancy Act is to prevent the landlord from circumventing the provisions of the Act to the detriment of the illiterate tenants. Section 147A of the Act shows the scheme on which the Act was framed. **C** NAFAR CHANDRA PAL *v.* BHUSI MOLLA **581**

——— *Holding over, effect of—Creation of new tenancy—Enhancement of rent, suit for—Presumption—Bengal Tenancy Act (VIII of 1885), ss* 50, 105, 105*A*.

When a tenant holds over after the expiration of the term of a tenancy, it is a new tenancy coming into operation after the date of the expiration of the term of the previous tenancy.

A *kabuliyat* executed in 1282 B S. creating a tenancy for a term of 3 years stated that, after the termination of the period of settlement, the tenants would take a fresh settlement on a proper rent. After the tenancy had come to an end in 1284 B. S, the tenants held over and continued paying rent at a uniform rate for more than 20 years. In a proceeding for enhancement of rent on the ground of rise in prices of staple food crops:

Held, that the origin of the tenancy should be considered to be from the year 1285 B S., that the presumption under section 50 of the Bengal Tenancy Act had been rebutted, and that, consequently, the landlords were entitled to have fair and equitable rent settled under the provisions of the Bengal Tenancy Act. **C** UDOY CHANDRA BASU *v.* MAHAMMAD ALI REPARI **589**

——— *Bengal Tenancy Act (VIII of 1885), ss.* 15, 16—*Landlord—Succession—Registration—Suit for rent on basis of* kabuliyat—*Land Registration Act (VIII B. C. of 1876), ss.* 78, 81.

A suit for recovery of rent in respect of a *patni* by a transferee from an heir of a deceased *patni*-holder who has not got his name registered in the Collectorate under section 78 of the Land Registration Act, is maintainable by reason of section 81 of the Act if there is a *kabuliyat* entered into by the defendant-tenant in favour of the heir transferor.

Section 16 of the Bengal Tenancy Act being a penal provision should be strictly construed. It applies only to a person who claims the rent *as a holder of the tenure* and not to a person who claims it by virtue of purchase from the person to whom the rent accrued due.

Obiter.—A person who has been deprived of possession of part of the demised premises should not be held liable for the whole rent for ever. This principle applies with greater force where the tenant is deprived of any portion of the leasehold property by any act on the part of the landlord himself. **C** MESBAHUDDIN AHMED CHOWDHURY *v.* ABDUL BORKAT AHAMADULLA, 34 C. L J 119 **839**

——— *Lease, construction of—'Durbar,' meaning of.*

Plaintiff leased a house in Delhi to defendant. One of the clauses in the lease ran as follows:—

"The tenant will occupy the said house himself or by sub-tenants, but in case the said tenant do sub-let the whole or a large portion of the said house to any Chief for Durbar occasion, the tenant will pay the landlords 25 per cent. of the amount recovered from such Chief and no rent will be payable by the tenant for such portion for such period":

Held, (1) that the parties intended the clause to apply to occasions on which a number of Ruling Chiefs should congregate at Delhi at one time and create competition for house accommodation, as distinguished from isolated visits of single Chiefs, and that the clause was applicable to the occasion of the Conference of Ruling Chiefs held at Delhi in October 1916;

(2) that under the clause the landlord was entitled to 25 per cent of the sum recovered by the tenant from a Chief on such an occasion without any deduction on account of any commission paid or any expenses incurred by him. **C** NAURANG AHMAD *v.* BASHESHAR NATH, 5 P. W. R 1922 **115**

——— *Occupancy holding—Transfer — Recognition by landlord—Knowledge—Burden of proof—Patwari, authority of—Acquiescence—Construction of document—Operative part—Recitals—Zerait, meaning of, in Bihar—Forgery—Test—Conveyancing—Corporeal and incorporeal hereditaments*

Per *Dawson Miller, C. J.*—The receipt of rent by a landlord from the transferee of a holding, not transferable by custom, validates the transfer. But the *Gomashta* or Patwari of the landlord, although authorised to collect rents on his behalf, has no authority by taking rent from a transferee to create the relationship of landlord and tenant between his master and the transferee. In such cases the landlord would not generally be bound unless he accepted the rent knowing the source from which it came.

In such cases it must be shown that the landlord had knowledge of the transaction and ratified it either expressly or by implication.

If a Court is satisfied upon the natural construction of the operative part of a deed that a certain property passes, notwithstanding that the construction may be difficult, the recitals have no binding force.

In Bihar the term *zerait* is used to denote all lands in direct cultivation of indigo planters for cultivation of indigo as distinguished from cultivation of indigo by *raiyats*. The factory may hold the land as proprietor, tenure-holder *raiyat*, or under-*raiyat* and whatever the interest may be the land is still called *zerait*. The word used in this sense has no connection with the term *zerait* as used in the Bengal Tenancy Act and meaning proprietor's private lands.

Landlord and tenant—contd.

Per *Das, J.*—An assertion by a tenant does not establish a case of recognition. It must be established that such an assertion was made to the knowledge of the landlord and that the landlord acquiesced in the assertion deliberately and with knowledge as to its effect.

Parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them, and where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. Recognition, like waiver, must be an intentional act with knowledge.

The fact that the transferee of an occupancy holding pays the rent as such transferee does not decide the question that the transferee has been recognised by the landlord as his tenant: he must establish that the landlord accepted rent from him as a tenant. In other words, it is the act of the landlord that decides the question, and not the act of the person who claims the status of tenant.

Where the circumstances are equally consistent both with the case of the tenant who sets up recognition and with the case of the landlord who denies it, the tenant, on whom the onus of proof as to recognition lies, must fail.

It is not within the scope of the authority of a Patwari or a rent Collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager.

A person who has conveyed his proprietary interest to another person but whose name is still borne on the Collector's register, cannot, by giving a rent receipt, recognise a person as having a right of occupancy in the land, who otherwise had no such right.

It is quite true that the recitals in a conveyance are subordinate to the operative part and that, consequently, where the operative part is clear, it is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals: but it is well-established that where the operative part is doubtful and it is impossible to say, on a mere reading of it, to which properties it refers, then the recitals can and ought to be used to explain its meaning; and that while, for the purpose of construing the operative part, the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its true construction than the subsidiary clauses of the deed. For instance, parcels of a deed described with certainty are not cut down by recitals showing that something less was intended to pass; but the recitals assist the construction of the operative part where there is an ambiguity in the operative part as to the property affected.

When a Court is considering, not whether the tenant can by lapse of time acquire a right of occupancy in the land but whether his status as an occupancy tenant has been recognised by the landlord by a series of transactions culminating in the lease itself, it is important to consider how the land has been described in the lease itself and whether there is a demise in respect of that land within the *jama* mentioned in the lease.

An occupancy holding forms a property by itself and is capable of being held and is in fact held distinct and apart from the estate, within the ambit of which it may happen to lie.

The old modes of conveyancing under which an estate accompanied by possession passed by livery, while future estates and other rights in land passed by grant, gave a practical rule for distinguishing between corporeal and incorporeal hereditaments. The old conveyancing test is now obsolete; but the distinction is still maintained, and such rights as are not accompanied by exclusive possession are classed amongst incorporeal hereditaments whereas those rights which entitle the owner to the present possession of the land or to receipt of rent and profit are classed as corporeal hereditaments. It is quite true that a right of occupancy, looked at from the point of view of right of property and not subject of property, is incorporeal in its nature; but the actual possession of the land, to which a person having a right of occupancy is entitled, attracts it to the class of corporeal hereditaments.

It is dangerous to come to a conclusion on the question of forgery on a mere comparison of the writing in a disputed document with the writings in admitted documents.

One of the most useful tests in considering a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formation of an idea or in the mode of spelling particular words.

Per *Adami, J.*—A recognition by a landlord to be effective in favour of a tenant must be clear and certain. **Pat** BHONU LAL CHAUDHURI *v.* VINCENT **882**

——— *Bengal Tenancy Act (VIII of* 1885*),* ss. 50, 105, 105*A*—*Presumption of correctness of entry in Record of Rights, whether question of law or of fact*—*Enhancement of rent*—*Mere payment of rent at uniform rate does not raise any presumption of fixity of rent.*

The question whether the presumption of the correctness of the Record of Rights has been rebutted by certain *kabuliyats* is more a question of fact than of law.

Every tenure, whether permanent or otherwise, is subject to the incident of enhancibility of rent.

Where in a suit for enhancement of rent of a tenure under section 7 of the Bengal Tenancy Act the plaintiff has proved that, at the inception of the tenancy, there was no condition excluding the tenure from the operation of the ordinary liability for enhancement of rent, the Court would be justified on this evidence to conclude, without any evidence to the contrary, that the same state of

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things existed on the date of the publication of the Record of Rights.

The mere fact of payment of rent at a uniform rate for any number of years, apart from the presumption that can be raised under section 50 of the Bengal Tenancy Act, does not raise any presumption of fixity of rent. **C** YAKUB ALI CHOWDHURI *v* RAJ KUMAR DUTTA **527**

——— *Bengal Tenancy Act (VIII of 1885), ss. 35, 105—Settlement of fair rent—Enhancement of rent, when inequitable.*

Section 35 of the Bengal Tenancy Act means, that the Court, when considering an application for the settlement of fair rents under section 105 of the Act, has to take into consideration all the facts of the particular case and has to take into consideration the rules which are set out in the Act relating to the particular application, and then, before it allows an enhancement, the Court must be satisfied that, under the circumstances of the case, the enhancement is fair and equitable.

The effect of section 35 of the Bengal Tenancy Act is not that a Court is bound to allow some enhancement of rent even though it finds that the lands are periodically flooded by water and that the rents are already too high. **C** ISHAN CHANDRA DIASI *v.* RAM PROSAD AICH, 25 C. W. N. 897 **656**

——— *Suit against landlord—Tenancy under lease prior to suit—Decision in suit, whether binding on tenant.*

A lessee under a lease granted before the institution of a suit against the lessor is not bound by the decision against the lessor in that suit to which he the lessee was not a party. **M** MUSSAN HAJI *v.* THIYAN THAVARA KORAN, 14 L. W. 387; 41 M. L. J. 92; (1921) M W. N. 679 **979**

Legal practitioner—*Advocate — Conviction for offence—Removal from Rolls, proceedings for—Propriety of conviction, whether can be gone into—Penal Code (Act XLV of 1860), s. 153A—Moral turpitude.*

In a proceeding against an Advocate to show cause why he should not be suspended or struck off the Rolls on the ground of his having been convicted of a criminal offence, he cannot go behind the conviction and show that the conviction was, in the circumstances, improper.

An offence under section 153A, Indian Penal Code, of promoting or attempting to promote feelings of enmity or hatred between different classes of His Majesty's subjects always involves element of moral turpitude and may involve an offence of the deepest moral turpitude, and an Advocate convicted of this offence is liable to removal from the Rolls of Advocates. **A** TASADDUQ AHMAD KHAN SHARWANI, *In the matter of*, 4 U. P. L. R. (A.) 1; 20 A. L. J. 200; 23 CR. L. J. 128 **560**

Legal Practitioners Act (XVIII of 1879), s. 14—Vakalatnama, *acceptance of*—Bona fide *mistake of Pleader—Warning by Court—Subsequent proceedings for dismissal or suspension—Rules of High Court—Pleaders, duty of.*

A Pleader was called upon by a Court to submit an explanation in the matter of his acceptance of a *vakalatnama*. The Pleader in his explanation submitted that he acted *bona fide* and thought that he had received the *vakalatnama* duly authorised by the executant and that he was entitled to act upon it. The Court on the 18th November 1920 accepted the explanation, excused the Pleader and warned him to be careful in future. Then on the 19th January 1921 the Court took up the matter again and drew up proceedings under section 14 of the Legal Practitioners Act for dismissal or suspension of the Pleader:

Held, that having regard to the fact that the Court had previously come to the conclusion that the Pleader had been acting *bona fide* although he had made a serious mistake there was no necessity for the Court to take up the matter again, especially after a lapse of a long time.

The rules with regard to the responsibilities of Pleaders in accepting *vakalatnamahs* should be strictly observed. **C** JNANENDRA KUMAR CHOUDHURY, *In the matter of Babu*, 23 CR. L J. 65 **417**

Letters Patent Appeal—Court-fee, whether leviable. *See* COURT FEES ACT, s. 4 **675**

Letters Patent (Bom.), cl. 12—*Administration suit—Immoveable property outside jurisdiction—Jurisdiction—Reference—Procedure.*

An administration suit is not a suit for land and can proceed on the Original Side of the High Court, even although it appears that there are immoveable properties, alleged to belong to the estate, outside the jurisdiction.

It is only when the reference commences before the Commissioner on the accounts being filed that it can be ascertained what are the contentions of the parties and whether the accounts filed together with the objections and surcharges show that there are properties either inside or outside the jurisdiction belonging to the estate. When claims to such properties are raised before the Commissioner, then it is a matter for him to decide what action to take, and even if he is of opinion that he has jurisdiction to decide questions of title to immoveable property, it will be open to the parties to ask him to make a reference for the opinion of the Court, when the Court will be in a position to decide how the disputed questions of title should be tried. **B** ABDUL HUSSEIN *v.* MAHOMEDALLY, 23 BOM. L. R. 1326 **160**

Letters Patent (Pat.), cl. 10—Remand order by Appellate Court, if can be challenged in final appeal by party not filing Letters Patent Appeal against remand order—Judgment, meaning of. *See* CIVIL PROCEDURE CODE, 1908, O XLI, RR. 23, 25 **175**

Limitation Act (XV of 1877), Sch. II, Arts. 140, 142, 144—*Suit for recovery of possession—Estate not falling into possession of plaintiff until termination of limited estate—Deed of doubtful import, construction of.*

A deed of doubtful import is best construed by evidence of the conduct of the parties to it—*optimus interpres rerum usus.*

Article 140 of the Second Schedule of the Limitation Act of 1877 contemplates a suit by a remainderman or reversioner for possession of immoveable property, when his estate falls into possession.

There is no bar to the application of Article 140 of the Second Schedule of the Limitation Act of 1877 to a suit for recovery of possession of a land

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of an estate which did not fall into possession of the plaintiff until after the death of a person who was in possession of the estate as a limited owner under an *ekrarnama*. It is immaterial whether the *ekrarnama*, conferred a life-estate properly so called and whether the plaintiff was a remainderman or reversioner, taking after the lapse of a life-estate in its strict sense. To such a suit Articles 142 and 144 cannot apply. **C** PROMOTHA NATH RAY CHAUDHURI v. DINAMANI CHAUDHURANI, 34 C. L. J. 129 826

Limitation Act (IX of 1908), s. 5—*Death of respondent—Extension of time.*

The provisions of section 5 of the Limitation Act do not apply to applications to bring on to the record the representatives of a deceased respondent. **L** SHAH MUHAMMAD v. KARAM ILAHI 121

——— s. 10, Sch. I, Arts. 134, 144—*Alienation by* mahant—*Suit for possession—Limitation.*

A suit to set aside an alienation by a *mahant* of ordinary *wakf* property gifted for general pious or religious purposes, is governed by Article 144 and not by Article 134 of Schedule I to the Limitation Act.

Article 134 of the Limitation Act is controlled by section 10 of the same Act, and refers to cases of specific trust and property "conveyed on trust."

A Hindu or Muhammadan may "convey in trust" a specific property to a particular individual for a specific and definite purpose when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term. "Conveyed in trust" is, however, hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. **L** DIWAN SINGH v. RAM SARAN 722

——— s. 10, Sch. I, Arts. 134, 144, applicability of. *See* HINDU LAW—CHARITABLE ENDOWMENTS 161

——— s. 19—*Acknowledgment—Existing liability—Construction of document—Signature of debtor, if necessary.*

A writing, to be an acknowledgment within the meaning of section 19 of the Limitation Act, must itself import an acknowledgment of an existing liability. Such liability cannot be read into it by proof *aliunde* or by the subsequent admissions of the acknowledgor, although oral evidence is admissible to prove the identity of the debt, property or right in respect of which the acknowledgment is made, or the name of the creditor or of the person entitled to the right or property or the date of an acknowledgment, and these need not appear on the face of the writing.

Unless the language of the document be identically the same, a decision upon the construction of one document cannot be of much assistance to the Court in construing another document and each case has to be treated on its own merits.

A postcard stating "..... I had said that I would come on Tuesday but as the goods had not been sold and as I was not keeping good health, I could not come. But I will very positively come on Tuesday with the money. Have no doubt about this," was set up to be an acknowledgment of debt:

Held, on the construction of the writing in the postcard, that there was no acknowledgment of any debt or liability.

Semble—The signature of a debtor need not appear at any particular part of the writing and the person authorised to give an acknowledgment may sign his own name or that of his principal. **N** ONKARLAL v. RAJ MOHAMUD, 17 N. L. R. 104 279

——— s. 20 (2)—*Transfer of Property Act (IV of 1882), s. 68*

The provisions of section 20 (2) of the Limitation Act do apply to cases for the recovery of the mortgage-money brought under the provisions of section 68 of the Transfer of Property Act. **O** MAHADEO TEWARI v. SITLA BAKHSH SINGH, 8 O. L. J. 660 408

——— s. 22 (2)—*Firm—Joinder of parties—One partner retiring, another joining, effect of—Suit by new firm on contract made by old firm—Substitution of partners of old firm for partners of new firm after limitation.*

In a suit by a firm all the partners must be joined, because the cause of action vests in them jointly.

If a partner of a firm retires after the firm has entered into a contract and a new partner joins the firm, the newly constituted firm is different from the old firm and cannot institute a suit on the contract entered into by the latter. If such a newly constituted firm brings a suit on a contract entered into by the old firm, it cannot, after the expiration of the period of limitation for a suit on the contract, substitute the names of the partners of the old firm under section 22 (2). **S** MANGHOOMAL JETHANAND v. ARATMAL SATRAMDAS, 15 S. L. R. 152 26

——— s. 23, Sch. I, Arts. 120, 142—*Criminal Procedure Code (Act V of 1898), s. 146—Attachment of land—Dispossession—Continuing wrong—Suit for declaration—Limitation.*

A land belonging to the plaintiff was taken possession of by the defendant in April 1904. In consequence of dispute between the parties the land was attached under section 146 of the Criminal Procedure Code on the 10th June 1904. On 2nd May 1906 the plaintiff brought this suit for declaration of his title to and for recovery of possession of the land alleging that the cause of action arose on the 10th June 1904, the date of the attachment:

Held, (1) that the suit though framed as a suit for possession could not be treated as such, because the possession was not with the defendant but with the Magistrate who was not and could not be a party to the suit and that the suit was a suit for declaration governed by Article 120 of the Limitation Act;

(2) that as the possession of the Magistrate was in law the possession of the true owner, the defendant's possession was determined upon the Magistrate's taking possession under the attachment or in other words the plaintiffs must be taken to have been restored to possession constructively on the date of the attachment and that he, therefore, got a fresh starting point for limitation and that

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being so the case fell within the principle of *Brojendra Kishore Roy's case*, 31 Ind. Cas. 242: 20 C. W. N. 481: 22 C. L. J. 283, and that the case could be treated as one of continuing wrong under section 24 of the Limitation Act.

If a person enters upon the land of another, and holds possession for a time and then without having acquired title under the Statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. The same principle applies where possession is taken out of him by a Magistrate acting under section 146 of the Criminal Procedure Code. C PANNA LAL *v.* PANCHU RUIDAS, 26 C. W. N. 432 **200**

——— **Sch. I, Arts. 14, 120**—*Settlement entries, suit for amendment of—C P Land Revenue Act (XVIII of 1881), s. 83—Limitation.*

A suit under section 83 of the C. P. Land Revenue Act of 1881 for amendment of Settlement entries is in the matter of limitation governed by Article 14 and not by Article 120 of the First Schedule to the Limitation Act and must be filed within one year of the date on which the Record of Rights is duly made and attested and the assessment is offered to the proprietor. N ONKARLAL *v.* SHALIGRAMLALA **970**

——— ——— **Arts. 29, 36**—*Standing crops—Immoveable property—Illegal attachment—Suit for compensation—Limitation.*

Standing crops are, for the purposes of the Limitation Act, immoveable property and an illegal attachment of such crops amounts to a trespass on immoveable property.

A suit for compensation for illegal attachment of standing crops is governed by Article 29 of the Limitation Act, which specially provides for suits for compensation for such trespass, and not by Article 36 which provides for suits for compensation for torts not provided for elsewhere. N SURAJMAL GANESHDAS *v.* PALHAD **665**

——— ——— **Art. 52**—*Punjab Loans Limitation Act (I of 1904)—Suit to recover price of articles sold.*

A suit to recover a sum of money as representing the price of certain articles sold by the plaintiff to the defendant, is governed by Article 52 of Schedule I to the Limitation Act as extended by the Punjab Loans Limitation Act. L GANGA RAM *v.* NANDA **687**

——— ——— **Arts. 65, 115**—*Advance of grain—Suit to recover value of advance—Limitation.*

When grain is advanced on a contract that it should be re-paid in kind and the contract is broken, a suit to recover the cash value of the advance is governed either by Article 65 or by Article 115 of Schedule I to the Limitation Act. L MUHAMMAD DIN *v.* SOHAN SINGH **691**

——— ——— **Art. 75**—*Instalment bond—Default in payment of one instalment—Limitation.*

Plaintiff sued upon a bond under which payment was provided for in three annual instalments, and it was also provided that in case of default the creditor would have the option of suing for the entire amount. No instalment was paid. Plaintiff brought the present suit more than three years after the date of the first default but within three years from the date of the second default:

Held, that limitation began to run from the date of the first default in respect of the whole amount, and that, therefore, the whole suit was barred by limitation. C SYAMA CHORAN *v.* NARATTAM BORMAN **257**

——— **Sch. I, Art. 85**—"*Mutual, open and current" account—Test—Civil Procedure Code (Act V of 1908), s. 115 (c)—Revision—Decision based on non-existent facts—Material irregularity.*

The test of an account being mutual, open and current within the meaning of Article 85 of Schedule I to the Limitation Act is the intention of the parties; the fact that the balance has always been in favour of the same party would not prevent the account from being mutual, open and current.

If the decision of a case is based not merely on a forced and impossible construction of the facts that were before the Court, but on the importation of facts which were admitted by both the parties not to exist, there is clearly a material irregularity in the exercise of jurisdiction of the sort contemplated by clause *(c)* of section 115 of the Civil Procedure Code. N PANDURANG *v.* KALLUDAS **881**

——— ——— **Art. 91**, *applicability of—Document invalid.*

Article 91 of the Limitation Act has no application in regard to a document which is altogether invalid and void. Pat ABDUL RAHMAN *v.* WALI MUHAMMAD **224**

——— ——— **Art. 120**, *applicability of—Right to sue.*

Article 120 of the Schedule to the Indian Limitation Act is applicable to a suit for declaration of title to immoveable property, which must consequently be brought within six years from the date when the right to sue accrues. The answer to the question when the right to sue originates, depends upon the circumstances of each case. C JOYNARAIN SEN UKIL *v.* SUCHITRA DEBYA, 33 C. L. J. 592; 26 C. W. N. 205 **8**

——— ——— **Art. 120**—*Declaratory suit—Cause of action—Limitation.*

Plaintiffs claimed *adna malkiyat* rights in certain land which formed part of the *shamilat deh*, on the ground that they had broken it up. They applied to the Assistant Collector that the *adna malkiyat* should be mutated in their names, but mutation was refused by him on the 26th November 1912. They appealed to the Collector, who reversed the order of the Assistant Collector and ordered mutation to be effected on the 3rd February 1913. This order was, however, reversed by the Commissioner on the 3rd May 1913. The plaintiffs remained in possession and brought the present suit for a declaration of their title as *adna maliks* on the 2nd April 1919:

Held, that, though the denial by the defendants of plaintiffs' title in 1912 gave them a cause of action, the order passed by the Commissioner on the 3rd May 1913 gave them a fresh cause of action and that, therefore, the present suit, which was brought within six years of that date, was within time. L LOBIND CHAND *v.* ALLAH BAKSH, 6 P. W. R. 1922 **124**

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——— Sch. I, Art. 120—Wakf—*Alienation—Suit for declaration—Cause of action.*

Certain land which formed part of a graveyard was brought under cultivation from time to time, and eventually defendants purchased certain portions of it. In 1915 the defendants prevented certain masons who wanted to repair some old tombs standing on the land from going on to the land. In 1919, the plaintiffs, on behalf of the Muhammadan community, brought a suit for a declaration that the land was *wakf* and also prayed for an injunction prohibiting the defendants from interfering with the plaintiffs' user of the land as a graveyard. It was contended that the suit was barred by time:

Held, that, in spite of the fact, that portions of the land in dispute had been brought under cultivation there had been no active interference with the plaintiffs' user of the land till 1915, and that, therefore, the suit was within time. **L** JAI GOPAL *v.* MUHAMMAD BAKHSH **647**

——— ——— Art. 132, *applicability of—Mortgage—Grain-debt—Limitation—Foreclosure, condition of, effect of.*

Where a bond hypothecates property to secure payment of grain with interest also in grain, a suit brought upon the bond is nevertheless a suit to enforce payment of money charged upon immoveable property and is governed by Article 132 of Schedule I to the Limitation Act, even though there be no specific condition in the mortgage-bond for determining the rate at which the grain debt is to be valued, in case it is not delivered as agreed, inasmuch as it is the money value of the grain-debt that is really charged upon the mortgaged property.

The fact that such a mortgage contains a condition of foreclosure and not of sale does not make any difference in this connection. **N** SHAMLAL *v.* DHANWA **697**

——— ——— Art. 182—*Civil Procedure Code (Act V of 1908), ss. 39, 42, O. XXI, r. 22—Execution—Application to send decree to another Court for execution—Step-in-aid of execution—Court passing decree, if ceases to have jurisdiction after ordering decree to be transferred to another Court—Jurisdiction.*

An application for a certificate to execute a decree in a Court other than that by which it was passed is a step-in-aid of execution as it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree.

Where an application to send a decree to another Court for execution is granted but for some reason or other the decree is not sent to that Court, the Court which passed the decree does not cease to have jurisdiction in the matter.

Quære:—Whether a Court having made a decree ceases to have jurisdiction in execution proceedings where it has once sent a copy of the decree and the other papers to another Court for execution. **Pat** RAM CHANDRA *v.* KRISHNA LAL, 3 P. L. T. 298 **332**

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——— Sch. I, Art. 182—*Execution—Step-in-aid of execution—Application, defective, whether saves limitation—Civil Procedure Code (Act V of 1908), O. XXI, r. 17 (2).*

An application for execution which does not show the amount of the decree and the amount of costs is not in accordance with law within the meaning of Order XXI, rule 17 (2), Civil Procedure Code, and is not a step-in-aid of execution so as to save limitation within the meaning of Article 182 of the Limitation Act. **Pat** GURU MAHALARA ASHRAM PROSAD SAHI *v.* MAHABIR SUKUL **120**

——— ——— Art. 182—*"In accordance with law," adjectival effect of—Application for execution—"Costs" and "previous application" not mentioned—Defect, whether material or immaterial—Civil Procedure Code (Act V of 1908), O. XXI, r. 11, cl. 2, sub-cls. (f), (h).*

Of all things that do not appear and of all things that do not exist the reckoning in a Court of Law is the same.

In clause 5, Article 182, Schedule I, Limitation Act, 1908, the words "in accordance with law" must be taken to qualify both the application for execution as well as the step taken in aid of execution.

In order that an application may be in accordance with law, it must ask the Court to do something which the Court is competent to do.

The question whether an application for execution or for taking some step-in-aid of execution is one according to law must be determined with reference to the circumstances of each case. It is not every failure to comply with the requirements of Order XXI, rule 11, clause 2, Civil Procedure Code, that would vitiate the application. Informalities of a material character, but not of an immaterial character, would vitiate the application.

Applications for the execution of a decree for possession of immoveable property were made one after another on the 6th December 1911, on the 6th December 1912, on the 7th December 1914, and on the 8th December 1916. In the application of 7th December 1914, there was no mention of costs nor of the application of 1912 as required by sub-clauses *(i)* and *(h)* of clause 2, rule 11, Order XXI, Civil Procedure Code:

Held, (1) that the omission to mention the amount of costs in the application of 1914 was a defect of such an immaterial character as could hardly be said to render the application one not in accordance with law;

(2) that the omission to mention the application of 1912 was such a material defect as to render the application of 1914 not in accordance with law, inasmuch as this last application, as it was presented to the Court, was on the face of it time-barred and on that application, as it stood, the Court had no power to grant the relief sought. **S** SUHIJRAM TAHILRAM *v.* TOWER, 15 S. L. R. 156 **14**

——— ——— Art. 182, Expl. I—*Decree for partition between plaintiff and defendants—Joint decree—Execution—Limitation.*

On 9th December 1901 a partition decree awarded the plaintiff and each of five defendants a share in certain properties, leaving the share of each to be

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ascertained. On plaintiff's application the shares were ascertained and one share delivered to plaintiff. One of the defendants subsequently applied for allotment and delivery of his share: the share was allotted, and on his applying on 9th April 912 it was delivered to him On 9th December 1913 another defendant sued to obtain his share, but, by order of the Appellate Court, his plaint was treated as an application in execution as having been presented on 9th December 1913, when it was objected that it was out of time having regard to the three years rule:

Held, that the partition decree should be regarded as a joint decree the execution of which was subject to the second portion of Explanation I to Article 182 of the First Schedule to the Limitation Act, that the defendant was entitled to count the time from the last application for execution, *viz*, the 9th April 19 2, and that, therefore, the application was not barred by limitation. **M** RAMASAMI AIYANGAR *v.* NARAYANA AIYANGAR, 14 L. W. 44?: 42 M. L. J. 94 **990**

——**Sch. I. Art. 182 (5)**—*Application for recording by Court of payment to decree-holder—Step-in-aid of execution.*

It is not what the decree-holder does that has to be a step-in-aid of execution but what he asks the Court to do, and the date from which the period of limitation starts is the date on which he asks for the step to be taken, not that on which it is taken.

An application by a decree-holder for recording by the ourt of a payment made to him by his judgment-debtor is an application to the Court to take a step-in-aid of execution. **N** LACHMAN *v.* GAHRESHWAR **631**

——**Art. 182 (5)**—*Execution decree—Decree consisting of mortgage-decree and simple decree—Execution of mortgage-decree—Application to execute simple decree within three years of first execution, whether within time.*

In a suit on a mortgage executed by two members of a family, who only were adults at the time, it was found that a certain portion only of the money lent was required for legal necessity, and a decree for that portion was passed against all the members of the family stipulating that if the sum was not paid within the stated time, the family property or a sufficient portion thereof shall be sold; and for the balance a simple money-decree was passed against the two executants only. An application to execute the decree by sale of the mortgaged property was made and the mortgaged property was sold. Within three years of that application an application was made to execute the simple money decree against one of the executants by his arrest. On an objection being raised that this decree was really two decrees, although written on one piece of paper and that the execution of the mortgage-decree could not keep alive the simple money-decree:

Held, that this was really one decree for the whole of the mortgage money and that the second application was not barred as it was made within three years of the first application to which the executants were also parties. **A** RAM BRICHH HAI *v.* DEOO TEWARI, 19 A. L. J. 962 **358**

Limitation and Code of Civil Procedure Amendment Act (XXVI of 1920), s. 3 (1), *applicability of—Decree passed before but application to deposit security made after its operation.*

The provisions of the Limitation and Code of Civil Procedure Amendment Act, 1920, as regards a deposit of security in case of an appeal to the Privy Council do not apply where the decree appealed from is one passed prior to the coming into force of the said Act; even though the application for the deposit of security is made after it comes into operation. Such a case is governed by the provisions of the Civil Procedure Code of 1908. **A** DEBI RAI *v.* PRAHLAD DAS, 20 A. L. J. 51 **340**

Local inspection by Court—*Omission to reduce to writing result of local investigation, effect of.*

When a Court bases its judgment on the result of a local investigation held by it, it ought to enter the result of such investigation on the record in order to enable the parties to adduce evidence in respect thereof.

But where the Court visits the locality in order to ascertain if the map which was put in by the plaintiff correctly depicts the locality and does not base its judgment on the result of the local investigation, the defendant cannot in any way be prejudiced by the fact of the local investigation being not put into writing. **C** HARI CHARAN *v.* JITENDRA NATH **601**

Lower Burma Courts Act (VI of 1900), s. 30. *See* BURMA LAWS ACT, S. 13 (1) **411**

Lunacy Act (IV of 1912), ss. 37, 38, 62—*Lunacy—Inquisition application—Jurisdiction—High Court and District Court.*

In a case where an alleged lunatic is subject to the jurisdiction of a High Court under section 37 of the Lunacy Act, the District Court has no jurisdiction under section 62, even though the person may reside within the local limits of the jurisdiction of the District Court. The jurisdictions of the High Court and the District Court are not concurrent, but the jurisdiction of the High Court excludes that of the District Court.

An alleged lunatic lived in Calcutta during nine or ten months on an average every year and two or three months at Pabna at his ancestral house. At the time of making an application for his inquisition in lunacy in the Court of the District Judge of Pabna he was in Pabna:

Held, that the alleged lunatic had two places of residence, one in Calcutta and the other in Pabna, but that as resident in Calcutta he was subject to the jurisdiction of the High Court under section 38 of the Lunacy Act and that he did not cease to be subject to the jurisdiction of the Calcutta High Court by his going to Pabna and that, consequently, the District Court at Pabna had no jurisdiction under section 62 to entertain the proceedings for his inquisition. **C** ANILABALA CHOWDHURANI *v.* DHIRENDRA NATH, 25 C. W. N. 178; 48 C. 577 **57**

Madras City Police Act (III of 1888), s. 71 (xl), *scope of—Applicability of section to obstruction caused otherwise than by vehicles and animals—Intention, proof of, when necessary.*

Madras City Police Act—concld.

Clause (*xi*) of section 71 of the Madras City Police Act covers a case of obstructing a thoroughfare in any manner and is not limited to obstruction caused by vehicles and animals. In the case of obstruction by vehicles and animals there is no question of intention. The act and obstruction caused by the act are sufficient. In other cases intention is necessary to be proved in addition to the obstruction. **M** KUPPAMMAL *v.* EMPEROR, (1921) M. W. N. 770; 41 M. L. J. 562; 14 L. W. 647; 30 M. L. T. 82; 23 CR. L. J. 175 **639**

Madras Hereditary Village Offices Act (III of 1895), s. 21—*Suit to recover emoluments of* purohit *office in proprietary estate —Jurisdiction of Civil Courts.*

Under section 21 of the Madras Hereditary Village Offices Act, Civil Courts have no jurisdiction to entertain suits for recovery of *purohit maniams* in proprietary estates. **M** VANCHINATHA AIYAR *v.* RAJAGOPALA AIYAR, 41 M. L. J. 372 **321**

Madras Village Courts Act (II of 1920). *See* PENAL CODE, ss. 161, 171-E **612**

Mahant—*Succession — Removal —* Gurdwara *of Guru Hargobind Singh at Hafizabad.*

A *mahant* is the head of any Hindu *dera* or religious institution and a person succeeding to such a headship by hereditary right can quite correctly be styled a *mahant.*

The only law as to *mahants*, their offices, functions and duties is found in custom and practice, which is to be proved by testimony.

A self-constituted *sangat* unable to prove any customary right to interfere in the control of *Gurdwara* or to remove the *mahant* have nothing to do with the succession to the office which is quite independent of any action on their part.

The people of Hafizabad have no customary right to interfere in the control of the *Gurdwara* of Guru Hargobind Singh or to remove its *mahant* for misconduct. **L** FATEH SINGH *v.* BUR SINGH **842**

Malabar Law—*Santhathi Brahmaswom tenures, inalienability of—Alienation—Landlord, right of, to re-enter.*

Under the Malabar Law in case of Santhathi Brahmaswom tenures a landlord is not entitled to re-enter on alienation by tenants without a special clause for re-entry in the deed of lease or a custom to that effect.

Quære:—Whether a grant of land as a Santhathi Brahmaswom to be held by the grantee "for all time without power of surrendering and without being dispossessed" is inalienable. **M** AYYAKKUTTI *v.* KRISHNA PATTER, (1922) M. W. N. 192 **942**

——— *Tarwad —* Karnavastanam *— Succession— Family* karar *diverting succession, whether binding on future* karnavan *not party to* karar.

Under the Marummakkathayam Law, a family *karar*, not assented to by a member of a Tarwad entitled to succeed to the office of *karnavan* on the death of the present incumbent, cannot interfere with the right of that member to succeed to all the powers of *karnavan* in due course of succession, even though the *karar* is assented to by a majority of the members of the Tarwad. The fact that the *karar* provides for a larger maintenance to the dissentient member as a set-off against the deprivation of his right would not render the *karar* valid. **M** SANKARA MENON *v.* GOPALA MENON **805**

Marriage contract—*Breach of contract— Damages—Jurisdiction—Contract Act (IX of 1872), s 63—Civil Procedure Code (Act V of 1908), s. 20 —Limitation Act (IX of 1908), Sch. I, Art. 36.*

The plaintiff, a resident of Muzaffarpur, arranged to marry his daughter to the defendant, a resident of Patna, and agreed to pay Rs. 1,500 in cash and Rs 300 worth of articles to the defendant at the Tilak ceremony. The cash and articles were delivered on the Tilak day to the defendant at Patna and it was arranged that the marriage should be performed on a certain date. A week before the date of marriage the defendant refused to perform the marriage and returned a portion of the Tilak money. In a suit for the balance and loss in connection with marriage arrangements it was pleaded that as the plaint showed that the defendant returned a part of the Tilak money and promised to pay the balance shortly, a new contract was entered into subsequent to the original contract:

Held, that as whole of the cash and articles were not returned, section 63 of the Contract Act did not apply in the case, and that as the plaintiff never intended to accept the mere promise which the defendant had not fulfilled, the parties were relegated to their original position and that the plaintiff was, therefore, entitled to balance and costs with interest.

Held, also, that the Court at Muzaffarpur, within whose jurisdiction the marriage was to be performed, had jurisdiction to try the case although the contract was made and cash and articles were delivered at Patna outside that jurisdiction.

Held, further, that the suit was not governed by Article 36 of the Limitation Act as the suit was simply a suit for damages on breach of contract. **Pat** MATHURA PRASAD SINGH *v.* SATYA NARAYAN PRASAD SAHI **812**

Martial Law (Supplementary) Ordinance III of 1921, cl. (6). *See* CRIMINAL PROCEDURE CODE, ss. 196, 252 **859**

Master and servant—Admission by party to suit—Estoppel. *See* COMPANIES ACT, s. 4 (2) **368**

Mortgage—*Attestation—Evidence interested— Presumption.*

In a suit on a mortgage by a mortgagee it lies upon the latter to prove the valid attestation of the mortgage, but where the attesting witnesses, being defendant's relations, turn hostile and do not state the truth and the other witnesses are interested in one party or another, the principle "*omnia præsumuntur rite et solenniter esse acta donec*" applies, and it must be presumed that everything was rightly and duly performed. **N** JAIRAM *v* VENKATRAO **658**

——— *Foreclosure decree without impleading subsequent transferee—Suit to eject transferee, maintainability of—Proper remedy.*

Mortgage—contd.

Where a purchaser from a mortgagee obtains a foreclosure decree without impleading a transferee from the mortgagor, for example, a tenant whose rights were created subsequent to the mortgage, he cannot subsequently sue to eject him. His only remedy is to file a fresh suit for foreclosure against the transferee who would have an opportunity of redeeming him. **N** SHEORAM *v.* JAMNABAI **503**

——— *Further charge, deed of — Redemption of mortgage not to be made unless deed of further charge paid off, effect of—Consolidation of mortgages.*

A deed of further charge expressly providing that the mortgagor would not be entitled to redeem the earlier mortgage without paying the money due on that deed and containing a covenant for the consolidation of the later deed with the earlier one, is enforceable against the mortgagor and the earlier mortgage cannot be redeemed without the payment of the money due on the later deed. **O** NAUNIDH LAL *v.* MAHADEO SINGH, 8 O. L. J. 640 **401**

——— *Personal liability of mortgagor.*

In every mortgage there is a personal covenant to pay, unless the contrary is expressly stated or appears by necessary implication from the terms of the bond. Where there is no express covenant, that necessary implication arises out of the terms of most foreclosure and many usufructuary mortgages, but not out of those of a mortgage for sale. **N** JIWANDAS *v.* JANAKI **53**

——— *Prior and puisne mortgagees, rights of — Civil Procedure Code (Act V of 1908), O. XXXIV.*

An owner of a property, who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee, who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield.

An omission by a prior mortgagee to make a puisne mortgagee a party to the suit instituted by him to execute his mortgage does not prevent him from setting up that prior mortgage in a subsequent suit by the puisne mortgagee in cases where he would have been so entitled before the Transfer of Property Act, 1882.

Where a puisne mortgagee not made a party to the suit of a prior mortgagee seeks to enforce his mortgage, it is the duty of the Court to give the plaintiff the opportunity of occupying the position which he would have occupied if he had been a party to the former suit. **P C** SUKHI *v.* GHULAM SAYDAR KHAN, (1921) M. W. N. 445; 14 L. W. 162; 43 A. 466; 26 C. W. N. 279; 42 M. L. J. 15; 30 M. L. T. 175; 24 BOM L. R. 590 **151**

——— *Prior and subsequent mortgagees—Sale in decree of first mortgage—Subsequent suit by puisne mortgagee—Decree, form of—Redemption—Auction-purchaser and private purchaser, distinction between—Improvements—Auction-purchaser, whether can claim.*

Where a puisne mortgagee wishes to sell property which has already been sold in execution of a decree passed under a prior mortgage, the decree must direct redemption by the second mortgagee of the first mortgage and then an order for sale if the purchaser of the property does not wish to redeem the second mortgage and there is no distinction in such a matter between an auction-purchaser and a private purchaser.

An auction-purchaser under a prior mortgage decree cannot claim the amount spent by him on improvements as payable before the puisne mortgagee could bring the property to sale. **A** RUDHI LAL *v.* ADMINISTRATOR-GENERAL, MADRAS HIGH COURT, 20 A. L. J. 216 **841**

——— *Redemption, if and when can be effected before expiry of term stated in bond—Redemption and foreclosure, general principle as to—Transfer of Property Act (IV of 1882), ss 60, 62.*

The general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, the right to redeem and the right to foreclose are co-extensive and this principle is embodied in sections 60 and 62 of the Transfer of Property Act. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. The question in each case is whether upon the terms of the contract between the parties the intention was such as to give the mortgagor a right to redeem before the expiry of the latest date fixed for payment. **C** JAMIR HOWLADAR *v* ARABJAN BIBI **273**

——— *Redemption—Special covenant entitling mortgagee to additional amount—Deed, ambiguous—Burden of proof.*

Where in a suit for redemption the defendants set up a special covenant entitling them to an additional amount and there is nothing to show that it refers to the mortgage in suit, there is no presumption and the burden is upon the defendants to show that it refers to the deed in suit. **O** BHUP SINGH *v.* LAZIM SINGH, 24 O. C. 319 **121**

——— *Redemption — Usufructuary and simple mortgages executed at one time—Tacking—Payment of both necessary at redemption—Interest, deficiency in, to be recovered every year - Entire deficiency, whether can be recovered at redemption.*

Where two mortgages, one usufructuary and the other simple, were executed of the same property on the same date in favour of the same mortgagee with a condition that the money secured by the simple mortgage was to be paid along with that of the usufructuary mortgage at the time of redemption, the simple mortgage is tacked to the usufructuary mortgage and its payment is necessary before the property can be redeemed.

The mere fact that a usufructuary mortgagee is given an option of recovering from the mortgagor at the end of every year any deficiency in the interest provided for by the mortgage, does not make the interest cease to be a part of the mortgage-money and a mortgagor at the time of redemption must pay the principal and interest due at that time. **A** ULFAT RAI *v.* KANHAIYA LAL, 20 A. L. J. 86 **819**

——— *, simple—Mortgage to be converted into usufructuary—Possession not delivered—Simple mortgage, whether can be enforced—Interest not to cease from date mortgagee to obtain possession—Mortgagee, position of.*

Mortgage—contd.

If a mortgage is originally a simple mortgage, liable to be converted into a usufructuary mortgage after the expiry of a certain period, the mortgagee can fall back on the simple mortgage and enforce it in case the mortgagor does not fulfil the obligation as to delivery of possession.

A mortgage provided that the mortgagor shall re-pay the mortgage-money at a certain rate of interest within three years, that the interest shall be payable yearly, and that if for two consecutive years the interest due remained unpaid, the mortgagee would be entitled to obtain possession of the mortgaged property in lieu of the principal sum secured by the mortgage subject to the condition that in the event of his getting possession of the mortgaged property the liability of the mortgagor for interest on the principal money shall cease and the profits of the mortgaged property shall go to the mortgagee. The interest for two consecutive years was not paid to the mortgagee and the mortgagor did not deliver possession over the mortgaged property:

Held, that the mortgagee could not be disallowed interest from the date when he became entitled to claim possession. **O** DAL CHAND *v.* SITA RAM, 8 O. L. J. 643 **449**

——— *Simple mortgage—Mortgagee given possession subsequently to pay himself principal and interest out of usufruct—Original contract, whether changed—Right of redemption, whether lost.*

In the case of a simple mortgage in which the mortgagee has a right to bring the property to sale and the mortgagor has a right to redeem, the mortgagor does not lose his right to redeem by the fact that the mortgagee is given additional security for his money by taking possession of land and pay himself the principal and interest out of the usufruct, as the original relations of a simple mortgagee and a simple mortgagor subsist. **N** PUNA *v.* LAXMAN-PRASAD **654**

——— *suit—Decree—Interest* pendent lite—*Suit whether pending during existence of an* ex parte *decree obtained earlier in suit but set aside—Costs—Plaintiff's laches.*

A plaintiff in a mortgage suit should get interest at the rate stipulated for the entire period during which the suit is pending.

Where an *ex parte* decree in a mortgage suit is set aside, the suit is considered to be pending between the date of the *ex parte* decree and the date when that decree is set aside.

A delay in the disposal of a suit due to the laches of the plaintiff should be taken into consideration in dealing with the question of costs. **C** SIBA PROSAD DAS *v.* KAZIMUDDIN SARKAR **709**

——— *Suit for sale—First suit brought and decreed but proved infructuous—Second suit not barred*—Res judicata—*Redemption, right of.*

A. made a mortgage in favour of *B.* *A.*'s rights were sold and purchased by *J.*, a son of *A.* *J.* entered into possession and sold the property to *M.* *M.* sold it to *R.* *B.* sued *J.* to enforce his mortgage but did not implead *M.* or *R.* He got a decree and purchased the property but was resisted by *R.* in obtaining possession. He then brought a suit against *R.* for sale of the property on the mortgage:

Held, that the second suit was not barred as *R.* was not entitled to any other right except to an opportunity to redeem which had been given him. **A** RAMPIA *v.* HAZARI LAL, 4 U. P. L. R. (A.) 42 **654**

———, *suit on—Decree satisfied by stranger under arrangement with judgment-debtor—Subrogation.*

Where a person in agreement with a mortgagor judgment-debtor undertakes to relieve him from his debt to the judgment-creditor on the condition that he takes over from the judgment-creditor the security which the latter holds, the transaction constitutes a valid subrogation. **Pat** MUHAMMAD MUSA *v.* AIDAL SINGH, 3 P. L. T. 232 **801**

——— *Two mortgages of same property of same date—Execution, order of, uncertain—Priority.*

Where two mortgages of the same property are executed on the same day, and it is impossible to decide which mortgage was executed first, it is not open to either of the mortgagees to claim priority over the other: they must rank *pari passu* as if the mortgages had been executed at the same time. **M** KUTTI THEVAN *v.* RAYAPPA GOUNDAN, 14 L. W. 422; (1921) M. W. N. 703 **961**

———, *usufructuary—Date of payment fixed—Construction—Anomalous mortgage—Suit for sale of mortgaged property maintainable.*

Where in a usufructuary mortgage a due date for payment has been fixed, the document is not purely a usufructuary mortgage and the mortgagee is entitled to sue for sale of the mortgaged property immediately after the due date is passed, even though he still remains in possession of the property **Pat** JAG SAHU *v.* RAM SAKHI KUER, (1922) PAT. 58; 3 P. L. T. 232 **666**

———, *usufructuary—Dispossession, effect of—Acquiescence—Interest—Further charge, deed of, providing for payment of debt at any time before redemption of original mortgage, effect of—Limitation.*

Where a usufructuary mortgagee after dispossession from a portion of the property, which constitutes the mortgage security, acquiesces in the situation and takes no action for possession or compensation for loss, he cannot put forward subsequently a claim for interest.

Where a deed of further charge provides that the borrower is entitled to pay the debt at any time prior to the date on which the original mortgage is to be redeemed, the deed fixes a date for payment and the limitation for the recovery of the money due on it does not begin to run from the date of its execution. **O** MAHADEO TEWARI *v.* SITLA BAKHSH SINGH, 8 O. L. J. 660 **408**

———, *usufructuary—Subsequent mortgage—Stipulation that second mortgage to be redeemed along with first—Redemption—Amount payable—Limitation*

Certain property was mortgaged to the defendant with possession and the agreement was that the mortgage should be redeemable on payment of the principal amount, the profits of the land being set off against the interest. Subsequently, a further charge was created on the same land in favour of the defendant. In this second mortgage-deed it was stipulated that the monies due thereunder

Mortgage—concld.

would be paid at the time of the redemption of the first mortgage. More than twelve years after this mortgage the plaintiff sued for redemption:

Held, that the plaintiff was entitled to redeem the land only on payment of the amount due under both the mortgages. **L** NATHWA *v.* KANHIYA **642**

Motor Vehicles Act (VIII of 1914), ss. 10, 11 (2) (a)—*Bombay Motor Vehicle Rules*, 1915, *r.* 6, *Sch. D—Registration of motor vehicles—Time-limit, fixing of*—Ultra vires.

Section 11 (2) (*a*) of the Motor Vehicles Act does not empower a Local Government to prescribe by rule the duration of time during which a certificate of registration shall be valid. **B** SHERSTON BAKER *v.* EMPEROR, 24 BOM. L. R. 50; 23 CR. L. J. 169 **633**

——— **ss. 16, 18 (2)**—*Licensed motor driver—License not on his body Driving, whether offence—Suspension of license, whether part of sentence—Order suspending license, whether appealable—Criminal Procedure Code (Act V of 1898)*, s. 565.

There is no prohibition against the driving of a motor car by a properly licensed person who has not got his license with him: it is only the non-production of the license upon demand by a Police Officer that is an offence.

The suspension of a license of a motor driver under section 18 (2) of the Motor Vehicles Act, if ordered in addition to the imposition of a fine for an offence under section 6 of the Motor Vehicles Act, is a part of the sentence, as an order under section 565 of the Criminal Procedure Code is An order of suspension under section 18 (2) as well as the order imposing fine for an offence under section 6 of the Motor Vehicles Act are both appealable under section 417 of the Criminal Procedure Code and are also subject to revision by a High Court. **N** DHEKLIA KUNBI *v.* EMPEROR, 23 CR. L. J. 73 **425**

Muhammadan Law—"Farzandan," meaning of. *See* BERAR INAM RULES, 1859, CLASS III, R. V **72**

——— **Dower**—*Widow's right to remain in possession until dower paid off—Right to transfer dower-debt—Transferee's right to remain in possession of property until dower-debt paid—Accounts, right to, when accrues—Limitation—Construction of document—Appeal, second—Mixed question of fact and law.*

When a Muhammadan has promised a woman whom he marries a dower but that dower has not been paid, she, when he dies, can lawfully remain in possession of his property until her dower is paid by her husband's heirs or until she has succeeded in realising it out of the usufruct which she enjoys by reason of her being in possession, but she has to render to the heirs an account.

The dower-debt is a definite portion of the widow's estate and her heirs are entitled to hold the possession of her deceased husband's property with the same legal incidences as were possessed by the widow herself. If the widow transfers her dower-debt and its security to a stranger, such a conveyance may also include in law the right to possession of her husband's property until the dower-debt is in some way liquidated.

Muhammadan Law—contd.

In order to effect the transfer of a widow's dower-debt with its security, express words so doing must be proved.

Quære—Why if express words of transfer are sufficient, a clearly implied covenant should not be effective?

The consideration of the proper construction of a document is often a mixed question of fact and of law

A Muhammadan widow, holding her husband's property in lieu of dower, executed a document in favour of a son of her late husband's brother providing: "I do hereby willingly sell and absolutely vend without reserving the right of cancellation to ..the whole and entire one-third share of mine .....owned and possessed by me together with all rights and appurtenances, for a consideration of a monthly allowance of ..till my death and I have put .....him in possession of the vended property as ab olute proprietor in my place..... In short the proprietary interest and all rights, title and interest which I had in the vended properties have, under this sale-deed, been transferred (from me and (become extinct and have devolved on and vested in the said purchaser and his heirs and representatives..... ..After my death my heirs and representatives shall not have any right of interference in or objection or claim to the vended properties." On a suit by the heir of the deceased husband of the widow for possession claiming the deed to be inoperative:

Held, on construction of the document,

(1) that this instrument did not transfer the widow's dower-debt and its security;

(2) that the general trend of the deed indicated an out-and-out sale of the whole estate;

(3) that it was only upon the widow's death that the plaintiff's cause of action really arose. **Pat** ABDUL RAHMAN *v.* WALI MUHAMMAD **224**

——— **Marriage**—*Shia—Requisites of valid marriage—Marriage performed secretly—Restitution of conjugal rights*

Plaintiff, a Shia Muhammadan, and defendant No. 1, a Shia girl, who was above 20 years of age, contracted a secret marriage of their own choice and of their own free-will and at the time the ceremony took place the plaintiff had an intention of having a public ceremony performed later with the consent of his wife's family and did not intend to consummate the marriage until that ceremony was performed. His wife's relatives opposed his access to his wife and endeavoured to marry her to another man. Thereupon, he sued for restitution of conjugal rights It was alleged on behalf of the defendants that no marriage ceremony had taken place:

Held, that as under the Shia Law, the presence of witnesses was not necessary in any matter regarding marriage and as a marriage contracted by the spouses themselves or their guardians in private was valid, the parties were legally married, and that a marriage which was a valid marriage could not be invalidated by the desire of the parties to have a more elaborate ceremony performed later.

Muhammadan Law—contd.

Held, further, that the ceremony being complete the plaintiff was entitled to claim restitution of conjugal rights although he had agreed that he would not consummate the marriage till public ceremony was performed.

Where in a Shia marriage the essentials are present (the declaration and the acceptance expressed in such a manner as to demonstrate intention without any sort of ambiguity) the presence or the absence of religious ceremonials is immaterial and in no way affects the validity of the union.

Under the Shia Law, as in the Hanafi Law, if a woman is adult and sane, she is competent to enter into a matrimonial engagement without advice or consent from any body. **A** NAFISUNNISA *v.* MUMTAZ HUSAIN, 4 U. P. L. R. (A.) 17 **539**

——— **Minor**—*Guardian*, de facto, *statements of, do not bind minor.*

A *de facto* guardian under the Muhammadan Law has no power to bind the minor by his statements or to affect his interest in the property. The statements made by such a person may, however, be taken into consideration by a Court as any other evidence. **C** BASARAT SARKAR *v.* HIRU PRAMANIK **353**

——— **Pre-emption**—*Demands, when to be made.*

Under the Muhammadan Law of pre-emption, it is necessary that the demands should be made immediately after the pre-emptor knows of the sale. Where it is in evidence that the plaintiff knew of the transfer two or three months before the demands were made, the demands were not made as required by law and he could not claim pre-emption. **A** ABDUL RAHMAM *v.* RIFAQATULNISSA, 4 U. P. L. R. (A) 24 **641**

——— **Shia School**—*Gift of vested remainder —Donee not born—Gift, essentials of—Deed, construction of—Gift under Shia Law is contract between two parties.*

The elements of 'proposal' and 'acceptance' are the essential elements of a contract of gift under Muhammadan Law and the absence of either is fatal to the validity of the gift

Among Shias the creation of a life-interest and a deferred estate, which would amount to a vested remainder under English Law, are permissible, but stand on the same footing as ordinary gifts. So that a gift of the deferred estate cannot be made in favour of a person who is not born at the time of the making of such gift.

A deed of gift provided: "I fix the annual maintenance of my daughter, Zakia Begum, and create a charge for this maintenance on 89 *bighas* of land. The maintenance shall subsist for her lifetime without right of transfer, and after her death shall be transferred automatically to her male issue without right of transfer. In case of necessity, the said lady or her male issue shall be entitled to transfer it for proper price to my sons or their issue:"

Held, that there was a gift of a life-interest to the daughter and a further gift *in præsenti* of the deferred estate in favour of her male issue and that the provision about the right of transfer for necessity did not in any way enlarge the life-estate in favour of the daughter. **O** SIRAJ HUSAIN *v.* MUSHAF HUSAIN, 24 O. C. 321; 9 O. L. J. 149 **132**

Muhammadan Law—concld.

Municipal election—*Wrong description of name in candidates' list—Suit for damages, maintainability of—Damages, liability for—Member as corporate body or individual—Principal and agent, principle of, applicability of—Discovery of documents—Civil Procedure Code (Act V of 1908), O. II, r. 12—Affidavit, contents of.*

If any duly qualified citizen, or burgher, or person entitled to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote, and so as to give the Returning Officer an adequate ground for refusing him the right to vote on election day when the matter has to be decided summarily, and that refusal or omission from the roll, as the case may be, turns out on investigation to be wrongful he has suffered a legal wrong; he has been deprived of a right recognised by law and he has against the person so depriving him a remedy by "an action on the case" for nominal damages for the right that he has lost, which may, at the discretion of the Court, be punitive or exemplary, if the conduct is the result of some malicious and wicked intention: and also for any pecuniary expenses to which he may have been reasonably put as a result of the wrong done, for example efforts to re-place his name on the roll.

A suit for damages for wrong done to the plaintiff by wrongful omission to record his name correctly on the candidate's list of the Municipal Electoral Roll is rightly brought against the Municipal Board itself and individual members including the Executive Officer, and if in such a case liability is eventually established for damages, that liability in order to be placed upon the right shoulders, must be decided according to the ordinary general principles of principal and agent. No individual member of the Board can be made liable in his own pocket, separately and independently of the Board, for an act in which he had no part or lot himself and which he did not in any way authorise. On the other hand, any individual member of the Board who either expressly or indirectly encouraged, incited, directed or approved of, in other words, aided and abetted the attempt to deprive the plaintiff of his right to be on the candidates' list would be liable in his own pocket, independently altogether of the question whether or not the Municipal Board would be liable as well. The Municipal Board as principal would only be liable for their corporate act, *i e*, an act done by themselves by way of resolution, or by a Committee of authority appointed by them, or by one of their servants in the ordinary course of business.

In such a case a plaintiff has a right under Order II, rule 12 of Civil Procedure Code, and any Court trying such a suit has the duty, to insist that all documents in existence or which had been in existence which throw light on that question must be produced.

Where a Municipal Board is called upon to produce documents and is unable to produce them, an affidavit must be made on behalf of the Municipal Board by the Chairman or the Executive Officer, who,

Municipal election—concld.

making their affidavits jointly as such officers, must swear that they have made all necessary enquiries of all employees in the Board with reference to the documents which they swear to in their affidavits and if there is any document to which they make any objection, legal or otherwise, to produce although it is relevant to the question in point, they must take their objection in the affidavit and the Court must decide it before hearing the case. **A** MUNICIPAL BOARD, AGRA *v.* ASHRAFI LAL, 20 A L. J. 1 **984**

Negotiable Instruments Act (XXVI of 1881), ss. 8, 78—*Promissory-note, who can sue upon—Beneficial owner, whether can sue.*

Under section 78 of the Negotiable Instruments Act, read with section 8 of that Act, only the person who holds a promissory-note in his own name can sue upon it and a beneficial owner cannot maintain a suit. **A** REOTI LAL *v.* MANNA KUNWAR, 20 A L. J. 126 **785**

N. W. P. Rent Act (XVIII of 1873). *See* AGRA TENANCY ACT, s. 22 **824**

Oaths Act (X of 1873), s. 9—*Offer to be bound by oath—Withdrawal before acceptance—Discretion of Court.*

Where a party offers to be bound by the oath of the opposite party, the Court has full discretion to call upon the opposite party to accept or refuse the offer; and, subject to the exercise of that discretion, the offer once made cannot be withdrawn, and if the opposite party eventually accepts it, the party making the offer is bound by the result.

The principle that an offer can be withdrawn before it is accepted is true in the case of an ordinary contract, but does not apply to an offer made under the Oaths Act. **L** KHAWAJ DIN *v.* NUR **700**

Occupancy holding, *non-transferable—Decree-holder not landlord, whether can sell portion of holding—Landlord money-decree-holder, whether can sell holding.*

A decree-holder, not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord, of which there is no evidence, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree, even where there is no local custom of transferability.

A landlord who has sued his tenant and obtained against him a money decree can in execution thereof sell the non-transferable occupancy holding of his tenant without the latter's consent **Pat** JUGESHAR MISRA *v.* NATH KOERI, (1922) PAT. 49; 2 P. L. T. 205; 4 U. P L. R. PAT. 9 **335**

Oudh Estates Act (I of 1869), Sch. I—*Letters of Government, effect of—Under-proprietary rights in Oudh before Annexation—Restoration of rights—Proof, nature of.*

Before a pre-mutiny root of title can be relied on in Oudh, it is necessary to show that that title has been recognised by the British Government after the date of Lord Canning's Proclamation either by an entry in the Settlement Records or by a Settlement decree, or in some other way.

The letters of the Government of India of 10th and 19th October 1859, which are appended as Schedule I to the Oudh Estates Act, have not the effect to restore all under-proprietary rights which existed before the annexation of Oudh. **O** MOHAMMAD RASHID-UD DIN *v.* RAM SUKH, 24 O. C. 342 **514**

Oudh Laws Act (XVIII of 1876), ss. 6, 9—*Pre-emption—Hindu Law—Joint family—Sale by one member—Another member, whether can pre-empt.*

In Oudh one member of a joint Hindu family has a right to pre-empt a sale effected by another member of the same family in favour of a stranger. **O** RAMADHIN *v.* SURAJPAL SINGH, 8 O. L. J. 506 **772**

Oudh Rent Act (XXII of 1886), s. 108 (5A)—*Jurisdiction of Civil and Revenue Courts*—Muafi, *transfer of—Suit by proprietor for possession, nature of.*

A suit by the proprietor of a *mahal* for a declaration that a transfer of the *muafi* rights in a plot of land is not binding on him and for possession of the land is in effect a suit for resumption of the *muafi* and is triable solely by a Revenue Court under the provisions of clause (5A) of section 108 of the Oudh Rent Act **O** GOPI CHARAN *v.* DURGA PRASAD, 8 O. L. J 472 **702**

Partition suit—*Preliminary decree—Order directing Commissioners to ascertain value and take possession of property—Interlocutory order—Appeal—Order, when can be questioned.*

There can be only one preliminary decree in a suit.

An order in a partition case after the passing of a preliminary decree directing Commissioners appointed in the case to ascertain the value of certain property and to take possession of it, is an interlocutory order and is, consequently, not appealable but can be questioned in appeal from the final decree. **O** JAGMOHAN DAS *v.* INDAR PRASAD, 24 O. C. 366 **983**

Partnership—Agreement — Use of words "partners" and "partnership"—Test of partnership. *See* COMPANIES ACT, s. 4 (2) **368**

Patni Regulation (VIII of 1819), when applicable to non-permanent tenures. *See* TALUK **145**

Penal Code (Act XLV of 1860), ss. 141, 147, 352—*Criminal Procedure Code (Act V of 1898), ss. 238, 535—Prosecution under s 147, Penal Code—Conviction for minor offence of assault under s. 352, Penal Code, maintainability of—Minor offence—Abetment of assault.*

A person charged under section 147, Indian Penal Code, for rioting may be convicted of an offence of assault under section 352, Indian Penal Code, but on a charge under section 147 there can be no conviction of abetment of assault.

A different *mens rea* is not necessary in section 146, Indian Penal Code, as contrasted with section 352. Criminal force being an element of the offence of section 143 it must be taken to be capable of carrying a conviction under section 352.

Where an accused was charged of an offence under section 147, Indian Penal Code, but was convicted of an offence under section 352, Indian Penal Code, and where the whole of the defence evidence was let in in the Court of first instance and was disbelieved

Penal Code—contd.

and it was also disbelieved in the lower Appellate Court, any irregularity in conviction was cured by section 535, Criminal Procedure Code. **M** MUTHUKANAKKU PILLAI *v.* EMPEROR, (1922) M. W. N. 182; 15 L. W. 583; 23 CR. L. J. 206 **862**

——— ss. 161, 171-E—*Bribery of Panchayat—Complaint against member—Sanction of Government—Madras Village Courts Act (II of 1920).*

A member of a village Panchayat, constituted under the Madras Village Courts Act, is a Judge, and the sanction of the Government is an essential precedent to the prosecution of such member of an offence under section 161 or section 171-E of the Penal Code. **M** PONNUSAMI THEVAN, *In re*, 15 L. W. 199; (1922) M. W. N. 122; 42 M. L. J. 139; 23 CR. L. J. 148; 30 M. L. T 351 **612**

——— s. 174—*Summons—Illness—Non-attendance, when offence—Sufficient cause.*

If a person is sufficiently incapacitated by illness to have given up his ordinary avocations, this is sufficient excuse for him not to attend a Court in obedience to a summons. If he is so ill that his absence cannot be regarded as a wilful disobedience to the Court's order, the fact that he does not send a man to inform the Court of his illness does not render him liable to punishment. **A** BOHRA BIRBAL *v.* EMPEROR, 20 A. L. J. 192; 23 CR. L. J. 208 **864**

——— ss. 191, 193, 194—*Criminal Procedure Code (Act V of 1898), ss. 174, 175—Death under suspicious circumstances—Inquest—False charge—False evidence.*

The offence of a person accusing another falsely of murder to a Police Officer in an enquiry under section 174 of the Criminal Procedure Code would not fall under section 194 of the Penal Code, the reason being that it is difficult to affirm the existence of an intention to cause, or of knowledge that the false evidence is likely to cause, a person to be convicted of a capital offence, when the proceeding in which the evidence is given is one in which such a conviction is not legally possible.

A person who comes forward without being summoned and volunteers information at an enquiry under section 174 of the Criminal Procedure Code, is not bound to answer truly questions put to him under section 175 of the Code, and not being so bound, his answers, if false, cannot form the basis of a charge of perjury, having regard to the definition of that offence in section 191 of the Penal Code. **L** MUHAMMAD HAYAT *v.* EMPEROR, 23 CR. L. J. 82 **434**

——— s. 193—Actual statements alleged to be false, mention of, in sanction order. *See* CRIMINAL PROCEDURE CODE, s. 195 **640**

——— s. 211—*"Institution" of proceedings, meaning of.*

The term "institution" in section 211, Indian Penal Code, means the institution either by the accused himself, or by the Police or others in consequence of the accused's action, in some Criminal Court. **L** MUHAMMAD HAYAT *v* EMPEROR, 23 CR. L. J. 82 **434**

——— s. 297—*Putting obstacle in burying dead child—Boycott—Offence—Security to keep peace.*

An accused person who deliberately puts obstacles in the way of a complainant burying his dead son because he has not joined the Khilafat movement but does not use violence to him though he effectively boycotts him, is not guilty of an offence under section 297, Indian Penal Code, of having offered an indignity to the corpse of the dead child and cannot also be bound over to keep the peace inasmuch as the act is an act of boycotting and not a criminal act under any law. **A** AMANAT *v.* EMPEROR, 20 A. L. J. 93, 23 CR. L. J. 72 **424**

——— s. 300, thirdly—*Death caused by single blow—Offence—Criteria for determining.*

Where a person causes the death of another by a single blow from a stick, the criteria for determining whether or not he has committed the offence of murder, are, the nature of the weapon used, its size and weight, the manner in which it is used, and the actual injuries caused; if the injuries are so severe and uncommon as to indicate the use of terrific force, the offence falls under section 300, thirdly, of the Penal Code, *i. e.*, that he intended to cause injury sufficient in the ordinary course of nature to cause death, even though the weapon used is not such as would of necessity have caused fatal injury. **L B** NGA KHAN *v.* EMPEROR, 11 L B. R. 115; 23 CR. L. J 111 **495**

——— ss. 300, Excep. (1), 302—*Murder—Woman of loose character—Refusal to admit husband to sexual intercourse—Grave and sudden provocation—Punishment.*

Accused killed his wife, whom he knew to be a woman of depraved character, because she refused to have sexual intercourse with him on the night of the occurrence and also abused him The woman had often before refused such intercourse:

Held, that the accused could not be said to have acted under grave and sudden provocation, and was guilty of murder.

Under the circumstances of this case, a sentence of transportation for life was considered sufficient **L** GHAZI *v.* EMPEROR, 1 P. W. R 1922 CR.; 23 CR. L. J. 140 **572**

——— s. 323, *prosecution under—Death of person hurt, whether causes abatement of prosecution*

A criminal prosecution under section 323, Indian Penal Code, does not abate by reason of the death of the person hurt. **M** MUHAMMAD IBRAHIM *v.* SHAIK DAWOOD, 40 M. L. J. 351; 13 L. W. 379; (1921) M W. N. 227; 44 M. 417; 23 CR. L. J. 117; 30 M. L. T. 849 **549**

——— s. 406—*Duty of prosecution to establish charge—Truth or falsehood of defence immaterial—Accused entitled to acquittal, when case for prosecution false.*

Before an accused person can be convicted it is necessary that the Court should be satisfied that the charge framed against him has been established.

If in a case under section 406, Indian Penal Code, the accused is charged with being entrusted with a certain sum of money, and the prosecution cannot prove how he came by the money, they do not establish one of the first essentials of the offence charged, that he was entrusted with that money and he is entitled to be acquitted.

If the case of the prosecution is false on the whole, the accused is entitled to an acquittal

Penal Code—contd.

whether his defence be true or false. **C** GOURI NARAIN BARUA *v.* TILBIKRAM CHETRI, 25 C. W. N 838; 23 CR. L. J. 220 **1004**

——— **s. 408**—*Criminal breach of trust—Jewellery entrusted for sale—Jewellery pledged—Pawnee, whether can be ordered to return jewellery—Magistrate, duty of.*

A Criminal Court ought not to usurp the functions of a Civil Court and assist a complainant in recovering goods, which were made over to the accused to dispose of, from the person to whom they were disposed of, merely because the accused did not dispose of them in accordance with the instructions given to him.

The complainant entrusted the accused with certain jewellery for sale The accused, however, pledged them to a money-lender. The Magistrate convicted the accused for criminal breach of trust and orderd the return of jewellery to the complainant:

Held, that as possession of the jewellery was not obtained wrongfully by the accused, the Magistrate was not justified in ordering the return of the jewellery to the complainant in the absence of bad faith on the part of the pawnee. **L B** ANNA MALAI CHETTY *v.* MRS. BASCH, 11 L. B. R. 217; 23 CR. L. J. 216 **1000**

——— **s. 409**—*Criminal breach of trust—Venue of trial—Criminal Procedure Code (Act V of 1898), s.* 179.

A, a commission agent doing business at Bombay, received from *B.*, at Ahmednagar, a consignment of cotton for sale at Bombay. The cotton was sold, but *A* failed to remit the sale-proceeds to *B.* at Ahmednagar, whereupon *B.* filed a complaint, under section 409 of the Penal Code, against *A* in the Court of the Sub-Divisional Magistrate at Ahmednagar. *A.* took the objection that the Ahmednagar Court had no jurisdiction to try the case:

Held, that, as the complainant was entitled to have the proceeds of the cotton, sent to Bombay, paid to him in Ahmednagar, and as the proceeds were not so paid, loss occurred to him at Ahamednagar, and that, therefore, under section 179 of the Criminal Procedure Code, the Ahmednagar Court had jurisdiction to try the case. **B** RAMRATAN CHUNILAL *v* EMPEROR, 24 BOM. L. R. 43; 23 CR. L. J. 178 **637**

——— **s. 420**—*Sharp practice—Fraud*

The accused resorted to a trick whereby he obtained the possession and use of the complainant's monies and to the injury of the complainant secured for himself the position of advantage properly belonging to the complainant:

Held, that sharp practice of this sort constituted fraud and made the accused liable to conviction under section 420 of the Indian Penal Code **C** ASWINI KUMAR CHATTERJEE *v.* EMPEROR, 25 C. W. N. 648; 23 CR L J 221 **1005**

——— **ss. 420, 423, 511**—*Offence requiring performance of series of acts—Commencement of series—Attempt—Preparation—Completion of act impossible—Attempt, whether punishable—Criminal Procedure Code (Act V of 189), s 1[illegible], scope of.*

Where the commission of an offence requires the performance of a series of acts and a person commences this series with a view to carry it out to its completion, he has, in the language of section 511, Indian Penal Code, done an act towards the commision of the offence in the attempt to commit the offence.

Section 182, Criminal Procedure Code, does not apply only to cases where some place of trial cannot be laid down with absolute certainty but it applies to cases where the offence is a continuing one.

The accused was charged for cheating *A.* by sending Railway receipts from Harda to Bombay for 300 bales of cotton when he had only 200 bales, inducing *A* to pay Rs 40,000. It was urged for the accused that he should have been tried at Bombay and his trial at Harda was without jurisdiction and had caused failure of justice:

Held, that as the procuring of the receipt was an essential part of the deception which went to make up the offence of cheating and as nothing was left to be done for the accused but to present the receipt and to effect the delivery his act was more than that of preparation and his trial at Harda was perfectly legal

An attempt is possible, even when the offence attempted cannot be committed. **N** SHIAMJI *v.* EMPEROR, 23 CR L. J. 210 **994**

——— **ss. 420, 511**—*Cheating, offence of—Attempt to cheat and preparation, distinction between.*

A clerk employed to weigh the carts of sugar-canes upon a machine and enter the (1) Gross, (2) Tare and 3 Net weights in a register, weighed a cart of sugar-cane and entered its gross weight as 16 maunds 30 seers, but soon after the cart was re-weighed by a superior officer and found to be only 14 maunds, 20 seers The clerk had not filled up the other columns fixing the liability absolutely upon the Company when he was intercepted and charged for cheating and convicted:

Held, that the writing of the false figure in the register had not passed from the stage of preparation into that of an attempt to commit the offence of cheating and that, therefore, the conviction under section 420, Indian Penal Code, was wrong. **Pat** LAKSHUMI PRASAD *v* EMPEROR, 23 CR. L. J. 103 **492**

——— **ss. 457, 460**—*Death caused in house-breaking—"At the time of the committing of house-breaking by night," meaning of*

The expression "at the time of the commission of house-breaking by night" in section 440 of the Penal Code must be limited to the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time.

Accused was one of several persons who broke into the complainant's house by effecting a breach in the wall. On issuing from the house the accused was caught while his companions ran away Some of the latter were armed with *dangs* and inflicted blows on one of the pursuers as a result of which the latter died:

Penal Code—concld.

Held, that the accused was not guilty of an offence under section 460 of the Penal Code, inasmuch as the offence of house-breaking had become complete before death was caused, but that he was guilty of an offence under section 457 of the Penal Code. **L** MUHAMMAD *v.* EMPEROR, 2 L. 342; 23 CR. L. J. 164 **628**

——— **ss. 467, 471**—*Forged document, used as genuine—Proof—Handwriting, proof of—Comparison by Judge—Expert evidence, value of.*

A Court is competent to use its own eyes for the purpose of deciding whether certain handwritings placed before it are similar or not and the opinion of expert is only a piece of evidence whereas the opinion of the Judge is the decision in the case.

Quære—Whether the prosecution must produce expert in handwriting when the case against the accused depends entirely upon the comparison of handwritings **Pat** UOHAB SANTARA *v* EMPEROR, 23 CR. L. J. 74 **426**

——— **s. 504**—*Insult*—"Kirar", *whether abuse*

Aroras are *Kirars*, though they may not be pleased to be called so.

The word *kirar* may sometimes have a somewhat contemptuous signification.

Where an Arora is called a "*kirar*" on provocation, the incident is of too trivial a nature to be brought before a Court, and no offence under section 504 of the Penal Code is committed. **L** MUHAMMAD BAKHSH *v.* EMPEROR, 23 CR. L. J. 171 **635**

Penal Code (Amendment) Act (XVI of 1921), s. 2. *See* CRIMINAL PROCEDURE CODE, ss 196, 252 **859**

Pensions Act (XXIII of 1871), ss. 11, 12—"*Pension*", *meaning of—Pension given in recognition of past services, whether transferable*

The word "pension" in section 11 of the Pensions Act is used in the sense of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits or as compensation to dethroned princes, their families and dependents.

An endowment consisting of the revenue of a number of villages was made by Emperor Akbar for the preservation of the tomb of a saint, Salim Chisti at Fatehpur Sikri, for the maintenance of certain religious services and for the allowance of the descendants of the said saint. In 1846 the Government took over the revenue of the villages and made arrangements for the preservation of the tomb and the performance of the religious ceremonies and set aside a specified sum to be applied in the maintenance of the saint's descendants who were declared to be pensioners of the Government entitled to draw their pensions in perpetuity from the Treasury :

Held, that inasmuch as the grant was made either in recognition of the past services of the saint or in acknowledgment of his particular merits, the continuance of the pensions to the descendants was based on political considerations and as such any assignment of this pension was null and void as provided by section 12 of the Act. **A** HARNAM DAS *v.* FAIYAZI BEGAM, 20 A. L. J. 172; 4 U. P. L. R. (A.) 48 **645**

Personal decree—*Arrest—Civil Procedure Code (Act V of 1908), s. 56.*

A personal or money-decree does not necessarily carry with it a right to arrest the judgment debtor.

The term "personal decree," though frequently used in commentaries, is not a statutory term and it is not every personal decree that includes the right to arrest a judgment-debtor, for example, a personal decree when passed against a woman does not involve any liability to arrest.

There is no provision of law which would protect a judgment-debtor from arrest under a decree for the payment of money properly passed against him, solely on the ground that the decree was based on a document executed on his behalf by his guardian during his minority.

Per *Dhobley, A. J. C.*—The proposition that no money-decree is possible which does not carry with it a right to arrest the judgment-debtor is not correct. There are some decrees in which that right does not exist, the remedy of the decree-holder being only against the property of the judgment-debtor. A money-decree against a female or against the legal representative of the deceased debtor are instances in point. **N** JIWANDAS *v.* JANKI **53**

Pleadings—*Amendment of plaint—Second appeal—Cause of action not arisen at filing of plaint—High Court, power of.*

A High Court, in second appeal, will not allow an amendment of a plaint for the purpose of enabling the plaintiff to rely upon a cause of action against the defendant which had not arisen at the time the plaint was filed. **C** MOBARAK MOLLA *v.* HECHAMUDDI MOLLA **214**

——— *New and inconsistent plea—Pre-emption—Suit on basis of custom—Custom not proved—Plea of pre-emption on basis of contract.*

A plaintiff pre-emptor having come into Court on the allegation of custom and having failed to prove it, his claim ought to be dismissed and should not be allowed on the ground of contract without the plaint being amended and an opportunity given to the defendant to meet the new case. **A** RAM GHARIB TEWARI *v* SHANKAR TEWARI, 20 A. L. J. 15 **242**

——— *New plea in second appeal—Suit not triable by Civil Courts*

In this case a plea by the defendant that Civil Courts had no jurisdiction to try the suit was allowed to be raised for the first time in second appeal **M** VANCHINATHA AIYAR *v.* RAJAGOPALA AIYAR, 41 M. L. J. 372 **321**

Police Act (V of 1861), s. 42. *See* U. P. EXCISE ACT, ss. 60, 64 **433**

Possessory right—*Trespasser—Inheritance.*

A possessory right even that of a trespasser is heritable. **O** GHULAM SARWAR KHAN *v.* MUHAMMAD ALI KHAN, 8 O. L. J. 609 **398**

Practice—*Procedure—Evidence—Hearing of suit without affording parties opportunity of examining their witnesses, propriety of.*

On the day to which a Small Cause Court suit had been adjourned for hearing both the parties to the suit applied for time on the ground that their witnesses had not come The Court rejected the application and proceeded with the hearing of the suit with the result that, after examining the

Practice—concld.

plaintiff and two of his witnesses and the defendant, the Court decreed the suit:

Held, that, under the circumstances of the case, the Court ought to have allowed time to the parties to produce their evidence before it for the purpose of coming to a just decision in the case and that the defendant having been prejudiced by the procedure adopted by the Court, the case ought to be re-heard. **C** KHETRA NATH DAS *v* MOHANANDA DAS **539**

Precedent—*Duty of Courts to follow rulings of own High Court in preference to other Courts.*

A Court is bound to follow the ruling of the High Court to which it is subordinate in preference to the ruling of other High Courts where the two Courts differ. **A** BADRI PARSHAD *v.* MOHAR SINGH, 4 U. P. L. R (A) 15 **511**

Pre-emption—*Custom—Co sharers in same* mahal *entitled to right of pre-emption—Partition of* mahal, *effect of, on custom.*

Where there is a custom giving a right of pre-emption to co-sharers in one and the same *mahal* as against persons who are not co-sharers in that *mahal*, the same custom, in the absence of evidence to the contrary, would continue after the partition of the *mahal*. **A** JOKHAN SINGH *v* SABHAJEET SINGH, 20 A. L J. 223 **832**

——— *Decree, compliance with—Payment short of decretal amount—Costs, deduction of—Intention.*

Where a suit for pre-emption is decreed on payment of a certain sum and the plaintiff is also awarded his costs, he is entitled to deduct the amount of the costs from the sum to be deposited by him. The decree, in such a case, is sufficiently complied with, if the amount deposited by the plaintiff is sufficient to cover the amount mentioned in the decree after deducting therefrom the amount of costs awarded to the plaintiff.

In such a case the intention of the plaintiff is immaterial, the real question is whether he has actually complied with the decree. **L** KAPURIA MAL *v.* WALI MUHAMMAD, 2 L. 294 **250**

——— *Liability of pre-emptor to pay for incumbrance created by vendee as part of sale consideration—Consideration—Compromise of suit—Person no party to compromise not bound.*

One *K.* sold a house to *J* for Rs. 1,800 on 4th October 1914. The vendee paid Rs 900 in cash and for the balance executed a mortgage of the same property in favour of *K.* on 5th October. *B.* and others sued to pre-empt the property making both the vendor and the vendee parties to the suit but compromised the suit with the vendee alone for possession of the property on payment of Rs. 1,575 to the vendee, stipulating that they did not admit the validity of the mortgage but if it was enforced they would pay. *K.* sued to enforce the mortgage:

Held, that the mortgage was a part of the sale consideration, and that as the pre-emptor knew of the existence of the mortgage he was liable for the amount.

A person who is no party to a compromise in a suit cannot be adversely affected by anything that the other parties chose to do behind his back. **A** BUCHAN SINGH *v.* KISHUN LAL, 20 A. L. J. 164; 4 U. P. L. R (A.) 23 **543**

Pre-emption—contd.

——— *Perpetual lease—Sale.*

A perpetual lease granted by a superior proprietor conferring under-proprietary rights on the lessee, where the annual rent reserved is substantially equal to the Government revenue assessed on the land and no right of re-entry is reserved, amounts, for purposes of pre-emption, to a sale. **O** ZULFAN KHAN *v.* SANT BAKHSH SINGH, 24 O. C. 310 **97**

——— *Suit decreed on condition of payment within certain time—Appeal—Further amount allowed not paid within time—Execution of decree by vendee for further amount—Restitution, subsequent application for.*

A suit for pre-emption was decreed on condition that if the plaintiff paid a certain amount within two months he would be entitled to get possession. The money was deposited and possession obtained by the plaintiff. Meanwhile, the vendee appealed and the Appellate Court allowed a further sum to the vendee and extended the time for payment. The plaintiff did not deposit the further amount within time. The vendee then applied for execution of the decree and claimed further amount allowed to him and costs and an order issuing process was made. The plaintiff appeared and deposited a part of the further amount and got an extension of time from the Court to pay the balance though he was opposed by the vendee. Before the expiry of the extended time the vendee applied for restitution of the property on the ground that the pre-emption money not having been deposited within the time allowed by the decree the suit stood dismissed. The plaintiff objected that this application was barred by the principle of *res judicata* as well as by the principle of estoppel:

Held, (1) that the rule of *res judicata* did not apply inasmuch as neither of the proceedings in execution could be said to amount to an express adjudication by the Court, that the proper remedy of the vendee was to recover the further amount allowed to him by execution or that any such amount was actually due to him;

(2) that the circumstance that the vendee wanted to realise the further amount awarded to him by execution of the decree, which sum admittedly was not due to him, did not estop him from coming to Court and claiming restitution of the property;

(3) that the order of the Court giving the plaintiff further time to deposit the pre-emption money was without jurisdiction;

(4) that the fact of the default of payment made by the plaintiff was to dismiss the suit *in toto* and that his possession was wrongful and that the vendee was entitled to a full restitution.

If an executing Court expressly decides a point *inter partes*, that decision becomes final according to the general principles of law, though the question whether the law of *res judicata* applies is irrelevant as the term refers to a matter decided in another suit. **A** SHEO MANGAL *v.* HULSA, 19 A. L. J. 954 **377**

——— *Oudh Laws Act (XVIII of 1876), s 9—Under-proprietary tenure—Proprietors and under-proprietors, preference between.*

Pre-emption—concld.

Under section 9 of the Oudh Laws Act an under-proprietary tenure may be any area of land, whether constituting an entire Mahal or only a portion of it.

Thus, where the vendor and the pre-emptor are co-sharers in an under-proprietary tenure and the vendee is a co-sharer in the proprietary tenure in which the under-proprietary tenure is situated, the pre-emptor comes within clause (1) of section 9 and has a preferential right, and he and the vendee do not come in clause (3) as members of the village community. **O** MUHAMMAD ABDUL AZIZ *v.* BHAGWAN DAS, 8 O. L. J. 560 **284**

Presidency Towns Insolvency Act (III of 1909), s. 7—*Insolvency Court, jurisdiction of, to decide between parties—Security bond in favour of creditor as indemnity against future litigation by minor son of insolvent—Decision of Insolvency Court that security property passed free to Official Assignee*—Res judicata—*Civil Procedure Code (Act V of 1908), s. 11.*

Under section 7 of the Presidency Towns Insolvency Act, an Insolvency Court has jurisdiction to decide matters *inter se* between the parties arising in the insolvency.

A Hindu father sold a portion of joint family property to a certain person, and also executed a security bond indemnifying the vendee against future litigation by his minor sons in respect of the property sold. On the vendor's application in insolvency, the Official Assignee sought for a decision on the question whether the sale by the insolvent was binding on his minor sons and whether the other property which was given in security passed free to the Official Assignee:

Held, that it was competent to the Insolvency Court under section 7 of the Presidency Towns Insolvency Act to decide the question to enable the Official Assignee to make a complete distribution of assets and that the decision of the Insolvency Court as to the effect of the sale by the minor's father was binding on the minors.

Per *Odgers, J.*—A decision under section 7 of the Presidency Towns Insolvency Act operates as *res judicata*. **M** DORAIAPPA IYER *v.* OFFICIAL ASSIGNEE OF MADRAS, (1922) M. W. N. 77; 42 M. L. J. 41; 15 L. W. 368 **244**

Prevention of Cruelty to Animals Act (XI of 1890), *applicability of, to Saran District.*

Prevention of Cruelty to Animals Act, XI of 1890, has no application to the local area of Saran in the Province of Bihar and Orissa and, therefore, an accused committing an offence under that Act within that area is not punishable. **Pat** SENEHI SINGH, *In the matter of*, 23 CR. L. J. 87 **439**

Principal and agent—*Agent, when personally liable—Disclosure of principal's name, when necessary.*

In order to make an agent personally liable under a contract entered into by him, it must be clearly established that the agent had not disclosed the name of his principal. If, however, the name of the principal is already known to the other party to the contract who also knows that he is dealing with the agent as an agent, a mere formal disclosure is unnecessary. **L** LYALLPUR SUGAR COMPANY *v.* MUL RAJ **473**

Principal and agent—concld.

——— *Contract signed by agent—Liability.*

In a case where a man is by profession an agent of some particular firm and describes himself as such, he may still be contracting in his personal capacity, but the mere fact that he fails to specify his capacity as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are clearly to the contrary. **L** G. S. BHARGAVA *v.* B. KOBAYASHI **468**

Probate and Administration Act (V of 1881), s. 89, *effect of, on criminal proceedings.*

Section 89 of the Probate and Administration Act has no reference to criminal prosecutions but is confined to civil actions only. **M** MUHAMMAD IBRAHIM *v.* SHAIK DAWOOD, 40 M. L. J. 351; 13 L. W. 379; (1921) M. W. N. 227; 44 M. 417; 23 CR. L. J. 117; 30 M. L. T. 349 **549**

Profits, *suit for—Interest, when co-sharer entitled to*—Lambardar, *when liable to pay interest.*

In a suit for profits by a co-sharer against a *lambardar* the question is one of accounts and unless the *lambardar* has deliberately or contumaciously refused to render accounts or pay what is due to the co-sharer he cannot be made liable for interest on what may be found due when the accounts are adjusted. **O** KAMPTA SINGH *v.* MATA BHIKH SINGH, 8 O. L. J. 630; 4 U. P. L. R. (J. C.) 24 **273**

Provincial Insolvency Act (III of 1907), s. 16—*Insolvent's property, vesting of, in Court—Suit for recovery of debts barred—Permission of Court when to be obtained—Proceedings without permission,* ultra vires, *and not* res judicata.

Under section 16 of the Provincial Insolvency Act of 1908 a Court making the order of adjudication is vested with the whole property of the insolvent and no creditor to whom the insolvent is indebted in respect of any debt, provable under the Insolvency Act, has any remedy against the property of the insolvent in respect of the debt, nor can he commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose.

The permission of a Court to sue an insolvent under section 16 of the Provincial Insolvency Act, 1907, is contingent to the suit being brought and cannot be given afterwards and the proceedings started without such permission are *ultra vires* and do not constitute *res judicata*. **N** TRIMBAK *v.* SHEORAM **941**

——— **ss. 16 (2) (a), 35**—*Property situate in foreign territory, vesting of—Annulment of transfer of such property—Court, power of.*

The property of an insolvent though situated in foreign territory vests in the Court under section 16 (2) *(a)* of the Provincial Insolvency Act.

A Court has no jurisdiction to annul the transfer by an insolvent of property situated in a foreign territory under section 16 of the Provincial Insolvency Act. **N** DRAUPADI BAI *v.* GOVINDSINGH **334**

Provincial Insolvency Act (V of 1920), ss. 4, 5, 56 (3)—*Sale by Official Receiver—Application by purchaser for removal of*

Provincial Insolvency Act—concld.

obstruction and delivery of possession—Jurisdiction of Insolvency Court.

A purchaser from the Official Receiver of a property of an insolvent can obtain under the Provincial Insolvency Act of 1920 an order from the Insolvency Court for delivery of possession of the property, where his application is resisted by a third party; and the method of executing the warrant under section 5 will be the same as that prescribed for the executing of a warrant issued by the Court in the exercise of Original Civil Jurisdiction.

Clause 3 of section 56 of the new Provincial Insolvency Act, V of 1920, is not limited to the case of an application by the Official Receiver, but applies equally to an application by a purchaser from the Receiver for delivery of possession.

An Insolvency Court has plenary powers under the provisions of Act V of 1920 to deal with the claims of third parties. **M** RAMASWAMI CHETTIAR *v.* OFFICIAL RECEIVER, MADURA, 15 L. W. 273; (1922) M. W. N. 110; 42 M. L. J. 185 **394**

Provincial Small Cause Courts Act (IX of 1887), s. 17, *scope of—Application for setting aside an ex parte decree—Deposit of full decretal amount necessary*

The provisions of section 17 of the Provincial Small Cause Courts Act are mandatory and the entire amount of the *ex parte* decree must be deposited with the application for setting it aside.

Where a decree was passed for a certain sum of money and the applicant did not deposit the amount at the time of making the application for setting aside the decree, but asked leave to deposit a lesser sum later and deposited it, and then applied to deposit the balance:

Held, that the Court had no power to order the balance to be deposited later and to hear the application **A** SRI BHAGWAT CHAUDHRI *v.* BALKARAN SAITHAR, 4 U. P. L. R. (A) 30; 20 A. L. J. 209 **596**

——— **s. 23**—*Suit for value of tree cut—Defendant pleading ownership—Return of plaint—Nature of suit not altered.*

The returning of a plaint to the plaintiff, suing for the value of the branches of a tree cut by the defendant on the latter's pleading that the tree belongs to him, to be presented to a Court having jurisdiction to determine the question of title, does not make the case any the less a suit of the nature cognizable by a Court of Small Causes and no second appeal lies from a decision in such a case.

Where in a suit for the value of trees cut by the defendant the plaint does not disclose any offence punishable under Chapter XVII of the Penal Code, it cannot be said that in view of the provisions of Article 35 *(ii)* of Schedule II to the Provincial Small Cause Courts Act that the suit is not one of a nature cognisable by Courts of Small Causes. **O** KANWAR SINGH *v* UJAGAR SINGH, 3 U. P. L. R. (J. C.) 18; 8 O. L. J. 391 **7**

——— **s. 25**—*Revision—Wrong decision on question of limitation—High Court, power of, to interfere—Limitation Act (IX of 1908), Sch. I, Art. 75.*

A High Court has power to interfere with a decision by a Court of Small Causes where it has wrongly decided a question of limitation. **A** HIRA LAL *v.* ALLAH BAKSH, 20 A. L. J. 89 **107**

Provincial Small Cause Courts Act—concld.

——— **Sch. II, Art. 8**—*Suit for recovery of shop rent, whether triable by Small Cause Court.*

The term "house rent," as used in Article 8 of the Provincial Small Cause Courts Act, includes "shop rent". Therefore, a suit for the recovery of the rent of a shop is cognizable by a Small Cause Court. **M** NATHU *v.* SONASA **966**

Public Demands Recovery Act (I of 1895). *See* CESS ACT, ss. 5, 41, CH IV, ss. 52, 64 **138**

Public Gambling Act (III of 1867), ss. 1, 3—*"Common gaming house", keeping of—Conviction, when sustainable—"Instruments of gaming," meaning of.*

Instruments of gaming include articles used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming.

The words "common gaming house" do not mean simply a house in which instruments of gaming are kept or used for the purpose of carrying on or facilitating gaming

Before convicting a person found in possession of instruments of gaming for keeping a "common gaming house" it must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gaming, or, at the outside, that he manipulates the conditions in such a manner that he cannot possibly lose. **A** LACHCHI RAM *v.* EMPEROR, 20 A. L. J. 218; 23 CR. L. J. 186 **852**

——— **s. 13**—*Public place—Private grove on occasion of fair, whether public place.*

When the public have access to a place without their access being refused or interfered with, that place is a public place whether the public have a right to go there or not.

The accused were convicted of gambling in an area occupied by a large private grove at a time when a fair was in progress there and visitors to the fair had penetrated to all parts of the grove without any interference:

Held, that the accused were gambling in a public place and were rightly convicted **A** SUKHNANDAN SINGH *v.* EMPEROR, 20 A. L. J. 80; 23 CR. L. J. 67 **419**

Punjab Land Revenue Act (XVII of 1887), ss. 144, 158 (2) (xix)—*Jurisdiction of Civil and Revenue Courts—Appraisement—Power of Revenue Officer—Question of title.*

Where a defendant objects to the jurisdiction of the Civil Court, it is for him to satisfy the Court that the claim made by the plaintiff is not within the cognisance of a Civil Court.

It was never contemplated by the Legislature that complicated questions of title should be determined by a referee or a Revenue Officer acting under section 144 of the Punjab Land Revenue Act. The function assigned to such officer under that section is one of a simple nature, namely, to determine the value of the produce which is admittedly joint or to divide it between the share-holders in accordance with their respective shares. Neither the language of the Statute nor the general principles

Punjab Land Revenue Act—concld.

of law lend any support to the contention that the Revenue Officer, and not the Civil Court, should determine whether the produce belongs exclusively to one party or whether it is the joint property of both the parties.

A suit, therefore, for the recovery of the price of certain produce alleged to have been delivered by the referee to the defendant, on the ground that it belonged exclusively to the plaintiff, is cognisable by a Civil Court. **L** RAMJI LAL *v.* MANGAL SINGH, 2 L. 302 **256**

Punjab Loans Limitation Act (I of 1904). *See* LIMITATION ACT, SCH. I, ART. 52 **687**

Punjab Tenancy Act (XVI of 1887), s. 77 (3), proviso—*Jurisdiction of Civil and Revenue Courts—Suit by lessee of occupancy tenant to recover possession from landlord.*

In a suit by the lessees of an occupancy tenant to recover possession of the land from the landlord on the ground that the latter had wrongfully dispossessed the plaintiffs, the landlord pleaded that the occupancy rights of the plaintiffs' lessor had come to an end:

Held, that, having regard to the proviso to section 77 (3) of the Punjab Tenancy Act, the suit was not cognisable by a Civil Court, inasmuch as it was necessary to decide in the case whether the occupancy tenant had lost his right or not. **L** CHUA *v.* ASA, 3 L. 84 **520**

Railways Act (IX of 1890), ss. 47 (1) (f), 54, 72—*Rules framed under s. 7 (1) (f), validity of—Consignment of goods—Grant of receipt, necessity of—Railway Company, responsibility of.*

It is not open to a Railway Company to enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the Railway, nevertheless the Court shall not deem them to be so delivered unless and until the Railway servant in question has performed a particular act, *e. g*, giving a receipt.

A consignor of goods by Railway, after his package had been taken over by the goods clerk and duly marked, was told to go away and come back for a Railway receipt in a couple of days' time. No receipt was taken by him The package was despatched, but was mis-sent to another destination and lost in consequence of having been so mis-sent The consignor sued for damages for the loss of the consignment. The Railway Company relied upon a rule made under section 47 (1) *(f)* of the Railways Act, to the effect that "goods will in all cases be at the owner's risk until taken over by the Railway Administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised Railway servant:"

Held, that if the rule put forward limited the statutory liability imposed upon the Railway Company by section 72 of the Railways Act, it was inconsistent with the Act and was of no effect and that as the goods were lost owing to negligence on the part of the company's servant, the company was liable notwithstanding no receipt was given.

Railways Act—contd

Per *Walsh, J.*—No rule which any company can make, can cut down, control or limit its liability which is the creature of Statute under section 72 of the Railways Act and, if a rule is relied upon by the company which is inconsistent with that liability, it has clearly gone beyond the authority created for making rules.

A Railway Company is by law a common carrier. It cannot lawfully refuse to carry goods properly tendered to it. It is given statutory existence and wide statutory powers in exchange for public duties and it is bound to carry goods.

Rule 2 framed under section 47 (1) *(f)* of the Railways Act is not inconsistent with anything contained in the Act, inasmuch as the rule is made for regulating the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on behalf of the consignee or owner and it is placed under a heading "wharfage," and has nothing whatever to do with the liability of a Railway in respect of goods which have been actually accepted by a Railway servant for despatch and have been either despatched or lost. **A** SOHANPAL-MUNNALAL *v.* EAST INDIAN RAILWAY, 20 A. L. J. 31 **109**

——— **s. 72**—*Contract Act (IX of 1872), s. 161—Railway Company, duty of, to deliver goods consigned within reasonable time—Delay—Damages.*

In the absence of any Risk Note or of any proof to show that the goods consigned were despatched at the risk of the consignor or consignee, or that any notice was given that the goods were to be carried subject to the rules contained in the Goods Tariff Regulations, a Railway Company is responsible under section 72 of the Railways Act, read with section 161 of the Contract Act, for delay in the delivery of goods consigned to it. **A** EAST INDIAN RAILWAY *v* FIRM INDERMAN TULSHI RAM, 20 A. L. J. 114 **771**

——— **s. 72 (2)**—*Risk Note, form of, effect of—Consignor, position of—Price of consignment lost, suit for—Neglect or theft by Railway Administration—Burden of proof.*

The responsibility of a Railway Company in carrying goods is limited under section 72 (2) of the Railways Act in accordance with the terms of the Risk Note filled up and signed by the consignor.

In a suit for price of a consignment belonging to the plaintiff and lost after transit in the Parcel Office of the Railway Company and in respect of which Risk Note Form B has been filled up, if the case comes within the exception mentioned in the Risk Note, the burden of proving wilful neglect or theft by the Railway Administration or its servants lies on the plaintiff. **O** HAZARI LAL *v* SECRETARY OF STATE FOR INDIA, 8 O. L. J. 588 **342**

——— **s. 75,** *applicability of—"Shawls," meaning of—"Special value," meaning of.*

The use of the words "special value" in the marginal note to section 75 of Act IX of 1890 and in clause *(s)* of the Second Schedule must not be taken to imply that only articles falling within the description of the Schedule which are of exceptional value, must be declared. In respect of loss of a consignment of "Shawls", it is a consideration of no consequence that the particular Shawls were

Railways Act—concld.

not Kashmir Shawls nor made of wool, nor articles of comparatively high value provided that the value of the articles in the parcel exceeded Rs 100 in all. **M** GREAT INDIAN PENINSULA RY. Co. *v.* CHELLARAM GIANCHAND, 14 L. W. 614; 41 M. L. J. 603; (1921) M. W. N. 852; 30 M. L. T. 229 **99**

——— **s. 76**—*Risk Note Form A—Consignment in damaged condition—Contract not to hold Railway liable—Shortage—Burden of proof.*

Certain "Pakoos" of Tobacco were consigned from Bombay to Agra under Risk Note Form A which contained an entry that the consignment was in bad condition and was liable to damage, leakage and wastage as the "Bakoos" were old and torn and the contents were wet and the consignors agreed to hold the Railway Company harmless and free from all responsibility for the condition in which the goods may be delivered to the consignee at destination and for any loss arising from the same. On delivery there was shortage in weights and the consignee sued the Company for the price of the difference in weights:

Held, that under the circumstances of this case the burden lay on the plaintiff and not on the Railway Company under section 76 of the Railways Act to prove that the shortage was due to pilfering by the Railway Company's servants. **A** FIRM PARBHOO LAL-RAM RATAN *v.* BENGAL N. W. RY, Co., 4 U. P. L. R. (A.) 2 **583**

——— **Sch. II, cls (m), (s)**—*"Shawls," meaning of—"Special value," meaning of.*

The term "Shawls" in clause *(m)* of Schedule II of the Railways Act should not be interpreted with reference to the use of the phrase "article of special value" in the marginal note to section 75 and in clause *(s)* of Schedule II. **M** GREAT INDIAN PENINSULA RY. Co *v.* CHELLARAM GIANCHAND, 14 L. W. 614; 41 M. L. J. 603; (1921) M. W. N. 852; 30 M. L. T. 229 **99**

Reformatory Schools Act (VIII of 1897), s. 31 (1), *applicability of, to girls—Girl of eleven—Murder.*

Section 31 of the Reformatory Schools Act, 1897, applies to girls as well as boys.

A girl of eleven who caused the death of a child of three was sentenced to transportation for life:

Held, on appeal, that it was undesirable that a girl of such tender age should be sent to prison, and that, under the provisions of section 31 of Act VIII of 1897, she should be delivered to her father on his executing a bond to be responsible for her good behaviour for twelve months. **O** PARBATI *v.* EMPEROR, 24 O. C. 305; 23 CR. L. J. 145 **609**

Registration Act (XX of 1866), s. 17 (d)—Kabuliyat *lease for indefinite period—Registration, whether compulsory.*

A *kabuliyat*, the terms of which show that though the lease might continue for an indefinite number of years, there is no certainty that it would last beyond the term of one year, does not come within the classification of section 17 *(d)* of the Registration Act as being a lease for a term exceeding one year and is not compulsorily registrable and, therefore, such a *kabuliyat* is admissible in evidence. **A** KASHI NATH *v.* ABDUR RAHMAN KHAN, 20 A. L. J. 211 **836**

Registration Act (XVI of 1908), ss. 17, 49—*Attestation—Knowledge of contents—Estoppel—Settlement—Registration.*

Attestation of a deed by itself does not estop a person attesting the deed from denying anything except that he has witnessed the execution of the deed. Knowledge of the contents of the deed ought not to be inferred from the mere fact of the attestation, though an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the deed.

The appellant and his two uncles were co-sharers in certain villages, of which the appellant was the registered proprietor. A deed of settlement signed by the appellant and addressed to his two uncles provided that the appellant was to manage the villages taking a salary and paying the expenses, that, if there was a loss, the uncles should make good the amount in respect of their shares on demand and that, in case of default, the uncles should lose their shares in the villages. This deed was presented for registration by one of the uncle and duly registered In the years following, there was loss in respect of one of the villages. On a demand by the appellant, the uncles wrote a letter to him that he was liable for the profit or loss accrued or accruing, that they were not to take shares and pay the loss and that he might manage as he liked. Subsequently, the uncles transferred their shares in the village in question by a deed which the appellant attested as a witness:

Held, (1) that, although the deed of settlement was only signed by the appellant, the arrangement made under it was a perfectly valid one, as it was accepted by the uncles and acted upon by the appellant;

(2) that the subsequent letter did not require registration as it was not an instrument of transfer but was only a piece of evidence showing that the uncles accepted the terms in the earlier deed of settlement and admitted that the condition upon which the first agreement was to operate had in fact arisen; and

(3) that the appellant was not estopped from denying that he was a party to the subsequent transfer by the uncles as there was no proof of his knowledge of the contents of the document he attested. **P C** PANDURANG KRISHNAJI *v.* MARKANDEYA TUKARAM, 21 C. W. N. 201; 3 U. P. L. (P. C.) 85; 20 A. L. J. 305; 42 M L J. 426; 15 L. W. 456; 30 M. L. T. 249; 35 C L. J. 409, 21 BOM. L. R. 557; 18 N. L. R. 1 **954**

——— **s. 17 (1) (c), (2) (v)**—*Oral sale—Agreement to execute sale-deed — Registration — Consideration.*

Defendant sold half of a house to plaintiff orally in 1908 and gave the latter possession of the portion sold. Subsequently, the defendant mortgaged the whole house. In 1913, the defendant executed an agreement in favour of the plaintiff in which he recited the oral sale and the subsequent mortgage and agreed to redeem the mortgage and execute a registered sale-deed in favour of the plaintiff in respect of the half house sold to him. Plaintiff brought a suit for specific performance of this agreement. It was objected by the defendant that the agreement was inadmissible in evidence for want of

Specific Relief Act—concld.

Where the plaintiff is in joint possession of immoveable property, whether such possession be actual possession of his share of the whole, or actual possession of a part coupled with constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the defendant disputing his share; in a suit so framed declaration of title is all that the plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition

The expression used by the Legislature in section 42 of the Specific Relief Act is, not 'other relief, but 'further relief.' The further relief must consequently be relief in relation to the legal character or right as to property which the plaintiff is entitled to and whose title to such character or right the defendant denies or is interested in denying: it must also be relief appropriate to and necessarily consequent on the right or title asserted.

A suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for.

The proviso to section 42 of the Specific Relief Act forbids a suit for a pure declaration without further relief, but it does not compel a plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want.

The entry and possession of land by one co-owner will not be presumed to be adverse to the others, but will ordinarily be held for the benefit of all; the difference between the possesossion of a co-owner and other cases is that acts which if done by a stranger would *per se* be a disseisin, are, in the case of tenancies-in-common, susceptible of explanation consistently with the real title; acts of ownership are not, in tenancies-in-common, acts of dissoisin, the law will not presume that one tenant-in-common intends to oust another; the facts, if the contrary is asserted, must be notorious and the intent must be established in proof.

The possession of one joint tenant is the possession of all and there can be no dispossession by one joint tenant, in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy. **C** JOYNARAIN SEN UKIL *v.* SUCHITRA DEBYA, 33 C. L. J. 597; 25 C. W. N. 206 **8**

Stage Carriages Act (XVI of 1861), s. 7, *offence under—Jurisdiction of Second Class Magistrate.*

A Second Class Magistrate has no jurisdiction to try an offence under section 7 of the Stage Carriages Act. **L** GOBIND RAM *v.* EMPEROR, 23 CR L. J. 87 **439**

Stamp Act (II of 1899)—*Fiscal Enactment, object of—Agreement, factum of.*

The Stamp Act is a fiscal Enactment, the primary object of which is to prevent evasion of the revenue. This object is attained by excluding the unstamped document from evidence entirely and not by acting upon it. But this object apart, it may, in other respects, be considered in favour of the subject. **S** NARAINDAS *v.* JASSOMAL, 15 S. L R. 135 **37**

——— s. 64, Sch. I, Art. 33—*Gift, deed of—No valuation given—Stamp, if necessary—Collector, whether can ascertain value—Omission or under-valuation, prosecution for—"As set forth in such instrument," applicability of.*

A deed of gift which contains no statement of the value of the property thereby conveyed, does not require any stamp under the Stamp Act and a Collector is not authorised to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value thus ascertained.

If a person executing a deed of gift omits to state the value of the property conveyed with intent to defraud the Government, or if there is an intentional under-valuation, a prosecution will lie against him under section 64 of the Stamp Act.

The words "as set forth in such instrument" in Article 33 to Schedule I to the Limitation Act refer back to the word "value" and not to the word "property." **A** MUHAMMAD MUZAFFAR ALI, *In the matter of*, 20 A. L J. 161 **811**

Survey *and* thak *maps—Presumption—Rebuttal.*

There is a *prima facie* presumption in favour of the accuracy of survey and *thak* maps, and it is for the party impugning their correctness to show that they are inaccurate. Such a map may be shown to be incorrect by the admission of parties or adjudication by a Court or by evidence intrinsic or extrinsic to the map in question, but such evidence must be clear and certain. **C** TARAMONI *v* GOPALDAS **182**

Taluk—*Permanent tenure—Proceeding for substituting variable for fixed rent, effect of—Bengal Government Indemnity Regulation XI of* 1822, *s.* 36—*Bengal Land Revenue Settlement Regulation IX of* 1825, *ss.* 2, 5—*Omission of words of inheritance in* patta *and* kabuliyat, *effect of—History of tenure and conduct of parties, value of—Patni Regulation (VIII of* 1819*), when applicable to non-permanent tenures.*

Although in the *patta* and *kabuliyat* by which a tenure is created there may not be words of inheritance, the omission of such words may be supplied by evidence bearing on the history of the tenure and the conduct of the parties.

A tenure which is not a permanent tenure, may nevertheless by agreement between the lessor and the lessee be saleable under the Patni Regulation (VIII of 1819).

The word *taluk prima facie* imports permanency.

In the year 1835 the Government purchased at a sale for arrears of land revenue a Zemindari in which there was a *taluk* comprising a *joar* or group of villages. The *joar* had been granted as a *miras taluk* by the then proprietors to one *S* in the year 1827 at a certain annual rent fixed in perpetuity. After the purchase of the parent estate by Government the Revenue Authorities had to consider how the estate should be dealt with, and in the year 1836 a proceeding was drawn up which concluded as

follows:—"According to section 36 of Act XI of 1822 and according to the rules under clause II of sections 2 and 5 of Act IX of 1825 the re-assessment of the *taluk* is considered necessary. Therefore, it is ordered that the said *taluk* be broken up and the fixed *jama* of it be held null and void and re-assessment be made according to the existing rate of the *pergunah*" Thereafter the *taluk*, by exchange of *patta* and *kabuliyat*, was settled with successive settlement-holders for various terms at variable rents. On the expiry of the last term of settlement with the plaintiffs, the Government having attempted to terminate the *taluk*, the plaintiffs instituted a suit for a declaration of their permanent *talukdari* right in the *joar* and of their right of obtaining settlement and possession of the same at a proper rent:

Held, (1) that the effect of the proceeding of the year 1836 was not to destroy or annul the *taluk* but merely to put an end to fixity of its rent:

(2) that as the proceeding merely had the effect of altering one of the incidents of the old tenure and as it substituted a variable rent for a fixed rent, the terms for which the plaintiffs had engaged might properly be regarded not as terms at the close of which the plaintiffs' tenancy came to an end, but as terms on the expiry of which the rent became subject to re-assessment;

(3) that as there was nothing in the *patta* and the *kabuliyat* as exchanged between the parties or their predecessors which took away from or deprived the plaintiffs of their right to hold the tenure as a permanent tenure, so long as they paid the rent which the Government might assess upon it, the Government could not annul the tenure on the expiry of the term of settlement with the plaintiffs:

(4) that the tenure was a permanent, heritable and transferable tenure. **C** SECRETARY OF STATE FOR INDIA *v.* ANANDA MOHAN ROY **145**

Tenancy—*Under-raiyati, transferability of—Custom—Acquisition of occupancy right* Benami—*Burden of proof—Appeal, second—New plea.*

Primarily, the party alleging that a person is a *benamdar* is bound to prove it.

Apart from custom, an under-*raiyati*, as a general rule, is not transferable But an under-*raiyat* may, under certain circumstances, acquire a right of occupancy and if he so acquires it his right is transferable.

A plea that an under-*raiyati* interest is not transferable cannot be raised for the first time in second appeal. **C** TUKA MEAH *v.* NABIN CHANDRA MAZUMDAR **701**

Tender—Mortgagor, duty of. *See* APPEAL, SECOND **666**

Transfer of Property Act (IV of 1882), s. 6 (a).

An instrument which purports to be a transfer of a chance or possibility, mentioned in section 6 *(a)* of the Transfer of Property Act, has no operation. **C** ANNADA MOHAN ROY *v.* GOUR MOHAN MALLIK, 25 C. W. N. 496; 33 C. L. J. 45; 48 C. 516 **27**

——— s. 41—*Consent—Evidence Act (I of 1872), s. 115—Intention and consent, whether include those based on mistake—Estoppel.*

The consent mentioned in section 41 of the Transfer of Property Act, or the intention mentioned in section 115 of the Evidence Act include a consent or intention which is based on a mistake.

A Jain died leaving his widow *B.* and daughter *I. B.* died in 1906 but before her death declared *S*, the son of her husband's separated nephew, as her heir. This was accepted as a valid adoption by *I* and other relatives of *B.* One *R* purchased in 1903 in execution of money-decree in his favour one of the houses of *B*'s estate. *I* did not object to the attachment and sale, being under the mistaken belief that *S* was validly adopted. Thereafter, in several suits brought by *S.* on bonds executed in favour of *B*'s husband, it was held that *S* was not the adopted son. On this *I.* filed a suit for possession of her father's estate and obtained a decree including the house purchased by *R.* On appeal by *R.*:

Held, that *R* was a *bona fide* purchaser for value and *I*, was estopped from disputing his right to the house. **N** RAMPRASAD *v.* IMARATBAI, 18 N. L. R. 27 **477**

——— s. 52—Lis pendens, *whether applicable to involuntary transfer—Execution sale and sale for non-payment of Government revenue, distinction between.*

So far as the express language of section 52 of the Transfer of Property Act is concerned, it may seem to mean that it applies only to voluntary transfers and not to an involuntary transfer but, having regard to the numerous cases decided on the point, it is impossible to hold that the doctrine of *lis pendens* as embodied in section 52 of the Act applies only to voluntary transfers and not to involuntary transfers.

There is no distinction between an execution sale and a sale for non-payment of Government revenue. **P** MATHURA PRASAD SAHU *v.* DASAI SAHU, 3 P. L. T. 296 **325**

——— s. 51, applicability of. *See* AJMERE-MERWARA REGULATION, CH. II **103**

——— s. 55 (1) (d)—*Sale of immoveable property—Seller's duty to execute proper conveyance—Execution of invalid sale-deed—Agreement to execute valid one afterwards—Specific performance—Sale—Transferee in possession under invalid sale-deed—Suit for possession by seller.*

In the case of a sale of immoveable property section 55 (1) *(d)* makes it a bounden duty of the seller to execute a proper conveyance of the property, and the execution of a document which for any reason does not operate to effect a legal transfer is in no way a complete performance of this bounden duty. Therefore, where a seller, being in a hurry, executes an invalid conveyance promising to follow it with a legal and binding sale-deed, the invalid conveyance is no answer to a suit for specific performance of the agreement to execute the legal and binding sale-deed.

It is a valid defence to a suit for possession by a seller that the defendant is in possession under a contract for sale, although he may have no valid registered sale-deed. **L B** SANTHAYI AMMAL *v.* MAHOMED, 11 L. B. R. 94 **405**

Transfer of Property Act—contd.

——— **ss. 58, 59**—*Mortgage, operation of—Conveyance or contract—Sale-deed executed after mortgage but before payment of full consideration—Priority*

A mortgage is a conveyance and not a contract. If there is nothing in a mortgage-deed to suggest that the mortgage is not to become effective until the consideration money is paid, the mortgage becomes operative as from the date of the execution of the mortgage-deed. A mere provision in the mortgage-deed that the mortgagor undertakes to make over the mortgage-deed to the mortgagee upon the payment of the full consideration money does not amount to a contract between the parties that the mortgage is not to take effect until the payment of the consideration money

Therefore, a deed of sale executed by a mortgagor after the execution and registration of the mortgage-deed but before the payment of the full consideration money of the mortgage is not entitled to priority over the mortgage-bond when there is nothing in the contract which establishes that the title is not to pass to the mortgagee as and from the date of the execution of the mortgage-bond. **Pat** RAGHUNATH BHAGAT *v.* AMIR BAKHSH, 3 P. L. T. 407 **329**

——— **s. 59**—*Mortgage-deed—Attestation by scribe and mortgagee—Indication*

Where a mortgage-deed is signed by the scribe and the mortgagee, but there is nothing to show that they subscribed as attesting witnesses, the deed is without attestation. **U B** MAUNG PO THAUNG *v.* MUTHIAH CHETTY, 4 U. B. R. (1921) 78 **64**

——— **s. 59**—*Mortgage—Test to determine whether transaction mortgage—Transaction in which no interest payable, whether mortgage—Royalty, whether immoveable property—Deed, construction of.*

A test to apply to determine whether a transaction amounts to a mortgage or not is to see whether any interest is to run upon the sum of money that may be due by one party to another in consideration of which the transaction is entered into.

Where in a transaction no interest is payable by the debtor to the creditor and the document expressly states that the transaction is entered into for the purpose of paying off the sum due by the debtor to the creditor, the transaction is not a mortgage.

Royalty is the price paid for a portion of the soil the payment whereof is distributed over a number of years Interest in the royalty is not an interest in immoveable property.

In order to pay off a certain debt without interest, the borrower executed a *Jat meadi* in respect of a certain commission due to him in respect of a certain coal land of his, and contracted that the lender shall continue to satisfy the sum borrowed by realising the commission every month, from year to year, till that month, of that year until which the entire amount is paid up but that if the income from the commission stopped the lender was to get nothing:

Held, that such a contract did not amount to a [illegible]gage and as such the deed was not one which [illegible] attestation in accordance with the provi-

Transfer of Property Act—concld.

sion of section 59 of the Transfer of Property Act. **Pat** KRISHNA KISHORE ADHIKARY *v.* KUSUNDA NYADI COLLIERIES, LTD **673**

——— **s. 83**—"*Amount due on mortgage*," *meaning of.*

The expression "the amount due on the mortgage" as used in section 83 of the Transfer of Property Act should be interpreted to mean what would be due according to law on the mortgage or what the Court would allow as due, and not what would be due according to any penal stipulation. **N** TARACHAND DIPCHAND *v.* NARAYAN **174**

U. P. Court of Wards Act (IV of 1912), s. 54 *Notice—Estate under Court of Wards—Notice delivered to Special Manager, validity of.*

A notice under section 54 of the U. P. Court of Wards Act left at the office of the Special Manager in immediate subordinate charge of an estate under a Collector as the Court of Wards, is valid, and is properly delivered to or left at the office of the Collector within the meaning of the section. **A** LACHMI NARAIN *v.* DURG BIJAI SINGH, 19 A. L. J. 38 **365**

U. P. Excise Act (IV of 1910), ss. 60, 64—*Selling liquor after hours—Police Officer, when can arrest—Illegal arrest, prosecution for, sustainability of—Police Act (V of 1861), s 42, applicability of.*

Unless a report concerning the commission of an offence of selling liquor after prescribed hours is made, a Police Officer has not power to arrest.

Section 42 of the Police Act is no bar to a trial of a Sub-Inspector for illegal arrest where the complaint is made against him within the period of limitation perscribed by that section. **A** SHANKAR LAL *v.* EMPEROR, 21 CR. L. J. 81 **433**

U. P. Municipalities Act (II of 1916), s. 178—*Public road, building abutting on—Building, alteration in*

A building situated at a distance from a public road but within a compound wall which abuts on the public road, cannot be said to be abutting on a public road within the meaning of section 178 of the U P Municipalities Act, and, therefore, no notice under section 178 need be given to the Board if any addition or material alteration is made in such a building **O** MOHAMMAD RAZA *v* EMPEROR, 8 O L. J. 603, 23 CR. L. J. 191 **767**

——— **ss. 314, 333**—*Tahsildar sanctioning prosecution—Conviction, legality of—Irregularity in sanction, whether cured—Criminal Procedure Code (Act V of 1898), s. 537.*

A Tahsildar acting as officer in charge, Municipal work, under section 333 of the U. P. Municipalities Act cannot sanction a prosecution under section 183 of the U. P. Municipalities Act and a conviction based on such a sanction is illegal.

An irregularity in a sanction, as required by section 334 of the U P. Municipalities Act cannot be cured by the provisions of section 537 of the Criminal Procedure Code, which are not applicable to the sanction under section 334 of the U. P. Municipalities Act. **A** JUGGAN *v.* EMPEROR, 19 A. L. J. 942, 23 Cr L. J. 95 **447**

Vendor and purchaser—Caveat emptor—*Purchaser failing to make enquiries—Defective title—Earnest money, recovery of.*

Plaintiff made the highest bid at an auction for certain property and paid one-tenth of the purchase-money. He subsequently discovered that the property was involved in litigation and filed a suit to recover the amount paid by him. It was found that the sale had been duly notified and that in the conditions of sale, which were available to the plaintiff, the would-be purchasers were told to satisfy themselves as to the nature of the property sold:

Held, that the doctrine of *caveat emptor* applied to the case and that the plaintiff could not recover the amount paid by him. **L** JUGLO *v.* ABDUL SALAM **734**

——— *Contract to sell—Option to purchaser to pay amount agreed in particular month in any year—Enforceability of agreement—Executory contract—Offer to purchase—Contract Act (IX of 1872), s. 51—Specific Relief Act (I of 1877), s. 12.*

Unless both parties agree there is no concluded agreement. It is only an offer. An instrument even though so worded as to express that both parties agree, is in point of law only an offer until both parties are bound.

Where an agreement is executory on both sides, with an option to one of the parties to do as he likes, there is nothing more than a standing offer, though it may be that, during the lifetime of the promisor the distinction between a binding offer and a complete agreement is not of much importance as between the parties.

Where in a suit for specific performance of an agreement to sell a land the promisee does not prove that the undertaking by the promisor not to withdraw the offer was not a mere *nudum pactum* but a binding undertaking there is no agreement which the promisee can enforce against a subsequent vendee of that property.

An agreement to sell land contained *inter alia* the following terms:—"On payment being made of the total amount of Rs. 800 within the 30th Vygasi of any year whatsoever, I shall execute a sale-deed to you of the lands * * * * . I shall not execute a sale-deed to any other person. Should a sale be so effected to any other person such sale shall not be valid";

Held, that the agreement was only an offer by the seller which could not be withdrawn and did not connote an agreement to buy, and that, as the seller could not charge the buyer with breach or failure to perform, there never was a contract at all. **M** EGALA NAGAPPA *v.* MUNISWAMY IYER, 30 M. L. T. 175; 15 L. W. 409; (1922) M. W. N. 201 **720**

Wajib-ul-arz, *entry in, as to pre-emption—Custom, evidence of.*

A village was settled with a single proprietor up to 1836. In 1836 the settlement was made with four persons. In the *wajib-ul-arz* of 1860 reference to pre-emption was made for the first time:

Held, that under the circumstances it could not be said that the custom of pre-emption had grown up in 24 years, and that the statement in the *wajib-ul-arz* of 1860 could only be taken to mean that the then co-sharers of the village had agreed to pre-emption among themselves. **A** RAM GHARIB TEWARI *v.* SHANKAR TEWARI, 20 A. L. J. 15 **242**

Wakf—*Decree for rent against one of two* mutwallis, *effect of—Decree for rent against some heirs of deceased tenure-holder does not affect other heirs.*

A suit for rent against one of two *mutwallis* of a *wakf* estate is bad. The decree obtained in such a suit does not bind either the other *mutwalli* or the *wakf* estate where there is nothing to show that the judgment-debtor *mutwalli* represented the other *mutwalli* or the *wakf* estate in the landlord's *sherista*.

Where on the death of a tenure-holder, a decree is obtained for rent against some of his heirs the interest of those heirs that are not parties to the decree is not affected either by the decree or by sale under that decree. **C** ABDUL GANI *v.* NABENDRA KISHORE ROY **592**

"Walda," *interpretation of*—"Bhaiya," *interpretation of.*

The terms '*walda* 'mother) and "*bhaiya*" (brother) are often applied out of love, affection and respect among Indians to persons held in the same affection as mother and brother **O** MUMTAZ-UN-NISSA BEGAM *v.* WAZIR ALI, 8 O. L. J. 569 **308**

Waste land—*Boundary dispute—Land capable of actual possession—Burden of proof.*

The principle that on questions of boundary, especially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable, does not apply to a case where, according to both parties, the land is capable of possession and each party is in actual possession of the land comprised within his tenure.

When the defendant in a suit for recovery of possession of land, even when the question is a question of boundaries, is clearly shown or found to have been in actual possession of the disputed area the burden lies on the plaintiff to establish his title. **C** RADHA KRISHNA DAS *v.* MATIYAR RAHMAN **743**

Will, *construction of—Principle of construction—Court, duty of*—"Malik," *meaning of—Gift by husband in favour of wife—Absolute or limited estate.*

It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in an another case.

In construing a Will a Court must look to all the clauses of the Will and give effect to all the clauses, ignoring none as redundant or contradictory.

The word "*malik*" is not a term of art, that is to say, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be. Absolute ownership imports at least the right to exclusive and free enjoyment of the property and free power of disposition.

A deed of gift, executed by a husband in favour of his wife, referred in the preamble to the deed to the whole collection of rights and by the first clause the properties were granted to the wife as "*malik*," by the second clause she was given the power of alienation for charitable purposes of a portion of the property to one of the relations of the husband and to no one else, by the third clause she was given power to execute a Will in favour of one of the aforesaid relations, by the

Will—contd

clause provison was made for undisposed of property at the conee's death, and by the fifth clause provision was made for any unmarried daughter or son's daughter of the donee, and by the last clause provision was made that if the donee died before the donor the properties undisposed of by the donee will revert to the donor. A *mokarrari* lease having been granted by the donee a question arose whether she had the power to grant the lease:

Held, that no absolute estate was granted to the donee and that the intention of the donor was to provide for the donee and also for the ultimate devolution of his property and that the grant in effect was the grant of an ordinary Hindu woman's estate with power to sell, or to appoint by deed or Will, to certin specified persons and that she was not empoweed to grant a *mokarrari* lease. **Pat** ASHURFI SINGH *v.* BISESWAR PRATAP NARAIN, (1922) PAT. 70; 3 P. L. T. 273 **977**

———, *construction of—Widows, property bequeathed to—Transfer, absolute power of, given subject to certain conditins—Conditions, whether enforceable.*

The materil portions of a Will were as follows:—"After me, the executant, no other person except the widows as heirs to the above mentioned share. Therefore, in accord with the opinion of each of the three widows, I do hereby bequeath my eight-anna share together with all the rights, recorded as well as unrecorded, without exemption of any thing or right, with power of alienation of every sort, to the above named ladies, in equal shares, and declare that after my death those ladies will remain in use and occupation of the said share like myself. In the event of the death of any of the three widows her share will devolve on the two surviving widow in equal shares, or if only one of them survives she will be in full possession and

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enjoyment of the entire property. But, the condition is that if any of these widows misbehaves herself, thereby bringing disgrace on the family, she will forfeit her share, which will go to the remaining widow or widows; and that if any of these widows intends to transfer the property she can do it only with the consent and approval of all or the remaining widows. Thus, whatever rights I possess will be exercised after my death by the widows subject to the conditions imposed as above:"

Held, that under the terms of the above Will none of the ladies was entitled to transfer her share or any portion of it without obtaining the consent of her co-widows. **O** MAKHANA *v.* BINDESHRI PRASAD, 8 O. L. J. 656 **457**

Withdrawal *and dismissal of suit, distinction between—Withdrawal of suit after examination of plaintiff's witnesses—Dismissal—Costs.*

No distinction on principle can be drawn between the withdrawal of a suit and the dismissal of a suit for default, but where a suit is withdrawn after witnesses have in fact been examined on behalf of the plaintiff, such withdrawal cannot be said to operate as a dismissal for default, and the opposite party is entitled to full costs. **Pat** MOHANT RAMKISHUN DAS *v.* DAULAT RAM, 3 P. L. T. 314 **355**

Works of Defence Act (VII of 1903), *—Platform in existence in Cantonment area for 30 years—Demolition—Acquiescence.*

A Cantonment authority which has acquiesced in the existence of a platform for over 30 years in the Cantonment area, cannot be permitted to demolish it.

The Works of Defence Act, 1903, does not authorise the demolition of a platform only three feet high. **A** RAM RATAN *v.* EMPEROR, 20 A. L. J. 162; 23 CR. L. J. 199 **855**

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